

**PURPOSE TRUSTS:
AN OPPORTUNITY FOR TAILORED PLANNING
AND GOVERNANCE
OR
BENEFICIARIES? WE DON'T NEED NO STINKING
BENEFICIARIES!**

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CHAPTER 13

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PURPOSE TRUSTS: AN OPPORTUNITY FOR TAILORED PLANNING AND GOVERNANCE OR BENEFICIARIES? WE DON'T NEED NO STINKING BENEFICIARIES!

This article provides a general overview of the developing area of non-charitable purpose trusts and the recently enacted statute bringing this concept to Texas. The author explores the limitations of traditional trusts in certain planning situations, the history of purpose trusts both domestically and abroad, and the legislative history surrounding the new Texas Trust Code statute. This article aims to provide the reader with circumstances in which it might make sense to recommend a purpose trust for a client as well as some initial provisions to consider.

I. INTRODUCTION TO PURPOSE TRUSTS

Effective June 18, 2023, the Governor of Texas signed into law House Bill 2333, for the first time allowing Texans to establish noncharitable trusts for a stated purpose rather than for one or more ascertainable beneficiaries (referred to generally in this Article as a “Purpose Trust”). Tex. Prop. Code Ann. 112.121-123. This statute may provide, at minimum, a partial solution to the long-standing conundrum of what to do when owners are adamant that businesses or other assets (e.g., family property, collections, etc.) not be sold or that business profits should be used to benefit certain causes. Before exploring the Texas statute and how a planner might leverage this new concept for a client, it makes sense to take a look at how we got here.

A. Family and Business Planning and Common Law Trusts

A common refrain of many clients of estate planners is that the business they spent decades building in their image “should never be sold” and/or should always be run the way the founder intended. This intent might be purely economic or perhaps benevolent. Putting aside whether it makes good policy sense to enable words like “never,” “forever,” or “always,” the preservation of a family business over generations is exceedingly difficult in even the most ideal situations. The presence of threats like litigation, divorce, divergent family interests, and the federal transfer tax system loom large when planning for the future.

The old adage of “when you are a hammer, all the world is a nail” is particularly applicable to planners, whose suggested structure typically involves the use of common-law, non-charitable irrevocable trusts

(referred to in this Article as “Traditional Trusts”). Although an excellent (and likely the best – admittedly, coming from a planner) tool for long-term ownership of assets, Traditional Trusts historically have always had one frustrating constant, *the beneficiary*. Unlike truly charitable trusts (which are typically not ideal for business ownership due to draconian rules against excess business holdings and self-dealing), Traditional Trusts must have a beneficiary to enforce the trust. Restatement (Third) of Trusts § 44 (2003); *See also* UNIF. TRUST CODE § 402(a)(3); *See also* Tex. Prop. Code Ann. § 111.004(4). It is this “enforcement” power that makes business owners and their respective counsel nervous.

At first, beneficiaries are typically children of the founder of the business, share the founder’s goals and desires for the company, its employees, and, sometimes, the causes the business supports, and may be willing to forego maximizing personal gain from the company. Future generations, however, may not have the same mindset and may start to put pressure on the trustee to maximize profits or sell the company to enable substantial distributions to the beneficiaries. Attempts have been made by estate planning practitioners to limit the impact of voracious beneficiaries. Strongly worded trust agreements directing the trustee to hold non-diversified assets or businesses and/or distribute funds for certain purposes, all with priority over individual beneficiaries, have been used for years. Although anecdotal evidence has shown these trusts to work in many cases, their success is dependent on cooperative, risk-averse trustees and content beneficiaries. Understandably, this does not provide enough comfort for some business owners.

This problem is not unique to trust-owned for-profit businesses. Family governance structures have struggled with the issue of the “rogue” beneficiary as well. For example, consider a wealthy family that has successfully transferred wealth to Traditional Trusts. To ensure good family governance and stewardship of this wealth, the family wants to establish a private trust company (“PTC”) to serve as trustee of these trusts for generations to come. The family is struggling, however, with who or what should own the PTC and have ultimate oversight over the family wealth. Individual ownership of a PTC is allowable under the Federal Tax Laws (*See* I.R.S. Notice 2008-63), but is not the ideal structure due to probate and estate tax laws, as well as the uncertainty as to who might own an interest in the PTC in the future. As a result, PTC counsel often suggests placing the ownership of the entity into a long-term, Federal Estate Tax-exempt Traditional Trust for the benefit of the family as a whole (an “Owner Trust”). Enter the disenfranchised beneficiary that hasn’t been allowed (likely for good reason) to participate in decision-making within the PTC and seeks to cause trouble for the whole structure. This beneficiary has substantial rights to enforce the Owner Trust and has the opportunity to make life

difficult for the trustee and interfere with the overall structure.

B. Beginnings of Purpose Trusts in the U.S. and Abroad

The “square peg round hole” relationship between Traditional Trusts and the desire to manage businesses and wealth for a purpose other than the economic gain of individual beneficiaries is not a new one. Attempts at solving these issues have been made in the US and abroad for years. Much has been written in recent years about Purpose Trusts, perhaps most completely by Professor Susan N. Gary of the University of Oregon. Her article in the University of Cincinnati Law Review and other works provide the reader with an excellent background on Purpose Trusts in general, as well as the relatively new “Stewardship Trust” provided by Oregon statute. Susan N. Gary *The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business*, 99 U. Cin. L. Rev. 707 (2020); see also Susan N. Gary *The Need for a New Type of Purpose Trust, the Stewardship Trust*, ACTEC Law Journal Vol. 45: No. 1, Article 8 (2019). Although this Article will not attempt to re-plow the same ground, some of the subsequent material is drawn from her excellent work.

