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Premature Judicial Termination of Non-Spendthrift Trusts: Reconciling a Dead Settlor's Intent with a Living Beneficiary's Needs

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PREMATURE JUDICIAL TERMINATION OF NON-SPENDTHRIFT TRUSTS: RECONCILING A DEAD SETTLOR'S INTENT WITH A LIVING BENEFICIARY'S NEEDS

INTRODUCTION

Trusts currently are popular tools for transferring property from generation to generation because they are simple to create, offer tax savings, and allow beneficiaries to avoid costly, and often delayed, probate procedures.[1] Professor Austin W. Scott aptly described the utility of using a trust to dispose of property:

> The trust . . . is a device for making dispositions of property. And no other system of law has for this purpose so flexible a tool. It is this that makes the trust unique. . . . The purposes for which trusts can be created are as unlimited as the imagination of lawyers.[2]

However, a trust may prove disadvantageous for beneficiaries seeking to obtain complete control of a dead settlor's assets. A beneficiary may seek early termination of a trust for any number of reasons—because he is unhappy with trust arrangements; he is capable of managing trust property; he prefers owning trust property outright; or he suffers a change in circumstances. Premature trust termination may be possible if a trust has flexible features authorizing early termination to accommodate a beneficiary's changing needs or circumstances. However, American jurisdictions generally prohibit premature trust termination absent such flexible features or if a trust's stated conditions or purposes have not been accomplished. Indeed, American courts prohibit premature trust termination even if all beneficiaries are *sui juris*[3] and consent to early termination.[4]

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1. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 571 (5th ed. 1995).

2. 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 1, at 2 (4th ed. 1987). In fact, in 1991, American banks managed almost 900,000 irrevocable trusts worth $450 billion. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 571. In addition, individual trustees reportedly handled billions of dollars held in trust. *See id.*

3. *Sui juris* means "[h]aving capacity to manage one's own affairs; not under legal disability to act for one's self." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

4. *See* 4 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 337, at 431 (4th ed. 1989). However, premature trust termination may be easily accomplished if a settlor is still alive and he and all the beneficiaries agree to early termination. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 646. Thus, premature trust termination problems generally arise when a settlor is dead or refuses to consent to the termination of a trust. This comment focuses solely on the possibility of early trust termination when all beneficiaries consent after the death of a settlor.

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Premature trust termination cases often result from a deceased settlor's failure to state his reasons for creating a trust in the trust document. Failure to state a trust's specific purposes may arise from a deceased settlor's oversight or from poor attorney drafting.

For example, a father creates a testamentary trust for his ten year old son that terminates when his son reaches age thirty-five. The father's unstated *purposes* in creating the trust are to pay for his son's education and to provide his son with income until he becomes self-sufficient. However, the father fails to specify his *purposes* behind creation of the trust in the trust document, and he fails to empower either his son or the trustee to prematurely terminate the trust if his son becomes financially independent before reaching age thirty-five.

If the settlor's son obtains a master's degree in finance, becomes an expert in stock investments, and has a stable job with an annual income of sixty thousand dollars by the time he turns twenty-six years old, the settlor's *purposes* in creating the trust have been accomplished. Alternatively, if the settlor's son needs money to pay his minor child's medical expenses, but the settlor's son is only twenty-six years old, the settlor's son may be forced to sell his interest in the trust to a third party at a price below the value of his interest because he has not met the *condition* for trust termination stated in the trust document.

In both scenarios, because most American jurisdictions adhere to the long-standing *Claflin* doctrine,[5] the son may not terminate the trust because he has not met the *condition* required by the settlor to terminate the trust—that is, attaining age thirty-five. The *Claflin* doctrine, followed in Texas, prevents premature termination of a trust unless its material *purposes* have been accomplished, even if all beneficiaries are sui juris and agree to terminate the trust.[6]

Section 112.054 of the Texas Property Code ("Section 112.054") addresses judicial modification or termination of a trust.[7] Section

5. *See* 4 SCOTT & FRATCHER, *supra* note 4, § 337.3 at 452-54; GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1008, at 420-33 (2d rev. ed. 1983).

6. *See* 4 SCOTT & FRATCHER, *supra* note 4, § 337.1, at 443-44. The *Claflin* doctrine was promulgated by the Massachusetts Supreme Court in *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). In *Claflin*, the sole beneficiary of a trust was to receive trust payments in three installments: ten thousand dollars at age twenty-one, ten thousand dollars at age twenty-five, and the remainder when he reached age thirty. *See id.* at 455. However, when the beneficiary turned twenty-one, he petitioned the court to transfer the remainder of his trust interest. *See id.* The court denied his petition for early trust termination, reasoning that "the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support; and we see no good reason why the intention of the testator should not be carried out." *Id.* at 456. Although the trust involved in *Claflin* was not a spendthrift trust, the *Claflin* court reasoned that the trust's postponement of payment clause had the same effect as that of a spendthrift trust. *See id.*

7. TEX. PROP. CODE ANN. § 112.054 (West 1995).

112.054 rigidly follows the *Claflin* doctrine, allowing premature judicial termination of an active trust upon petition by a trustee or beneficiary only under narrow circumstances.[8] The purpose of Section 112.054 is to *effect a settlor's intent* and to provide certainty and predictability with a bright line rule restricting a beneficiary's recourse to early judicial trust termination.

However, rigid adherence to the *Claflin* doctrine may create consequences a deceased settlor did not intend and may preclude actions a settlor might readily have approved. Furthermore, rigid adherence to a trust's terms, under the guise of honoring a settlor's intent, may result in a beneficiary's incurring unnecessary trust fees after a trust's unstated *purposes* have been accomplished because a trust *condition* has not been fulfilled.

