I. INTRODUCTION

As illustrated in an article from the November 17, 1999 Wall Street Journal, it has become de rigueur for wealthy parents to attempt to control their children from the grave by designing trusts which punish and/or reward certain desired or undesired behaviors. These trusts are designed to encourage positive behavior, such as obtaining an education or post-graduate degree. Many clients wish to encourage industry or hard work. Some more altruistic clients wish to encourage altruistic behavior by their beneficiaries. Others wish to encourage stewardship among their children or other beneficiaries. Many clients wish to discourage other behavior, such as profligate consumption, sloth or self-destructive behavior. Although there are several techniques for this, the most popular is the so called “incentive” trust. These trusts are not significantly different from traditional irrevocable trusts. They differ only in that they typically set specific criteria for beneficiary behavior. Rather than making distributions mandatory or leaving them to the discretion of trustees as is typically done, they provide that beneficiaries will receive distributions if and only if they meet certain (hopefully) specific and objectively measurable criteria. Unfortunately, there has been no scientific evaluation of the effectiveness of these trusts, so it is unknown whether they work better than traditional discretionary trusts. Critics charge that such trusts bring a “carnival-like atmosphere to trust administration–hit the target, get a prize.”

II. DISTINGUISHED FROM TRADITIONAL DISCRETIONARY TRUSTS.

Clients and their lawyers have always been concerned in designing trusts that money not come into the hands of a beneficiary who, for one reason or another, lack the ability or inclination to handle responsibly and prudently the sum of money they are receiving. Examples abound. The beneficiary may be legally incapacitated due to minority or physical or mental disability. The beneficiary may be spendthrift, chemically dependent, easily influenced, or consistently make bad choices regarding such things as marriage partners and financial matters. These issues have traditionally been dealt with in a number of ways as the following examples illustrate.

A. Facility of Payment Provision. While not generally thought of as “incentive” language, a facility of payment provision does help prevent unwise distributions by allowing the Trustee to make distributions for the benefit of the beneficiary without actually distributing money to the beneficiary.

Example. In case the income or principal payment under any trust created hereunder or any share thereof shall become payable to a person under the age of Twenty-one (21), or to a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability, is, in the opinion of my Trustee unable
properly to administer such amounts, then such amounts shall be paid out by my Trustee in such of the following ways as my Trustee deems best: (1) directly to the beneficiary; (2) to the legally appointed guardian of the beneficiary; (3) to a custodian under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of either the state in which the donee or the custodian resides; (4) by additions to existing trusts; (5) to some relative or friend for the health, education, support and maintenance of the beneficiary; and (6) by my Trustee using such amounts directly for the beneficiary's health, education, support and maintenance.

Comment. Here, the alternative payment provisions are triggered by “legal incompetence” or “physical or mental disability.” Other triggering events can easily be conceived.

B. Delayed Distributions.

1. Delayed Until Certain Ages:

Example. After division into shares, when a beneficiary attains the age of Twenty-five (25) years, my Trustee shall distribute to the beneficiary one-third (1/3) of the principal of his or her share as then constituted; and when a beneficiary attains the age of Thirty (30) years, my Trustee shall distribute to the beneficiary one-half (1/2) of the principal of his or her share as then constituted; and when a beneficiary attains the age of Thirty-five (35) years, my Trustee shall distribute to the beneficiary the undistributed balance of his or her share. If a beneficiary has already attained age Twenty-five (25), age Thirty (30) or age Thirty-five (35) at the time this Trust is divided into separate shares, my Trustee shall, upon making the division, distribute to the beneficiary one-third (1/3), two-thirds (2/3) or all of his or her share, respectively.

Comment. This language is designed to delay distributions until such time as it is thought (and hoped) that the beneficiary will be sufficiently mature to handle a distribution of the size called for. By combining this provision with a facility of payment provision as shown above, money can be kept out of the hands of a beneficiary who is not prepared to receive it. An alternative is the use of a withdrawal trust which will allow the beneficiary to withdraw various percentages at different ages. This type of provision is easy to understand and implement, and is used in almost all trusts that have minor beneficiaries.

2. Delayed Indefinitely in Trustee’s Discretion.

Example. At any time after the beneficiary of a separate trust hereunder attains the age of Thirty-five (35) years, the Trustee may distribute the balance of the trust estate to the beneficiary thereof and thus terminate the trust if the Trustee determines, in the Trustee’s sole discretion, that a current distribution of such principal and accumulated income would be in the best interest of the beneficiary. In determining whether or not it is in the best interest of the beneficiary for any such payment to be made to him or her, the Trustee shall consider the existing economic or social conditions, the tax and property laws applicable to such trust and its beneficiary, and the financial responsibility, judgment and maturity of the beneficiary. The decision of the Trustee to terminate a trust as provided herein shall be binding and conclusive on any persons or entities having
any interest in the trust.

**Comment.** In this case distributions are delayed indefinitely in the discretion of the trustee, but can be paid out after the beneficiary attains the age of 35. The desire to protect the beneficiary from the pressures of receiving too much money must be balanced against the costs of continuing the trust indefinitely. The trustee may be inclined to keep the trust going if he is receiving a nice fee and the work is not too hard. Perhaps a power to remove or replace the trustee may help prevent this type of problem.