1. Non-US Structures

In Europe, Purpose Trusts, foundations, and similar structures have been used to maintain a company’s purpose for over 100 years. For example, the Carl Zeiss Foundation has owned and operated the well-known optics company since 1891. Gary, *The Oregon Stewardship Trust*, at 731. This German single foundation structure, or Stiftung, requires the operation of the companies in line with the fundamental goals of one of the original owners, Ernst Abbe, including (1) preservation of the companies and their economic capacity, (2) promotion and social security of employees, including their social environment, and (3) funding of science research from profits. See www.carl-zeiss-stiftung.de/en/foundation/structure/statute. Structures like this are also found in other countries such as the Netherlands, where the Stichting is popular. Dutch foundations, or “Stichtings,” have been around for centuries and are defined by Section 2:285 of the Dutch Civil Code to mean: “A legal person formed under law, that has no members, and that intends to realize an objective (purpose), mentioned in its articles of incorporation, by using capital (property) which has been brought in for this purpose.” See www.step.org/step-journal/step-journal-july-2013/dutch-foundation (quoting the Dutch statute).

Bosch, the German technology and service company, has used a split structure since the death of its founder Robert Bosch. Gary, *The Oregon Stewardship Trust*, at 731. Most of the voting rights of the company are owned by Robert Bosch

Industrietreuhand KG (IK), a limited liability-like company with ten trustee-shareholders at the helm, some from the company and some third-parties with relevant experience, and most of the equity is owned by the Robert Bosch Foundation. *Id.* Another European model employs a trust-partnership structure, where a trust owns the company on behalf of partners, usually employees, where the partners are involved in management and profits are retained in the business. *Id.* At 732 (discussing the John Lewis Partnership in the United Kingdom).

2. Purpose Trusts under Common Law and the Uniform Trust Code

Prior to the end of the 20th century, it was not uncommon for settlors in the United States to create trusts to make distributions to certain individuals for benevolent, but not truly charitable, purposes. *Id.* At 714. Examples of these trusts would be those to maintain a gravesite, pay for religious observances, or care for an animal. *Id.* The issue with using Traditional Trusts for these purposes is, without defined beneficiaries (or the attorney general in the case of a truly charitable trust) the settlor is effectively relying on the trustee’s willingness to follow through with the stated ends. With no beneficiary to seek court involvement, the trustee’s actions or inactions would not be subject to enforcement, and in some cases courts would find the trust invalid even if the trustee was willing to comply. *Id.* Citing the Restatement (Second) of Trusts Section 123, cmt. D (Am. Law Inst. 1959).

To at least partially address this issue, two Uniform Trust Code (“UTC”) sections were introduced in 2000. Section 408 of the UTC validates a trust for the care of an animal, and Section 409 of the UTC validates other noncharitable trusts. UNIF. TRUST CODE § 408, 409. While the animal trust is self-explanatory, UTC § 409 began to offer something intriguing for those looking for a true Purpose Trust. Although the drafters clearly had the historical use of cemetery or other similar trusts in mind, Section 409 is not limited to any particular types of purposes. *Id.* At § 408, cmt., 409, cmt. Further, the UTC introduced the position of “enforcer,” a person named by the grantor to enforce the terms of the trust in lieu of an identifiable beneficiary. *Id.* At § 408(b) and 409(2).

However, two provisions of UTC § 409 can be concerning to a grantor who creates such a trust to own a business. First, Section 409 limits a trust created thereunder to a period of 21 years (although the Comment provides that each adopting state can choose a different time period). *Id.* At 409(1), and cmt. Second, Section 409 gives a court the power to reduce the amount held in a purpose trust to the extent the total amount is “not required for [the trust’s] intended use” (e.g., by requiring such excess be returned to the grantor or his or her successors in interest). *Id.* At 409(3). This concept is present in many of the state statutes that allow for Purpose Trusts (including

Texas), and is effectively the statutory answer to the concern that a settlor not create a trust for “capricious” purposes. See Gary, *The Oregon Stewardship Trust*, at 718.

3. Oregon and Other States

Though many states have currently adopted some form of the Uniform Trust Code, certain states, such as Nevada, Wyoming, Florida, and Delaware, have removed the time limit included in UTC § 409(1) and/or modified or removed the authority granted to the courts to reduce the amount held by the trust in excess of its intended use included in UTC § 409(3). Attached to this Article as Appendix A is a brief side-by-side comparison of the statutory provisions in effect in a few of these states.