Section I of this comment examines the historical background of the *Claflin* doctrine. Section II discusses Texas cases applying the *Claflin* doctrine. Section III critically analyzes Section 112.054 which restricts premature trust termination. Section IV proposes adopting an amendment to the Texas Property Code to permit premature judicial termination of a non-spendthrift trust if all beneficiaries are sui juris and consent.[9]

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8. *See id.* Under Section 112.054, judicial modification or termination of a trust is allowed under the following circumstances:

> (a) On the petition of a trustee or a beneficiary, a court may order . . . that the terms of the trust be modified . . . or that the trust be terminated in whole or in part, if:
> (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; or
> (2) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.
> (b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.

9. *See* BOGERT & BOGERT, *supra* note 5, § 1007 (rev. 2d ed. 1983 & Supp. 1994) (citing CAL. PROB. CODE ANN. § 15403 (West 1991)) (permitting a court to exercise discretionary power and to take a balancing approach to the premature termination of a non-spendthrift trust upon the petition of all beneficiaries, regardless of whether the material purposes of a trust are accomplished. Thus, if the court finds the reason for termination outweighs the interest in accomplishing a trust's material purpose, it will likely terminate the trust). *See also* Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine—New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805, 807 (1985) (suggesting MO. ANN. STAT. § 456.590(2), enacted in 1983, "repeals, at least in part, the *Claflin* doctrine" so that if all beneficiaries have reached majority and are of sound mind, they are entitled to vary or terminate a trust even if that action will defeat a material purpose of the settlor). MO. ANN. STAT. § 456.590(2) (West 1992) reads as follows:

> 2. When all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, vary the terms of a private trust so

I. HISTORICAL BACKGROUND OF THE *CLAFLIN* DOCTRINE

Historically, American courts consider a dead settlor, not a living beneficiary, to be an owner of trust property with an absolute right to dispose of his property as he sees fit, provided his disposition does not contravene public policy.[10] Accordingly, American courts place great emphasis on carrying out a dead settlor's intentions.[11] By readily accepting the *Claflin* doctrine, a substantial majority of American jurisdictions expressly favor a dead donor's right to dispose of property over a living donee's right to enjoy a gift free of restraints.[12]

However, prior to the adoption of the *Claflin* doctrine, American courts generally applied the English common law rule derived from *Saunders v. Vautier*.[13] The *Saunders* rule permits early trust termination before the *event* or *condition* designated as triggering termination has occurred or before the trust's stated *purpose* has been accomplished.[14]

In *Saunders*, a twenty-one year old sole beneficiary sought premature judicial termination of a testamentary trust scheduled by its terms to terminate when he reached age twenty-five.[15] The *Saunders* court permitted premature termination of the trust because the sole living beneficiary had an absolute and indefeasible right to the gift.[16] Thus, the court held the beneficiary had a right to demand the transfer of property held in trust once he reached majority.[17]

The *Saunders* rule subsequently was interpreted by English courts to provide that a sole beneficiary under no legal incapacity may compel termination of a trust despite a testator's intent that the trust ter-

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as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.

10. *See, e.g.*, Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889); Lanius v. Fletcher, 101 S.W. 1076, 1078 (Tex. 1907).

11. *See* 4 SCOTT & FRATCHER, *supra* note 4, § 337, at 433. *See, e.g.*, Albritton v. Albritton, 600 So. 2d 1328, 1331 (La. 1992) (holding the settlor's intention controls in construing the trust); Myrick v. Moody, 802 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (holding the primary objective of trial courts is to construe trusts to determine the intent of the makers); Aberg v. First Nat'l Bank, 450 S.W.2d 403, 410 (Tex. Civ. App.—Dallas 1970, writ ref. n.r.e.) (holding the cardinal rule in construing trust instruments is to enforce the intention of settlors); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 273 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.) (holding the intent of settlors is determinative).

12. *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1203 (1985).

13. 49 Eng. Rep. 282 (1841). *See* Alexander, *supra* note 12, at 1201 n.38 (listing early American cases following the English common law rule). *See also* 4 SCOTT & FRATCHER, *supra* note 4, § 337.3, at 450 n.2 (collection of cases allowing early trust termination upon consent of all beneficiaries in Commonwealth countries).

14. *See* 49 Eng. Rep. at 282.

15. *See id.*

16. *See id.*

17. *See id.*

minate on a later date.[18] The rationale behind this liberal approach to premature trust termination is that English courts considered property held in trust to belong to a beneficiary, not to a dead settlor.[19] Thus, under the *Saunders* rule, a beneficiary has a right to control and dispose of trust property as he wishes, provided he is the sole beneficiary and under no legal incapacity.[20]

The *Saunders* approach appears to be based on the public policy "favoring the free alienability"[21] of property and is consistent with the English courts' treatment of spendthrift trusts. English courts invalidated the spendthrift trust doctrine[22] which allows a settlor to restrict the voluntary and involuntary alienation of trust property.[23] This invalidation was premised on the principle that "a restraint on alienation is inconsistent with the conveyance of an absolute interest."[24]

Furthermore, English courts recognize that a beneficiary with an absolute and indefeasible interest in trust property may sell his interest to a third party.[25] However, since a third-party purchaser, like a trust beneficiary, is bound by the terms of the trust, a beneficiary often can only sell trust property at a price substantially below the actual value of the beneficiary's interest.[26] Thus, although a settlor may include a *condition* or *termination event* restricting a beneficiary's access to trust principal for the purpose of ensuring the beneficiary's future financial stability, the *condition* may actually force the beneficiary to sell his interest to a third party at a discounted price because courts refuse to prematurely terminate the trust.