3. Delayed for Stated Reasons.

**Example.** Notwithstanding the provisions for distributions of income and principal under any trust created hereunder or any share thereof, the Trustee shall have authority to withhold any distribution to a descendant of the Grantor if the Trustee determines that such distribution is not in the best interest of the beneficiary. In determining whether or not it is in the best interest of a beneficiary for any such payment to be made to him or her, the Trustee shall consider the financial responsibility, judgment and maturity of that beneficiary, including whether or not, at the time of such distribution, he or she (i) is suffering from any debilitating physical, mental, emotional or other condition that might adversely affect his or her ability to manage, invest and conserve property of the value that would be distributed to him or her; (ii) is at such time, or previously has been, a substantial user of or addicted to a substance the use of which might adversely affect his or her ability to manage, invest and conserve property of such a value; (iii) has demonstrated financial instability and/or an inability to manage, invest and conserve his or her property; (iv) is going through a period of emotional, marital or other stress that might affect his or her ability to manage, invest and conserve such property; and/or (v) is or has been under the influence of one or more individuals or organizations who or which in the opinion of the Trustee may successfully endeavor to induce that beneficiary to part with such property.

**Comment.** Here, the trustee is given the discretion to withhold distributions which are not in the best interest of the beneficiary, and instructive examples are given. During the time in which distributions are suspended, payments can be made for the benefit of the beneficiary, though not directly to the beneficiary, similar to the facility of payment clause. Used in connection with a valid spendthrift clause, this clause would hopefully keep trust funds from a bankruptcy trustee or divorce court or from a religious cult. Similar language could be used to discourage certain relationships, such as illicit cohabitation or homosexual unions.

C. General Statements of Intent. Clients commonly want to give the trustee advice regarding distributions. This usually takes the form of a statement of intent or philosophy without specific limitations and coupled with a broad discretion in the trustee. Thus:

**Example.** It is my intention that my children and grandchildren and, more importantly, the spouses of my children and grandchildren, shall not depend upon the trusts created hereunder for their support and maintenance if they are mentally and physically capable of earning a living themselves. If a beneficiary has financial difficulties because of his own or his spouse’s lack of industry, I believe that those difficulties should be
addressed not by the trusts hereunder but by the beneficiary or the beneficiary's spouse. In such cases, it is my intent that my Trustee be circumspect in making substantial distributions in these circumstances. On the other hand, if a beneficiary is unable to earn a significant income because of age, mental or physical incapacity, or, for example, because the beneficiary is a single parent and feels a commitment to raising children, I would not wish all distributions be withheld from the beneficiary. The trusts created hereunder are not, therefore, intended to support my children or grandchildren without regard to their particular circumstances and industry, and no decision by my Trustee to withhold or limit a distribution may be challenged by a beneficiary. I believe that making an excessive amount of money available to a young person can corrupt that person and destroy his or her initiative to realize his or her potential as a mature, productive adult. For this reason, I have limited the purposes for which distributions can be made from these trusts and have restricted the distributions to necessities.

Comment. As mentioned, these statements are generally used in connection with broad grants of discretion to the trustee, such as a “best interests” standard. There are some problems related to giving such a broad discretion. First, if the trustee is also a beneficiary, such a broad discretion may cause the trust property to be taxed in the estate of the trustee/beneficiary on the theory that the trustee/beneficiary has a general power of appointment over the funds. This problem can be avoided by prohibiting the trustee from participating in the discretion to make distributions to himself or herself or in support of his or her obligation to support a trust beneficiary. The inability to make distributions to oneself suggests the use of an “independent” trustee, but this raises the practical problem of finding a trustee who is competent in trust management and who is both willing to assume the risk of exercising such broad discretion and can be trusted not to abuse it. This problem suggests the use of a trust advisor or advisory committee, as discussed later.

D. Educational, Business and Professional. Provisions can be inserted allowing discretionary distributions for the purpose of encouraging a child to obtain a college or post-graduate degree or enter a profession or start a business. Thus:

Example. My Trustee may use trust funds to assist in providing a college education for each of my children, including as many years of graduate study in any private or public college or university, as may be required for the completion of that child’s training for his or her career. My Trustee may pay the necessary costs of clothing, tuition, books, room and board and may pay the costs of any extracurricular activities in which my child desires to participate during attendance at college, provided such extracurricular activities are first approved by the child’s [mother][father], if living, and if not, any payments for extracurricular activities may be made solely in the discretion of my Trustee. In making the expenditures for any one of my children as permitted by this paragraph, my Trustee shall also consider the funds which my other children may need for education expenses.

Example. Provided there are adequate funds available in a beneficiary's trust, my Trustee is further authorized to distribute to any beneficiary who has attained the age of twenty-five (25) years a portion of the funds of that
beneficiary's trust for the purpose of establishing the beneficiary in a business or profession. Such distribution shall be requested in writing by the beneficiary and accompanied by such information as my Trustee deems necessary to permit my Trustee to evaluate the feasibility of the investment. The information provided shall include, but not be limited to, a business plan and adequate projections of income and expense. If my Trustee determines the investment to be feasible, my Trustee may distribute to that beneficiary such portions of principal as my Trustee deems desirable, but not to exceed $250,000.00.