Oregon previously adopted a Purpose Trust statute consistent with UTC § 409 (including a 90-year term limit on any such trust), but took a step further in 2019 with the adoption of a second statute providing for the creation of “Stewardship Trusts” to own for-profit businesses in perpetuity. Ore. Rev. Stat § 130.190, 193; see also Gary, *The Oregon Stewardship Trust*, at 725. The proponents of Oregon’s new statute essentially wanted to provide a default framework for the structure and governance of this type of Purpose Trust. Gary, *The Oregon Stewardship Trust*, at 725. The new statute provides for multiple roles at the trust level: (1) Trustee, to hold legal title to the assets, (2) Enforcer, a fiduciary with enforcement rights similar to a beneficiary, and (3) a Stewardship Committee of at least three members, with the power to remove and replace the Trustee and Enforcer, direct distributions from the trust, and exercise the typical rights of a trustee, including the voting of stock held in the trust, all while acting in a fiduciary capacity. Ore. Rev. Stat. § 130.193. As a safe-harbor framework of sorts, so long as a trust is governed in accordance with the terms of the Stewardship Trust statute, such trust would not be subject to Oregon’s otherwise applicable 90-year perpetuities limit or a court’s ability to force a reduction of assets in the trust. *Id.*

II. THE TEXAS PURPOSE TRUST STATUTE

A. Legislative History

In 2005, the Texas Legislature enacted Section 112.037 of the Texas Property Code, providing for trusts for the care of an animal, drawing significantly from Section 408 of the Uniform Trust Code. Tex. Prop. Code Ann. § 112.037. Until 2023, all other trusts in Texas (other than wholly charitable trusts) were necessarily for the benefit of another person to be enforceable. *Id.* At 111.004(4); see also *City of Wichita Falls v. Kemp Public Library Bd. Of Trustees*, 593 S.W.2d 834 (Tex. App.—Fort Worth 1980, writ ref’d n.r.e.).

1. Introduction of H.B. No. 2333

On February 14, 2023, House Bill 2333 (“HB 2333” or the “Bill”) was introduced by Representative

Steve Allison in the Texas Legislature to allow for the creation of a Purpose Trust in Texas. HB 2333, as introduced, took a bifurcated approach by creating two similar, but different, Purpose Trusts. First, the Bill broadly authorized trusts for a noncharitable purpose without an ascertainable beneficiary, to be enforced by the newly created “enforcer” position. *For the full text of H.B. 2333, as introduced, see Appendix B and <https://capitol.texas.gov/tlodocs/88R/billtext/html/HB023331.htm>.* This first portion of HB 2333 is similar to the legislation found in many states such as Oregon, Nevada, Wyoming, etc. The second portion of the Bill appears to have drawn heavily from the Oregon Stewardship Trust by authorizing the creation of “commercial legacy trusts” for the specific purpose of holding an interest in a for-profit business entity. Unlike the Oregon statute, however, the proposed Texas commercial legacy trust statute (a) did not exempt commercial legacy trusts from the general perpetuities rule in Texas (although admittedly a distinction without much difference given that the current rule in Texas allows trusts to last 300 years) and (b) required that a commercial legacy trust own a controlling interest in the applicable entity.

2. Support and Opposition

HB 2333, or parts thereof, was met with mixed reviews, with the Texas Bankers Association largely staying neutral, and swift opposition from members of the Texas State Bar. The Texas Real Estate & Probate Institute (“T-REP”) is an organization responsible for representing certain members of the real estate, probate, and trust law bar in legislative activities. See Texas Real Estate & Probate Institute letter to Representative Steve Allison, *Re: H.B. No. 2333 – Relating to Non-Charitable Trusts Without an Ascertainable Beneficiary* (April 1, 2023). T-REP acquiesced to the general Purpose Trust provisions of HB 2333, but formally opposed the second half of the Bill containing the commercial legacy trust provisions. *Id.* In addition to general discomfort from some T-REP members in allowing this type of Purpose Trust altogether, T-REP was specifically concerned with the ability of the so-named “business committee” to remove and replace the enforcer of the trust, effectively providing unchecked authority to the business committee, a result very different from Traditional Trusts. *Id.* At 3. T-REP also questioned whether the proposed statute would inadvertently create a new limited liability business entity outside the current registration and fee regime under Texas law (i.e., trusts in Texas do not require any registration with state authorities). *Id.* Additionally, concerns were expressed that (1) the commercial legacy trust language was too detailed and such design should be left to the planner (effectively taking the opposite view of many involved with the Oregon statute), (2) requiring the Commercial Legacy Trust to have a controlling interest in the applicable entity would interfere with a settlor’s ability

to fund significant but not controlling interests in such a trust, and (3) the fiduciary duties expressly stated in the statute were confusing with respect to who owed duties to whom and contained misplaced references to rights of beneficiaries (when none exist). *Id.*

B. The New Statute

Whether convinced by T-REP or others, the Oregon-esque commercial legacy trust portion of HB 2333 never made it out of the House Committee on Judiciary & Civil Jurisprudence. See <https://capitol.texas.gov/tlodocs/88R/billtext/html/HB02333H.htm>. The remainder of the Bill sailed through the House and Senate and was signed by the Governor on June 18, 2023, to be effective immediately and applicable to Purpose Trusts created on or after such date.

The revised Texas Property Code Section 111.004(4) (with underlines added below to show the relevant changes to the prior version of such Section) and new Sections 112.121-123 (referred to herein as the “Act”) are as follows:

Section 111.004(4), Property Code, is amended to read as follows:

(4) “Express trust” means a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property:

- (A) for the benefit of another person;
- or
- (B) for a particular purpose, in the case of a trust subject to Subchapter F.