Based on public policy considerations, English Parliament eventually enacted the *Saunders* doctrine into the English Variation of Trusts Act of 1958.[27] This Act empowers the courts to modify or terminate

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18. *See* Alexander, *supra* note 12, at 1201.

19. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 647.

20. *See Saunders,* 49 Eng. Rep. at 282; Alexander, *supra* note 12, at 1201; DUKEMINIER & JOHANSON, *supra* note 1, at 647.

21. Gail Boreman Bird, *Trust Termination: Unborn, Living and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS L. J. 563, 578 (1985).

22. *See* BOGERT & BOGERT, *supra* note 5, § 1008, at 412-13; 4 SCOTT & FRATCHER, *supra* note 4, § 337, at 433.

23. 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 151 (4th ed. 1987).

24. *See* BOGERT & BOGERT, *supra* note 5, § 1008, at 412-13.

25. *See* Curtis v. Lukin, 49 Eng. Rep. 533 (1842) in which the court stated:

> [The beneficiary] has the legal power of disposing of [trust property], he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain. . . . [S]ince the legatee has such the legal right and power over the property, and can deal with it as he pleases, [the court] will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment.

Id. at 536.

26. Beneficiaries in England can sell their future interests in the auction market. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 640.

27. *See* Wiedenbeck, *supra* note 9, at 813-14.

trusts and "[to] consent to modification or termination of a trust on behalf of incompetent, minor, or unborn beneficiaries whenever the court finds it beneficial to the beneficiaries."[28]

However, in contrast to English trust beneficiaries, American trust beneficiaries have had little success in loosening the grip of a dead settlor's hand. The *Claflin* doctrine, adopted by a majority of courts in the United States, has posed an obstacle to premature trust termination.[29] Indeed, American courts generally strive to carry out a settlor's intent,[30] "even though such action may thwart the desires and needs of the beneficiaries."[31] Thus, most American courts consistently hold a trust cannot be terminated unless the material purposes of the trust have been fulfilled, regardless of whether all trust beneficiaries are adults, are of sound mind, and have consented.[32]

Furthermore, the position taken by courts following the *Claflin* doctrine is "consistent with the attitude of the great majority of American courts in sustaining spendthrift trusts."[33] By sustaining the spendthrift trust, American courts explicitly recognize a dead settlor's right to control the disposition of his property, and recognize "the power of

28. DUKEMINIER & JOHANSON, *supra* note 1, at 647. Under the Variation of Trusts Act of 1958, judicial approval to modify or terminate a trust is required only on behalf of beneficiaries who are incapacitated, minor, unborn, or otherwise unascertained. *See* Wiedenbeck, *supra* note 9, at 813-14. However, judicial approval is unnecessary when "all of the beneficiaries in the trust are in existence and sui juris." *Id.* In such cases, beneficiaries may terminate the trust upon agreement and a dead settlor's intention that a trust continue is not considered. *See id.*

29. *See* Wiedenbeck, *supra* note 9, at 807-12.

30. *See, e.g.*, Albritton v. Albritton, 600 So. 2d 1328, 1331-32 (La. 1992) (refusing to hold a beneficiary's interest above a settlor's intent).

31. Bird, *supra* note 21, at 580.

32. *See, e.g.*, Adams v. Link, 145 A.2d 753, 756 (Conn. 1958) (refusing to approve an agreement between the life beneficiary and the remaindermen to prematurely terminate the trust notwithstanding the fact that the trust was not a spendthrift trust); Mohler v. Wesner, 47 N.E.2d 64, 66 (Ill. 1943) (holding trusts could not be terminated by beneficiary agreements except where the design and object of the trust have been accomplished); Maley v. Citizens Nat'l Bank, 92 N.E.2d 727, 733 (Ind. App. 1950) (stating the fact that the trustee did not make investments in accordance with the wishes of the beneficiary was not a situation creating an impossibility of performance that would serve as a cause of action for premature trust termination); Young v. Robinette, 239 S.W.2d 91, 91 (Ky. 1951) (holding sale of real property devised in a trust did not make the trust inactive, and proceeds from the sale were to remain in the trust until termination date of the trust); Allen v. First Nat'l Bank & Trust Co., 67 N.E.2d 472, 474 (Mass. 1946) (stating no circumstances were shown to the court that made it impossible to carry out the trust in strict accordance with its expressed purpose); Thomson v. Union Nat'l Bank, 291 S.W.2d 178, 182-83 (Mo. 1956) (entering judgment against the beneficiaries who sought early termination of a trust to put the trust corpus in a new trust to allow more lucrative investments than would the established trust).

33. BOGERT & BOGERT, *supra* note 5, § 1008, at 434. A spendthrift trust is "created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his improvidence or incapacity; provisions against alienation of the trust fund by the voluntary act of the beneficiary or by his creditors are its usual incidents." BLACK'S LAW DICTIONARY 1400 (6th ed. 1990).

the donor to reach into the future and control his donees and their methods of enjoyment."[34]

Professor Scott characterizes the difference in judicial attitudes of the English and American courts as being based on policy considerations rather than logic:[35]

> The American courts have laid emphasis on the idea that the wishes of the settlor should be controlling except where it would be opposed to some definite policy to give effect to his desires. In England, on the other hand, the courts have felt that although the extent of the interests of the beneficiaries depends on the intention of the settlor, the control of their interests should be in their own hands, except where the interests of others limit such control. In the United States the courts take the view that the settlor can dispose of his property as he likes. In England the beneficiary of a trust can dispose of his interest as he likes. These different points of view appear in the attitude of the courts of the two countries toward spendthrift trusts. As we have seen, the English courts have consistently held that the settlor cannot make the interests of the beneficiaries of a trust inalienable by them, whereas a great majority of the American courts have permitted the settlor to impose such a restraint on alienation. Similarly, the courts in the two countries have reached different results where the question is one of the power of the beneficiaries to terminate the trust. In England the beneficiaries, if they all consent and are all sui juris, can at any time terminate the trust, even though the purposes for which the trust was created by the settlor have not been fully accomplished. The trust property belongs beneficially to them alone, and they have power to control its disposition. On the other hand, in the United States the wishes of the settlor in creating the trust are paramount to the wishes of the beneficiaries. Even though the beneficiaries all consent and all are sui juris, they cannot compel the termination of the trust if such termination would run counter to the intention of the settlor in creating the trust.[36]

Even conceding the difference in judicial attitudes concerning treatment of trusts is based on policy considerations, one may wonder why "Americans permit more extensive dead-hand control through trusts than do the English—a people whose whole history since the Conquest has been marked by inventions of lawyers to assist their rich clients in controlling their descendants' fortunes after their deaths."[37]

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34. BOGERT & BOGERT, *supra* note 5, § 1008, at 434.
35. *See* 4 SCOTT & FRATCHER, *supra* note 4, § 337.3 at 455.
36. *Id.* at 433. *See* Wiedenbeck, *supra* note 9, at 809.
37. DUKEMINIER & JOHANSON, *supra* note 1, at 662.

II. ADOPTION OF THE *CLAFLIN* DOCTRINE IN TEXAS

The Texas Supreme Court's decision in *Lanius v. Fletcher* established the *Claflin* doctrine in Texas.[38] In *Lanius*, a daughter sought early termination of a testamentary trust established by her mother.[39] Under the terms of the trust, the daughter was to receive only the interest generated by the trust property during her husband's lifetime, and after his death, the corpus of the trust.[40] The Texas Supreme Court reversed the lower courts' decisions and refused to permit early termination of the trust, holding "the purposes of the trust have not been accomplished."[41] The court opined the mother clearly expressed her intention in the will that "the property should not be subject to the control of [the daughter's husband], and that the trust should continue as long as he should live."[42] Thus, the court held because the husband was still living, the trust could not be prematurely terminated.[43]

In support of its holding, the court declared a property owner has an "absolute right" to dispose of property in any manner she wishes, and imposing restrictions on property use is legitimate provided the restrictions do not violate public policy or the law.[44] Thus, the court refused to inquire into the unjustness or unreasonableness of the restriction "however much the court might differ from the testatrix as to the right or policy of such a provision."[45]

For many years, Texas courts followed the *Claflin* doctrine adopted in *Lanius*.[46] However, in 1971, in *Alamo National Bank v. Daubert*,[47] the Beaumont Court of Appeals carved out an exception. In *Daubert*,

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38. 101 S.W. 1076 (Tex. 1907). *See* Lynn Alexander, Note, *Trusts—Termination—Court Cannot Judicially Terminate Testamentary Trust on Grounds that Primary Purposes Have Been Accomplished If Trust Calls for Termination at Stated Event*: Frost National Bank of San Antonio v. Newton, *54 S.W.2d 149 (Tex. 1977)*, 9 TEX. TECH L. REV. 748, 754 (1978).

39. *See Lanius,* 101 S.W. at 1076.

40. *See id.* The relevant portion of the testamentary trust provided the executor "'shall hold [the daughter's portion of the beneficial interest] as trustee, and keep it invested paying her the interest during the lifetime of her husband, John S. Fletcher, and only the interest shall be paid her.'" *Id.* (quoting from Mrs. Mary A. Gilpin's will).

41. *Id.* at 1078.

42. *Id.*

43. *See id.*

44. *Id.* The court agreed with the *Claflin* decision that "a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy." Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889).

45. 101 S.W. at 1078.

46. *See, e.g.*, McNeill v. St. Aubin, 209 S.W. 781, 785 (Tex. Civ. App.—Galveston 1919, no writ) (denying termination until minor beneficiaries reached age twenty-one); Brown v. Scherck, 393 S.W.2d 172, 181 (Tex. Civ. App.—Corpus Christi 1965, no writ) (refusing to grant an early termination of a testamentary trust although all the adult beneficiaries agreed to termination).

47. 467 S.W.2d 555 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

a testator created two testamentary trusts, one for the benefit of his wife and the other for the benefit of his daughter.[48] However, the wife had a contingent remainder in the daughter's trust that would terminate when the daughter attained age thirty-five, unless the wife was still living.[49] The mother elected to take against the will and renounced all her rights in the trusts.[50] Instead, she took her half-interest in the community property that was "without any control from the grave."[51] Subsequently, the daughter, on reaching age thirty-five, sought to judicially terminate the trust to receive the remaining corpus of the trust estate.[52]

The *Daubert* court held the trust terminated when the daughter attained age thirty-five, even though the mother was still living.[53] The court reasoned the *primary purpose* of the daughter's trust was to provide support for the daughter until she attained the age of thirty-five.[54] Furthermore, the court reasoned, the mother's contingent interest in the daughter's trust was only an *incidental purpose* which failed to necessitate continuation of the trust.[55] Thus, the *Daubert* court permitted premature termination of the trust because the *primary purpose* of the trust was fulfilled.