Chapter 112, Property Code, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY

Sec. 112.121. VALIDITY OF TRUST; APPLICABILITY.

- (a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary. A noncharitable purpose may include seeking economic or noneconomic benefits.
- (b) This subchapter does not apply to a trust created under section 112.037.

Sec. 112.122. ENFORCEMENT OF TRUST.

- (a) A trust created under this subchapter must be enforced by one or more persons appointed in the terms of the trust to serve as a trust enforcer.
- (b) A trust enforcer shall enforce the purpose and terms of the trust. The trust enforcer is not a beneficiary of the trust, but has the rights of a beneficiary provided under this title and the common law of this state, or as otherwise provided by the terms of the trust.
- (c) A trust enforcer shall exercise any authority granted under the terms of the trust or the provisions of this section as a fiduciary owing a duty to the trust and is entitled to reasonable compensation for serving as trust enforcer.
- (d) A trust enforcer may consent to, waive, object to, or petition an appropriate court concerning any matter regarding the purpose or administration of the trust.
- (e) Except as otherwise provided by the terms of the trust, if more than one person is acting as a trust enforcer, any action in that capacity must be decided by the majority vote of the persons acting as trust enforcers. If there are an even number of trust enforcers and a majority vote cannot be established, the decision of the trustee controls.
- (f) The terms of the trust may provide for the succession of a trust enforcer or a process of appointing any successor trust enforcer.
- (g) If no person is serving as a trust enforcer for a trust created under this subchapter, a court properly exercising jurisdiction shall appoint one or more persons to serve as the trust enforcer.

Sec. 112.123. APPLICATION OR DISTRIBUTION OF TRUST PROPERTY.

- (a) Property of a trust created under this subchapter may be applied only to the intended purpose of the trust, except to the extent that a court finds that the value of the trust property exceeds the amount required for the intended purpose of the trust.
- (b) Except as provided by the terms of the trust, property found by a court not to be required for the trust’s intended purpose shall be distributed:

- (1) *as provided by the terms of the trust; or*
- (2) *if the trust does not provide for the distribution of such property, to the settlor if then living or to the settlor's successors in interest.*

III. PLANNING WITH A PURPOSE TRUST

A. Potential Planning Opportunities

Although not a fix-all for every situation, below are a few scenarios where using a new Texas Purpose Trust might make sense.

1. *Situation 1 – THE PATAGONIA MODEL: Client builds a company based on socially-responsible fundamentals and wants the company to continue operating in support of its employees and its fundamental mission, rather than focusing on maximizing distributions to shareholders.*

The Patagonia transaction has drawn so much attention over the past year, it seems appropriate to reference it first and discuss how a Purpose Trust can be used to solve a similar situation. The founder of Patagonia, Yvon Chouinard, had a greater interest in ensuring that the company survived to combat climate change than he did in building and maintaining wealth. David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES, Sept. 14, 2022. In August of 2022, the Chouinard family transferred all the voting stock of Patagonia to an Oregon Stewardship Trust, known as the Patagonia Purpose Trust. *Id.* The Chouinards donated the rest of the company, being the non-voting shares and most of the economic value, to a 501(c)(4) entity known as the Holdfast Collective. *Id.* 501(c)(4)s are typically organizations not organized for profit but operated exclusively for the promotion of social welfare and, unlike 501(c)(3)s, may engage in lobbying efforts consistent with their purposes, a trait that undoubtedly appealed to the Chouinards. Gifts may be made to 501(c)(4)s without incurring gift tax under Internal Revenue Code § 2501(a)(6), but there is no equivalent Federal Estate Tax deduction under I.R.C. § 2055(a).

Although the Patagonia founder used an Oregon Stewardship Trust (the trust structure ultimately rejected in Texas), a Texas Purpose Trust can be used for a similar client with similar results. A planner might suggest that the Client fund a Texas Purpose Trust with voting interests in his company and with the expressly stated purpose being to support the long-term success of the company as integral to the advancement of the Client's preferred cause. The Purpose Trust could have a mix of family and non-family Trustees, with representatives of the relevant causes or supported organizations as Enforcers. The family and non-family Trustees can vote the interests in the company, but the Purpose Trust can be drafted such that the company may not be sold, merged, or otherwise disposed of

without approval of the Enforcers. Similarly to Patagonia, non-voting interests in the company could be transferred to a 501(c)(4), or perhaps a public charity, family trusts, or some combination thereof through traditional estate planning methods.

2. *Situation 2 – THE LONG-TERM HOLD MODEL: Client owns a company that she wants held long-term and overseen by trusted insiders rather than sold at the whims of her family.*

Although many point to benevolent or socially-responsible causes when championing Purpose Trusts, many clients will be interested in using them to ensure their business is privately-owned long term and not subject to the squeaky-wheel family member. In this circumstance, planning counsel could suggest that the Client fund a Purpose Trust with voting interests in her company, but with trusted business insiders as Enforcers instead of charitable representatives. The trust agreement would provide that the purpose of the trust is the long-term success of the company as a privately-owned business, and the company may not be sold, merged, or otherwise disposed of without approval of these Enforcers. The non-voting interests in the company could be transferred to or for the benefit of the Client's family through traditional estate planning methods, where they would benefit from the profits of the company. As beneficial owners of non-voting interests, they may still seek to exercise their limited rights to influence the company, but at minimum would not be able to pressure the trustees of the Purpose Trust directly to sell the company.