Nevertheless, the Texas Supreme Court in *Frost National Bank v. Newton*[56] subsequently disapproved of the *primary* versus *incidental purpose* approach applied in *Daubert*.[57] In *Frost*, the majority opinion declared "the better rule of law is that beneficiaries of a trust can consent to its termination only where *all purposes* of the trust have been accomplished."[58] Thus, the court reversed the lowers courts' decisions which had permitted premature trust termination upon the accom-

48. *See id.* at 556-57.
49. *See id.* at 557.
50. *See id.* at 556.
51. *Id.* at 560.
52. *See id.* at 558.
53. *See id.* at 561-62.
54. *See id.* at 560.
55. *See id.* at 561.
56. 554 S.W.2d 149 (Tex. 1977).
57. *See id.* at 154. In *Frost*, the testatrix created a testamentary trust to pay the high school and college educational expenses of her great-nephew and great-nieces. *See id.* at 151. The trust directed the trustee, at his discretion, to pay any excess income in equal shares to two other named beneficiaries (two nieces). *See id.* at 152. Upon the termination of the trust, the remaining trust estate was to be given in equal shares to the same two other named beneficiaries. *See id.* However, in the event either of the named beneficiaries was not living, her share would go to the deceased beneficiary's then-living children, in equal shares. *See id.* The trust provided it would continue through the lifetime of the last survivor of the named beneficiaries and would terminate on his death, unless the trust income became insufficient. *See id.* at 151. The main dispute in this case was whether the trust could be terminated when the beneficiaries completed their education, which the beneficiaries claimed constituted the primary purpose of the trust. *See id.* at 153.
58. *Id.* at 154 (emphasis added).

plishment of the primary purpose of the trust—completion of the three beneficiaries' education.[59]

The court further held that if a trust expressly states it terminates upon "the happening of specified events," courts will not judicially terminate trusts merely because their primary purposes have been accomplished.[60] Furthermore, absent an express declaration of purposes in a trust instrument, courts will refuse to determine which purpose is primary and which is incidental, because to do so would "take the court beyond the express language of the will into the realm of conjecture and speculation."[61]

However, three justices dissented.[62] The Chief Justice stated, "the better rule would be that where a trust is not a spendthrift trust, and the material purposes of the trust have been accomplished, an agreement by all beneficiaries to terminate the trust should be given effect, provided none of the beneficiaries is under an incapacity."[63] The dissenting justices argued the testatrix clearly indicated in the trust that the payment of excess income to the beneficiaries was merely "an *incidental* or minor purpose of the trust,"[64] while providing the educational expenses for the beneficiaries was the *primary purpose*.[65] Since all student beneficiaries had completed their education, the dissent found no *primary purpose* obstacle preventing premature judicial termination of the trust.[66]

Nevertheless, the Texas Legislature eventually codified the *Frost* decision in the Texas Property Code in 1985, thereby preventing early termination of an active trust unless *all purposes* of the trust have been accomplished.[67]

III. SECTION 112.054 OF THE TEXAS PROPERTY CODE

Section 112.054 of the Texas Property Code requires *all purposes* of a trust be fulfilled before a trust may be judicially terminated, except in situations where continuance of a trust is illegal or impossible.[68] However, the soundness of such an inflexible rule is questionable if its underlying policy is to honor a dead settlor's intent.[69]

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59. *See id.* at 153-54.
60. *Id.* at 154.
61. *Id.*
62. *See id.*
63. *Id.* at 155 (Greenhill, C.J., dissenting) (emphasis added).
64. *Id.* (emphasis added).
65. *See id.* at 154.
66. *See id.* at 155.
67. Act 1983, 68th Leg., R.S., ch. 567, art. 2, § 2, 1983 Tex. Gen. Laws 3332 (codified as amended at TEX. PROP. CODE ANN. § 112.054 (West 1995)).
68. TEX. PROP. CODE ANN. 112.054 (West 1995).
69. *See supra* note 8 and accompanying text. Since the Code requires that all purposes of a trust be accomplished, beneficiaries may be discouraged from seeking a premature termination of a trust.

Although Section 112.054 was enacted to effect a settlor's intent, its requirement that *all* trust purposes must be accomplished may actually defeat a settlor's intent. For instance, if a settlor designated a termination date or event in the trust instrument, but failed to state the trust's purpose, a beneficiary may not compel early termination of the trust, even if its known, but unstated, purpose has already been accomplished.

The first hypothetical in this comment's introduction reflects such a situation. There, the settlor's unwritten *purpose* was to provide for his son's education and financial support until he became self-sufficient. However, because the settlor specified a *condition* of trust termination—arrival of the son's thirty-fifth birth date—but failed to specify his purpose in creating the trust, the son probably cannot compel early judicial termination of the trust. Further, in the second hypothetical, a prohibition on early trust termination actually defeats the settlor's purpose—to ensure his son's future financial stability—because the son may be forced to sell his trust interest at a discounted price to a third party to obtain money to pay his child's medical expenses. Thus, absent express declarations of *purposes* in trust documents, notwithstanding the settlor's real purpose, courts that follow Section 112.054 and the *Frost* holding will refuse to grant early termination of trusts, because the *conditions* that trigger trust termination have not been accomplished.[70] Consequently, a strict application of the *all purposes* approach to trust termination may often defeat the true intent of a settlor.

For example, in *Moxley v. Title Insurance & Trust Co.*,[71] a beneficiary sought early termination of a testamentary trust created by her mother.[72] The testatrix/mother, separated from her husband, established the daughter's trust in her will, intending to provide financial security for her minor daughter in the event the child's father remarried and left his property to others.[73] However, the father, who died several years after the mother, left his property to the daughter in another trust.[74] Thus, it was no longer necessary for the daughter to depend solely on her mother's smaller trust for future financial security.

When the married daughter/beneficiary turned twenty-six, she sought termination of the trust, seeking to reach the trust corpus for

70. The *Frost* court disallowed termination of the trust because the trust expressly provided it would terminate upon the happening of specified events. Frost Nat'l Bank v. Newton, 554 S.W.2d 149, 154 (Tex. 1977).