3. *Situation 3 – THE PTC MODEL: Client establishes a Private Trust Company but is concerned about the long-term ownership and control of the PTC.*

Compared to the companies in situations 1 and 2, a PTC has relatively low economic value. However, its ownership and control are no less important. A Client could consider funding a Purpose Trust with the ownership interests in the PTC, expressly state that the purpose is the long-term ownership and control of the PTC, and integrate the desired family governance scheme into the trustee/enforcer structure. The beneficiary-less nature of the Purpose Trust would (1) avoid any expectations of profitability of the PTC (which would otherwise not likely turn a profit from the family trusts) and (2) provide greater protection to the trustees and the overall governance structure from a disgruntled family member. The ability to leverage this solution, however, depends on the state in which the PTC is organized. Statutes in some states (such as Nevada) would clearly allow ownership of a PTC by a Purpose Trust, while other states (such as Texas) require a PTC to be owned, legally or beneficially, by a family member. *See Nev. Rev. Stat. § 669A.080; compare Tex. Fin. Code § 182.011.* It is yet unclear how banking regulators will interpret a family-created

Purpose Trust under these rules, and whether these rules may evolve to allow ownership by such structures.

4. Considerations

Despite being an excellent tool for a number of clients, prior to deciding to form and fund a Purpose Trust, a client should take into consideration a number of factors:

- Lack of Jurisprudence. Early adoption of new planning tools can be enticing, but the limited historical use of Purpose Trusts creates uncertainty as to their long-term interpretation by courts and regulatory bodies. Enforcement of purposes and fiduciary duties, as well as treatment of such trusts by the IRS for tax purposes, is anything but settled.
- Need for Flexibility. Clients and planners should balance the need to protect the client's purposes with the need for sufficient flexibility so that managers of the business can adapt to changes over time.
- Long-term Management Structure. Although the client's purpose may be clear, establishing a self-perpetuating management structure that will continue to uphold this purpose for the trust and the business it controls will be challenging, but critical.
- Gift Tax and Estate Tax. For Federal Gift Tax purposes, despite the absence of identifiable beneficiaries, contributions to a Purpose Trust would be considered gifts to the same extent as contributions to a Traditional Trust. Thus, like Traditional Trusts, a Purpose Trust can be structured as a completed gift or an incomplete gift (such as a revocable trust), and, as these trusts are not truly charitable trusts, completed gifts to a Purpose Trust would not qualify for the charitable deduction. A Purpose Trust must also be structured so that the transferor retains no powers that would otherwise trigger estate tax inclusion with respect to a Traditional Trust. Given the Texas statute allows a court to order distributions of property in excess of the trust's intended purpose, care should be taken in the trust instrument to direct where and to whom any such distributions should be made to avoid the default distribution back to the transferor.
- The Rest of the Company Interests. At minimum, a planner will want to fund a Purpose Trust with controlling interests in an entity. For various reasons (value concerns, structure limitations, need for distributions to family, etc.), however, it may not be feasible to fund the trust with the entire company. Although a full analysis of the potential methods and potential recipients of these interests is beyond the scope of this Article, planners should consider alternatives such as

irrevocable trusts for family members, public charities, and lifetime gifts to 501(c)(4) (recall that, although tax-free gifts to 501(c)(4) are allowed under Internal Revenue Code § 2501(a) (6), there is no equivalent Federal Estate Tax exemption under I.R.C. § 2055(a)). Consider also that although the Purpose Trust has no beneficiaries to pressure the trustee for economic gain, if non-voting shares or other limited liability interests are held outside the trust, these owners may seek to use what rights they have to pressure the company directly to maximize profits or act in ways inconsistent with the Purpose Trust.

5. Suggested Language

The Texas Act is only months old, so highly developed and vetted sample language is unavailable. However, below is some sample language that can be considered for use when drafting a Purpose Trust. This sample language assumes a hypothetical Situation 1 from above, in which the client is seeking to fund the Purpose Trust with voting shares for the applicable company to be run to support socially-conscious endeavors.

Statement of Purpose. *The Trust shall be a noncharitable trust without an ascertainable beneficiary as provided in Chapter 112, Subchapter F, of the Texas Trust Code. The purpose of the Trust is to support the long-term success of Acme Company, a Texas corporation, or its successor ("Acme" or the "Company"), and the long-term success of the philanthropic legacy of Wile E. Coyote, advancing and supporting roadrunner and other wildlife conservation in the State of Texas, recognizing that the success of Acme is integral to the advancement of such philanthropic legacy.*

- (a) **Distributions.** *If at any time the Trust holds cash that is not needed to meet current or future trust expenses, then the Trustee may, in the Trustee's sole discretion, distribute such excess cash to such one or more individuals or entities (other than any Trustee, any Trustee's creditors, any Trustee's estate, or the creditors of any Trustee's estate) as the Trustee of the Trust shall select; provided, that any such distribution shall be made in furtherance of the purpose set forth in section 1.1 (as determined by the Trustee in the Trustee's sole discretion). Notwithstanding anything herein or Section 112.123 of the Texas Trust Code to the contrary, no distribution shall be ever be made to the Grantor or the Grantor's successors in interest.*