71. 165 P.2d 15 (Cal. 1946).

72. *See id.* Under the trust, the daughter was to receive the trust principal and any accumulated income at age thirty-five. *See id.* at 16.

73. *See id.* at 25 (Traynor, J., dissenting).

74. *See id.* at 17. The trust assets left by the father allegedly exceeded one-half million dollars while the one created by the mother had a value of about $37,500. *See id.*

the purchase of a house.[75] The daughter claimed two grounds justified early termination of the trust established by her mother: 1) the "[c]hange of circumstances not anticipated by the testatrix"[76] and 2) the "accomplishment of the objects of the trust."[77] Additionally, the daughter pointed out the trust had no spendthrift provision.[78]

The *Moxley* court rejected the daughter's arguments, reasoning that her *changed circumstances* claim "amounts to no more than the pleading of mere considerations of convenience to herself as ground for frustration of the testamentary design for administration of the trust."[79] Furthermore, the court explained that termination of an active trust containing a designated termination date and whose terms are reasonable and valid is against "both reason and the great weight of authority" in this country.[80] Thus, the court disregarded the absence of the spendthrift features in the trust.[81]

In his dissenting opinion, Justice Traynor underscored the court's inherent equitable power to grant early termination of a non-spendthrift trust if all beneficiaries are *sui juris* and consent to its termination, and if a court of equity finds that termination of the trust will serve the beneficiaries' interests.[82] He further emphasized "the principal purpose of a trust is to benefit the beneficiaries."[83] Thus, in the event circumstances unanticipated by the settlor arise subsequent to the creation of a trust, the intent of a settlor will be better served by the court's "weighing the actual interests of the beneficiary of a trust in its termination against the benefits intended by its continuance,"[84] rather than demanding "adequate proof be offered that the present circumstances could not be or were not anticipated by the settlor."[85]

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75. *See id.*

76. *Id.* at 19.

77. *Id.* The daughter claimed "the primary purpose of the trust was to protect [her] during her minority in providing for her support, education and maintenance" and "such purpose has been accomplished." *Id.* at 17. She further alleged because of her father's death, she was "unable to have comforts and necessities and to buy a home as she could if her father were alive . . . and said situation was not contemplated by [her] mother and therefore no provision was made for the same." *Id.*

78. *See id.* at 17.

79. *Id.* at 19.

80. *Id.* at 20. Justice Traynor quoted Professor Bogert in his dissent:

> The majority American position to the effect that non-spendthrift trusts are indestructible as long as they are active and have a purpose to be performed has the appearance of strength, in that it stresses respect for the intent of the settlor, harmony with the spendthrift trust doctrine, and refusal by the courts to make wills and deeds; but it seems in fact an impractical rule which brings about an adherence to theory but no practical individual or social benefit. 4 Bogart, Trusts, 2940.

Id. at 24 (Traynor, J., dissenting).

81. *See id.* at 18.

82. *See id.* at 22 (Traynor, J., dissenting).

83. *Id.* at 23.

84. *Id.* at 23-24.

85. *Id.* at 24.

Additionally, Justice Traynor concluded the court should not preclude the possibility of early trust termination if it finds "the present needs of the beneficiary outweigh his interest in future security."[86] Further, he declared that a court, satisfied that the beneficiary's current needs should prevail, may terminate a trust even though the settlor's intent is to provide a beneficiary with future financial security.[87] Justice Traynor found the beneficiary had sufficient grounds to terminate the trust prematurely.

The Texas Property Code's requirement that all purposes of a trust must be fulfilled prior to judicial termination leaves no room for reconciling a settlor's stated or presumed intent with a beneficiary's needs or interests. For example, the Code's early termination prohibition is enforceable only against a beneficiary seeking judicial termination of a trust to access trust principal without a trustee's consent.[88] The Code does not, however, prohibit a trust beneficiary from selling his interest to a third-party for a generally discounted price to receive trust principal indirectly,[89] or from offering a trustee financial inducements to obtain his consent to terminate the trust. Professor Bogert highlights this flaw:

> [I]t is not a result which the court would have sanctioned if its advice had been asked. This penalizes beneficiaries who are overconscientious and seek the instruction of the court, or who have a trustee who is anxious to get the commissions from the trust and hence will not consent to termination. . . . Is it good policy to make the result depend on the attitude of the trustee in the matter, when he is merely a representative who should be following the interests of the beneficiaries and should not be primarily thinking of benefits from his commission?[90]

Thus, the Code has no effect on a beneficiary's premature trust termination either through his purchasing a "trustee's consent to termination",[91] or through sale of his interest to a third party. Indeed, such circumstances often arise when a trust document does not contain a spendthrift provision, but contains a condition that merely postpones a beneficiary's enjoyment of the trust corpus.[92] Accordingly, one un-

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86. *Id.*

87. *See id.*

88. *See* Wiedenbeck, *supra* note 9, at 812.

89. The *Claflin* court acknowledged the possibility that a beneficiary could sell his interest prior to the natural termination of the trust, but nevertheless refused to grant the decree, reasoning that "[i]t is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow because the testator has not imposed all possible restrictions that the restrictions which he has imposed should not be carried into effect." Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889).

90. BOGERT & BOGERT, *supra* note 5, § 1008, at 419.

91. Wiedenbeck, *supra* note 9, at 812.

92. Postponement of enjoyment occurs when a trust vests a beneficial interest in a beneficiary and provides for payment of income to the beneficiary for a designated

intended effect of the Texas Property Code's *all purposes* requirement is to allow a trustee to set the price a beneficiary must pay him to obtain his consent to early termination.[93] It is possible the only party actually benefitting from the Code's rigid requirement that all purposes of a trust must be accomplished prior to judicial termination is a trustee. Considering these possibilities, a more sound policy would be elimination of the *all purposes* rule in cases involving non-spendthrift trusts, to permit early judicial termination of trusts if all beneficiaries, who are sui juris, agree to termination and petition the court.

IV. PROPOSED AMENDMENT TO SECTION 112.054 OF THE TEXAS PROPERTY CODE

Whatever administrative plan a settlor may select for disposing of his assets, his principal intent in creating a trust is undoubtedly to ensure that beneficiaries enjoy and utilize the fruits of his lifetime endeavors. Considering that basic purpose, a rule governing trust termination should be flexible for beneficiaries to maximize trust assets. In contrast, a strict requirement that all *purposes* of a trust must be accomplished before a trust may be judicially terminated may fail to maximize trust assets. In fact, application of the *all purposes* requirement may result in a waste of trust assets or an opportunity for a trustee to extort money from a beneficiary. A more flexible approach should be adopted to reconcile a settlor's intent with a beneficiary's needs. Premature trust termination should be considered when beneficiaries suffer a change in circumstances or when the real purposes of the trust are accomplished.[94] Further, a flexible rule assures that a settlor's underlying purpose behind creation of a trust is accomplished—that beneficiaries achieve the maximum benefits of a trust.

The Texas Legislature should adopt a flexible approach to premature trust termination similar to Section 15403 of the California Probate Code ("CPC 15403").[95] CPC 15403 permits modification or

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term and payment of the remaining trust corpus at the close of that period of time. *See* 4 SCOTT & FRATCHER, *supra* note 4, § 337.3 at 449. Both *Claflin v. Claflin*, 20 N.E. 454, 456 (Mass. 1889) and *Saunders v. Vautier*, 49 Eng. Rep. 282 (1841) involved the postponement of enjoyment of trusts.

93. *See* discussion *supra* notes 88-89 and accompanying text. Chief Justice Greenhill advocated the adoption of the material purpose doctrine set out in the RESTATEMENT (SECOND) OF TRUSTS § 337 to allow termination of a non-spendthrift trust if the beneficiaries consent and if the material purpose of the trust has been fulfilled. Frost Nat'l Bank v. Newton, 554 S.W.2d 149, 155 (Tex. 1977) (Greenhill, C. J. dissenting). Therefore, it is not at all surprising that the material purpose doctrine advocated by Chief Justice Greenhill in his dissent in *Frost* aroused "significant concern in the banking community" because many banks perform trust services for a fee. Steve R. Akers, Address Before the Central Texas Estate Planning Council (1993) (transcript on file at Jenkins & Gilchrist, A Prof. Corp., Dallas, Tex.).

94. *See* Bird, *supra* note 21, at 563-64. Professor Bird recommended a similar policy in her study prepared for the California Law Revision Commission.

95. CAL. PROB. CODE § 15403 (West 1991) provides as follows:

termination of an irrevocable non-spendthrift trust if all beneficiaries petition the court, as well as if "the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest."[96] Further, under the statute, modification or termination of a non-spendthrift trust may occur regardless of whether a material purpose of the trust has been accomplished. Thus, a California court may terminate a trust if *in its discretion* it determines the reason for termination "outweighs the interest in accomplishing a material purpose of a trust."[97] CPC 15403 adopted the Restatement of Trusts' material purpose approach, which authorizes trust termination only upon a finding that the trust's material purpose has been accomplished.[98] However, CPC 15403 modified the Restatement's approach authorizing courts to exercise a more flexible *discretionary* power in determining whether to permit premature trust termination.[99]

While CPC 15403 is concededly more flexible than Section 112.054 of the Texas Property Code, the provision still requires courts to determine which *purposes* of a trust are material and which are incidental. The Texas Legislature should provide Texas courts even greater flexibility by amending the Texas Property Code to permit courts to prematurely terminate trusts if the courts simply determine the benefits of trust termination outweigh the benefits of continuation of the trust until all trust purposes are accomplished.

Additionally, the Texas Legislature should incorporate a provision allowing courts to exercise discretionary power to approve a proposed trust termination on behalf of beneficiaries who are "disabled, minor, unborn, and unascertained,"[100] where such termination would be to their advantage. Absent such a provision, successive beneficiaries, whose consent cannot be obtained because they are under a legal disa-

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(a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.
(b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in Chapter 2 (commending with Section 15300).

96. *Id.* § 15403 note (Law Revision Comm'n Comment).
97. CAL. PROB. CODE § 15403(a) (West 1991); *see supra* note 95.
98. RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). This provision provides:
(1) Except as stated in Subsection (2), if all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination of the trust.
(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination.
Id.
99. CAL. PROB. CODE § 15403(b) (West 1991).
100. MO. ANN. STAT. § 456.590(2) (West 1992); *see supra* note 9.

bility or because their interests are contingent, may pose obstacles to early trust termination.[101] However, a court authorized by legislative amendment to use discretion in approving trust terminations may utilize several devices to overcome obstacles posed by beneficiaries with legal disabilities or contingent interests, including unborn or unascertained beneficiaries.