Termination. *The Trust shall terminate upon the earlier to occur of (i) the date the Trust does not own any Voting Securities of the Company or (ii) the then serving Trustees vote unanimously to*

terminate the Trust. Upon such termination, any Voting Securities of the Company held by the Trust shall be sold and the remaining property of the Trust shall be distributed to such one or more individuals or entities (other than the Grantor or any Trustee, any of the Grantor's or Trustee's creditors, the Grantor's or any Trustee's estate, or the creditors of the Grantor's or any Trustee's estate) as the Trustee shall select; provided, that any such distribution shall be made in furtherance of the purpose set forth in section 1.1 (as determined by the Trustee in the Trustee's sole discretion).

Enforcers. *At all times the Trust shall have seven (7) "trust enforcers" for purposes of Section 112.122 of the Texas Trust Code (in such capacity, each an "Enforcer"), as follows: (i) four (4) Enforcers shall serve as "Acme Enforcers" and shall be appointed by the Board of Acme Company and (ii) three (3) Enforcers shall serve as "Conservation Enforcers" and shall be appointed by the Board of the Roadrunner Conservation Society. Each individual serving as an Enforcer must be designated as either an Acme Enforcer or a Conservation Enforcer.*

Actions by Enforcers. *At any time there is more than one Enforcer, any action by the Enforcers in exercise of the powers granted to them in such capacity under this Article and Section 112.122 of the Texas Trust Code shall require the affirmative vote of twothirds (2/3) of the Enforcers acting at that time. Any such action shall be made by an acknowledged instrument signed by the Enforcers exercising such power, filed in the trust records and delivered to each individual then serving as Trustee.*

Exculpatory and Indemnity Provisions. *Each Enforcer is a fiduciary but shall be released and held harmless from any liability for any action such Enforcer may take or for the failure of such Enforcer to take any action if such act or omission is done in good faith and without gross negligence. In addition, to the maximum extent permitted by law, each Enforcer shall be indemnified by the Trust from and against any loss, cost, expense, or liability whatsoever in connection with or as a result of any claim asserted by any party for damages or losses relating to any act or omission of such Enforcer.*

Enforcer Compensation. *No Enforcer shall receive any compensation for services rendered by such Enforcer. Every Enforcer shall be reimbursed for the reasonable costs and expenses incurred in connection with such fiduciary's duties as an Enforcer.*

Exercise of Fundamental Power. *Any exercise of any Fundamental Power shall require the affirmative vote of at least five (5) of the seven (7) Enforcers who are then serving. Any such action shall be made by written instrument signed by the consenting Enforcers, filed in the trust records and delivered to each Trustee. For purposes of clarity, if any action involving the exercise of a Fundamental Power is under consideration by the Enforcers and either (a) there are fewer than seven Enforcers then serving (i.e., four Acme Enforcers and three Conservation Enforcers) or (b) the proposed action does not receive the affirmative vote of at least five of the Enforcers then serving, then (i) the proposed action shall not be taken, or (ii) if the Fundamental Power relates to the voting of the Voting Securities held in the Trust, the Trustees shall cause such Voting Securities to be voted against the proposed action. "Fundamental Power" means the voting of the Voting Securities in connection with the approval of (i) the sale of all or substantially all of the Company's assets, (ii) a merger of the Company or any of its subsidiaries, (iii) an initial public offering of the Company's or any of its subsidiaries equity securities, (iv) the issuance by Acme of additional Voting Securities, or (v) the amendment of the Certificate of Formation, the Bylaws, the Shareholders Agreement, or any other governing document of the Company.*

IV. CONCLUSION*

One might wonder if the stories of Patagonia and the Carl Zeiss Foundation might encourage every charitably-inclined business owner to consider leveraging a Purpose Trust to lock in the owner's long-supported initiatives. The reality is that the right set of circumstances for this type of Purpose Trust will likely come along more seldomly. In the near term, it is expected that these trusts will generate more interest from clients looking to prevent future sales of businesses or lock in governance structures than dedicate billions to progressive causes. That said, Texas planners surely welcome having another tool in the toolkit when representing entrepreneurs in this great state.

APPENDIX A

	Nevada	Wyoming	Florida	Delaware
Statute	NRS § 163.5505	WY Stat § 4-10-410	FL Stat § 736.0409	12 DE Code § 3556
Allowable Purpose	Any noncharitable purpose (must be ascertainable) without a definite ascertainable beneficiary	Any noncharitable purpose (identified in the trust agreement or to be selected by the trustee) without a definite or definitely ascertainable beneficiary	Any noncharitable purpose (identified in the trust agreement or to be selected by the trustee) without a definite or definitely ascertainable beneficiary	Any declared purpose that is not impossible of attainment, without the need for an identifiable beneficiary
Trust Enforcement	By any person or entity appointed under the terms of the trust including a: <ul style="list-style-type: none"> • trustee, • trust adviser, or • trust protector. If none appointed, the court may enforce.	By any person or entity appointed under the terms of the trust or, if none, as appointed by the court, including a: <ul style="list-style-type: none"> • trust adviser, or • trust protector. 	By any person or entity appointed under the terms of the trust or, if none, as appointed by the court.	By any person or entity appointed under the terms of the trust. A person with an interest (other than as just the general public) in the declared purpose may petition the court to appoint or remove an enforcer.
Application of Trust Property in Excess of Amount Required for Intended Purpose	Except as otherwise provided by the terms of the trust, excess property not required for the intended use (as determined by a court) must be distributed to the settlor, if living, or otherwise to the settlor's successors in interest.	Except as otherwise provided in the terms of the trust, excess property not required for the intended use (as determined by a court) shall be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.	Except as otherwise provided in the terms of the trust, excess property not required for the intended use (as determined by a court) shall be distributed to the settlor, if then living, otherwise as part of the settlor's estate.	Excess property may be accumulated by the trust, and a court may not order its distribution.
Maximum Term of Trust	365 years	1,000 years	1,000 years	Perpetual

	Texas	Oregon	Oregon Stewardship Trust
Statute	Tex. Prop. Code 112.121-123	ORS 130.190	ORS 130.193
Allowable Purpose	Any noncharitable purpose without a definite or definitely ascertainable beneficiary. The purpose may include seeking economic or noneconomic benefits.	Any valid noncharitable purpose (identified in the trust agreement or to be selected by the trustee) without a definite or definitely ascertainable beneficiary	<i>Any business purpose including seeking economic and noneconomic benefits.</i> May hold an ownership interest in entity (control not required)
Trust Enforcement	By any one or more persons or entities appointed in the terms of the trust, or if none, as appointed by the court. If the Enforcers cannot agree on a decision, the decision of the Trustee controls. More robust Enforcer provisions in Texas Statute than other similar statutes.	By any one or more persons or entities appointed in the terms of the trust or, if none, as appointed by the court.	Trust Enforcer – one or more persons named in or pursuant to the terms of the trust or, if none, by the court (Note: may not be the same person as Trustee or member of the Stewardship Committee) Stewardship Committee (Requirement) – at least three members appointed by or pursuant to the terms of the trust by unanimous vote of enforcers or by court, in that order. May not be trustee or enforcer. Stewardship Committee exercises all rights normally belonging to a trustee (including distributions and voting stock) and must report to trust enforcer at least annually.
Application of Trust Property in Excess of Amount Required for Intended Purpose	Except as otherwise provided by the terms of the trust, excess property not required for the trust's intended use shall be distributed as provided by the terms of the trust or, if the trust does not provide, to the settlor, if then living, otherwise to the settlor's successors in interest.	Excess property not required for the intended use (as determined by a court) must be distributed to those persons designated in the trust or, if the trust does not provide, to the settlor, if then living, otherwise to the settlor's successors in interest.	No statutory reference
Maximum Term of Trust	300 years	90 years	Perpetual

APPENDIX B

HB 2333 AS INTRODUCED

88R2814 ATP-F

By: Allison

H.B. No. 2333

A BILL TO BE ENTITLED

AN ACT

relating to noncharitable trusts without an ascertainable beneficiary.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 112, Property Code, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY

Sec. 112.121. VALIDITY OF TRUST; APPLICABILITY. (a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary.

(b) This subchapter does not apply to a trust created under Section 112.037.

Sec. 112.122. ENFORCEMENT OF TRUST. (a) A trust created under this subchapter must be enforced by one or more persons appointed in the terms of the trust to serve as a trust enforcer.

(b) A trust enforcer shall enforce the purpose and terms of the trust. The trust enforcer is not a beneficiary of the trust, but has the rights of a beneficiary provided under this title and the common law of this state, or as otherwise provided by the terms of the trust.

(c) A trust enforcer shall exercise any authority granted under the terms of the trust or the provisions of this section as a fiduciary owing a duty to the trust and is entitled to reasonable compensation for serving as trust enforcer.

(d) A trust enforcer may consent to, waive, object to, or petition an appropriate court concerning any matter regarding the purpose or administration of the trust.

(e) Except as otherwise provided by Section 112.124 or 112.125 or the terms of the trust, if more than one person is acting as a trust enforcer, any action in that capacity must be decided by the majority vote of the persons acting as trust enforcers. If there are an even number of trust enforcers and a majority vote cannot be established, the decision of the trustee controls.

(f) The terms of the trust may provide for the succession of a trust enforcer or a process of appointing any successor trust enforcer.

(g) If no person is serving as a trust enforcer for a trust created under this subchapter, a court properly exercising jurisdiction shall appoint one or more persons to serve as the trust enforcer.

Sec. 112.123. APPLICATION OR DISTRIBUTION OF TRUST PROPERTY. (a) Property of a trust created under this subchapter may be applied only to the intended purpose of the trust, except to the extent that a court finds that the value of the trust property exceeds the amount required for the intended purpose of the trust.

(b) Except as provided by the terms of the trust, property found by a court not to be required for the trust's intended purpose shall be

distributed:

(1) as provided by the terms of the trust; or

(2) if the trust does not provide for the distribution of such property, to the settlor if then living or to the settlor's successors in interest.