First, a court may appoint a guardian ad litem to act in a fiduciary capacity to protect the interests of beneficiaries who are unborn, unascertained, or under a legal disability.[102] For instance, in *Carroll v. Carroll*,[103] the Corpus Christi Court of Civil Appeals ordered a receiver's sale of land that represented the corpus of a trust estate, even though the trust document forbade any sale of trust property and several beneficiaries were incompetent.[104] The court held that a guardian ad litem, appointed to represent the interests of the incompetent beneficiaries, had provided proper counsel and representation of those beneficiaries.[105]

However, a guardian ad litem representing protected class members should not focus solely on individual financial benefits, but rather should consider non-pecuniary benefits that may be obtained by early trust termination.[106] For example, a Wisconsin statute provides that "[a] guardian ad litem for such beneficiary may rely on general family benefits accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof."[107]

Second, a court may utilize the doctrine of virtual representation in early trust termination cases. Under the doctrine of virtual representation, living members of the same class, or those whose interests are substantially similar to persons not represented, can represent the absent members and their interests.[108] For example, in *Christie v. Lowrey*,[109] the Dallas Court of Appeals held the doctrine of virtual representation applies where all contingent remaindermen and poten-

101. *See* Hamerstrom v. Commerce Bank, 808 S.W.2d 434, 438 (Mo. Ct. App. 1991) (discussing court's protection of unnamed, unborn and unascertained remaindermen); Frost Nat'l Bank v. Newton, 554 S.W.2d 149, 153 (Tex. 1977) (noting guardian ad litem for unborn and unadopted children opposed early trust termination); Brown v. Scherck, 393 S.W.2d 172, 181 (Tex. Civ. App.—Corpus Christi 1965, no writ) (holding trustees have a duty to protect the trust's minor contingent beneficiaries).

102. Bird, *supra* note 21, at 604.

103. 464 S.W.2d 440 (Tex. Civ. App.—Corpus Christi 1971, writ dism'd).

104. *See id.* at 442, 449.

105. *See id.* at 450. *See also* Brown v. Scherck, 393 S.W.2d 172 (Tex. Civ. App.—Corpus Christi 1965, no writ) (appointing a guardian ad litem for minor children, saying that "trustees owe a duty to protect the interest of the minor contingent beneficiaries of the trusts.") *Id.* at 181.

106. *See* Wiedenbeck, *supra* note 9, at 817-20 (discussing indirect and non-pecuniary benefits).

107. WIS. STAT. ANN. § 701.12(2) (West 1981).

108. *See* Bird, *supra* note 21, at 600.

109. 589 S.W.2d 870 (Tex. Civ. App.—Dallas 1979, no writ).

tial contingent remaindermen have identical interests. Thus, living class members may speak for protected or non-represented class members.[110]

Devices such as appointment of a guardian ad litem or virtual representation may assist a court in deciding whether to permit premature termination of a trust. However, a court should proceed with caution as such devices may entail hidden costs. For example, while use of a guardian ad litem provides greater flexibility and protection for non-represented or disabled class members than does virtual representation,[111] it can be costly and deplete trust assets. On the other hand, although virtual representation may not involve additional costs in the form of guardian ad litem attorney fees, its application to trust terminations may be limited if a conflict of interest arises between the interests of a representative and the interests of represented class members. Further, if a conflict of interest exists between class members, virtual representation cannot apply.[112] Therefore, the doctrine of virtual representation should be utilized only after a court determines that all beneficiaries have identical interests. Consequently, a court must examine all the surrounding circumstances and exercise discretion in determining whether a proposed premature trust termination will benefit the protected class members.[113]

In light of the above considerations, Section 112.054 of the Texas Property Code should be revised to read:

> (a) On the petition of a beneficiary or a trustee, a court may order that the terms of the trust be modified or that the trust be terminated in whole or in part, if:
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> 1) all adult beneficiaries of a non-spendthrift trust under no legal disability consent, and the court, in its discretion, determines that the reason for termination or modification, under the circumstances, outweighs the interest in continuation of the trust and such modification as well as such termination or modification will benefit the interests of the disabled, minor, unborn and unascertained beneficiaries; or
>
> 2) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; or
>
> 3) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purpose of the trust.
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> (b) The court shall consider spendthrift provisions as a factor in making a determination under Subsection (a)(2)(3) whether to terminate or modify a trust, but the court is not precluded from exer-

110. *See id.* at 875.

111. *See* Bird, *supra* note 21, at 601-02.

112. *See id.* at 601.

113. *See* Wiedenbeck, *supra* note 9, at 817-20 (discussing non-pecuniary benefits that may be obtained for the protected class members).

cising its discretion to modify or terminate solely because the trust is a spendthrift trust.

CONCLUSION

A strict requirement that all purposes of a trust be accomplished prior to a judicial termination is meritorious because it may carry out a settlor's written intent and provide judicial economy. However, the merits of such an inflexible rule lose force when the rule effectively defeats the true purpose of a trust—to benefit a beneficiary—and primarily operates to benefit a trustee, whose role is to administer a trust for a beneficiary's benefit. Consequently, the Texas Legislature should re-examine Section 112.054 of the Texas Property Code and consider amending Section 112.054 to reconcile a dead settlor's intent with a living beneficiary's needs.

A revision sanctioning judicially approved early termination of a trust upon written consent of all beneficiaries who are *sui juris* may raise concerns that a flood of litigation may result. However, under the proposed rule, early termination of a trust by a court requires the unanimous consent of all adult beneficiaries under no legal disability. Because unanimous consent of all *sui juris* beneficiaries may not be easily obtained, it is unlikely that the revision will greatly increase litigation. Furthermore, under the proposed provision, premature trust termination is conditioned upon a judicial finding that termination under the circumstances outweighs the interests in continuing the trust. Thus, a court cannot grant early trust termination on demand, but only upon a finding that all required factors are present. Finally, a rule allowing courts to take a more flexible approach in determining whether to grant premature termination of a trust may better serve the settlor's intentions than does the current Code provision.

Eun C. Han