Sec. 112.124. COMMERCIAL LEGACY TRUST. (a) In this section, "commercial legacy trust" means a trust subject to this section. A commercial legacy trust is not a business trust for purposes of Section 111.003.

(b) Subject to this section, a trust may be created under this subchapter for a commercial purpose, including seeking economic and noneconomic benefits.

(c) A commercial legacy trust that holds an ownership interest in a corporation, partnership, limited partnership, cooperative, limited liability company, limited liability partnership, or other business entity created to conduct business under the laws of this state must hold a controlling interest in that business entity.

(d) A commercial legacy trust may have a business committee governed by Section 112.125. Each member of the business committee shall exercise authority as a fiduciary of the commercial legacy trust. A trustee of a commercial legacy trust must act in accordance with a direction from the business committee unless the action is manifestly contrary to the terms of the trust or the trustee knows that the action would constitute a breach of fiduciary duty that the business committee, the trust enforcer, or the trustee owes to the trust.

(e) A trustee of a commercial legacy trust is liable only for wilful misconduct and is not liable for reliance on documents provided by the business committee or the trust enforcer.

(f) Unless the terms of a commercial legacy trust provide otherwise, the trust enforcer and the business committee, acting together, may modify or terminate a commercial legacy trust by unanimous agreement of all members of the business committee and all trust enforcers.

(g) On termination of a commercial legacy trust, the trustee shall distribute all remaining trust property:

(1) as the terms of the trust provide; or

(2) if the terms of the trust do not provide for complete distribution of the property, as a court determines to be consistent with the purposes for which the trust was created.

(h) A person serving as trustee of a commercial legacy trust may not serve as a trust enforcer or a member of a business committee of that trust. A person serving as a trust enforcer of a commercial legacy trust may not serve as a member of the business committee of that trust.

Sec. 112.125. BUSINESS COMMITTEE FOR COMMERCIAL LEGACY TRUST; REQUIRED REPORT. (a) In this section, "business committee" means the business committee established under Section 112.124(d) for a commercial legacy trust subject to Section 112.124.

(b) The terms of a commercial legacy trust subject to Section 112.124 may appoint the initial members of the business committee and

may provide for the succession of a business committee member or a process of appointing a successor business committee member.

(c) A business committee must have a minimum of three members.

If a vacancy on a business committee results in fewer than three members on the committee, the vacancy must be filled in the following order of priority:

(1) by a person designated in the terms of the commercial legacy trust or selected through a process provided by the terms of the trust;

(2) by a person appointed by the unanimous agreement of the trust enforcers; or

(3) by a person appointed by a court properly exercising jurisdiction.

(d) Except as provided by Subsection (e)(3) or (e)(4), Section 112.124(f), or the terms of the commercial legacy trust, any action taken by a business committee must be decided by the majority vote of business committee members. If there are an even number of business committee members and a majority vote cannot be established, the decision of the trustee controls.

(e) Unless the terms of the commercial legacy trust provide otherwise, in carrying out the purposes of the trust and after reasonable written notice has been provided to the trust enforcer, a business committee may:

(1) remove a trustee with or without cause;

(2) appoint one or more successor trustees or cotrustees;

(3) remove a trust enforcer with or without cause by the unanimous vote of all members of the business committee and all trustees;

(4) remove a member of the business committee by the unanimous vote of all other members of the business committee;

(5) direct distributions from the trust; and

(6) with the consent of the trust enforcer and subject to the trust enforcer's revocation of consent at any time on reasonable notice, exercise any right or power belonging to the trustee, including the right to vote stock owned by the trust.

(f) Unless the commercial legacy trust agreement provides otherwise, a member of a business committee may resign:

(1) not earlier than the 30th day after providing written notice to all trustees, all trust enforcers, and all members of the business committee; or

(2) at any time with the approval of a court properly exercising jurisdiction.

(g) A member of a business committee may be removed by the unanimous vote of all trustees and trust enforcers.

(h) Unless the terms of the commercial legacy trust provide otherwise, a business committee shall provide a report to the trustee and the trust enforcer at least annually. The report must show receipts, disbursements, and a detailed list of the assets and liabilities of the commercial legacy trust. A business committee shall keep the trustee and the trust enforcer reasonably informed about the

administration of the commercial legacy trust, company matters, and any other material facts necessary for the trustee to comply with the trustee's duties and for the trust enforcer to protect the purpose of the trust. A report properly prepared under this subsection and provided to the trust enforcer meets the trustee's duty to provide an accounting under Section 113.151.

(i) If a business committee fails to provide a report in compliance with Subsection (h), the trustee or trust enforcer may demand in writing that the business committee deliver to the trust enforcer and trustee a written statement of accounts covering all transactions since the last report prepared under Subsection (h) was provided. If the business committee does not deliver the statement on or before the 90th day after the date the business committee receives the written demand or after a longer period ordered by a court, the trustee or trust enforcer may file suit to compel the business committee to deliver the statement to the trust enforcer and trustee. If a trustee or trust enforcer is successful in the suit to compel a statement under this subsection, the court may in its discretion award all or part of the court costs and all of the prevailing party's reasonable and necessary attorney's fees and costs against the members of the business committee in their individual capacities.

SECTION 2. Subchapter F, Chapter 112, Property Code, as added by this Act, applies only to a trust created on or after the effective date of this Act.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2023.