III. USING INCENTIVE LANGUAGE TO CONTROL BEHAVIOR.

The above are examples of traditional trust provisions have the effect of encouraging or discouraging behavior, and so can be thought of as “incentive” provisions, but do not detract from the trustee’s discretion or cause a loss of flexibility in making distributions. The modern concept of the “incentive” trust goes beyond these traditional techniques. Some of the more common clauses are set out and commented upon below.

A. Encouraging Behavior.

1. Educational Goals.

Example. Distribution Upon Entering College. At any time after a beneficiary has commenced a course of study at an accredited college or university with the objective of obtaining a bachelor’s degree in a subject which the Trustees, in their discretion, deem reasonably likely to prepare the beneficiary for financial self-sufficiency, the Trustees may make a single, lump-sum distribution to the beneficiary from his or her trust of an amount not to exceed FIVE THOUSAND DOLLARS ($5,000). The Trustees may also make this one time distribution to a beneficiary who does not satisfy the foregoing requirements, but who has commenced a course of study or training which the Trustees, in their discretion, determine to be reasonably equivalent to the pursuit of a bachelor’s degree in light of all of the facts and circumstances, including the beneficiary’s abilities or disabilities and the beneficiary’s career goals. The distribution described in this paragraph may be made to the beneficiary no more than once during his or her lifetime.[ii]

Example. Annual Award for Academic Performance. At the end of each academic year that a beneficiary is engaged in a course of study at an accredited college or university with the objective of obtaining a bachelor’s degree in a subject which the Trustees, in their discretion, deem reasonably likely to prepare the beneficiary for financial self-sufficiency, if such beneficiary has maintained a grade point average of at least 3.0 on a grading scale that provides a 4.0 for an “A” average (or the equivalent on a different grading system), and if such beneficiary is pursuing his or her education on a full time or substantially full time basis, the Trustees may make a lump-sum distribution to the beneficiary of an amount not to exceed TEN THOUSAND DOLLARS ($10,000). In determining the amount distributed under this paragraph, the Trustees may take into consideration, for example, the quality of the educational institution, the difficulty of the beneficiary’s curriculum, and any special challenges the
beneficiary may have faced during the academic year.

**Example. Distribution Upon Receiving a Bachelor's Degree.** At any time after a beneficiary has received a bachelor's degree from an accredited college or university, or such other degree or certification as the Trustees, in their discretion, shall deem reasonably equivalent to the attainment of a bachelor's degree in light of all of the facts and circumstances, including such beneficiary's abilities or disabilities, or the beneficiary's career goals, and if the beneficiary has completed his or her education with a final grade point average of at least 3.0 on a grading scale that provides a 4.0 for an "A" average (or the equivalent on a different grading system) the Trustees may make a single, lump-sum distribution to the beneficiary from his or her trust of an amount not to exceed TWENTY-FIVE THOUSAND DOLLARS ($25,000). In determining the amount to be distributed under this paragraph, the Trustees may take into account, for example, the degree of difficulty of the beneficiary's curriculum, the beneficiary's grade point average, any academic honors received by the beneficiary and any special challenges faced by the beneficiary. The distribution described in this paragraph may be made to the beneficiary no more than once during his or her lifetime.

**Example. Distribution Upon Receiving an Advanced Degree.** At any time after a beneficiary has received an advanced degree (such as a master's degree, a PhD, an MBA or a professional degree) from an accredited university, or such other educational achievement as the Trustees, in their discretion, shall deem reasonably equivalent thereto in light of all of the facts and circumstances, including such beneficiary's abilities or disabilities, the Trustees may make a single, lump-sum distribution to the beneficiary from his or her trust of an amount not to exceed THIRTY-FIVE THOUSAND DOLLARS ($35,000.00). The distribution described in this paragraph may be made to the beneficiary no more than once during his or her lifetime.

**Comment.** Traditional trust planning described in Section II encourages education by providing support for educational pursuits. "Incentive" planning goes beyond this by setting out specific financial rewards or carrots for specific educational achievements. The client must be concerned to avoid creating a professional student. Also, less gifted children should not be punished if they pursue a trade or skill as opposed to an academic degree or professional career. Academic standards must be considered. Cost of living adjustments should be considered where specific dollar amounts are used. Such a provision may be added as follows:

**Example.** Wherever a specified dollar amount is referred to in this paragraph in connection with a distribution to or for the benefit of a beneficiary, such amount shall be increased by the same percentage as the percentage of increase, if any, shown by the All Items Consumer Price Index for Urban Wage Earners and Clerical Workers published by the U.S. Department of Labor, Bureau of Labor Statistics, for the Jackson, Mississippi area or the closest metropolitan area for which this information is available, for the month in which this trust agreement is executed, as compared with the most recently published index on the first date that such gift takes effect or such distribution becomes permissible. If such index is no longer published, the Trustees, in their discretion, shall select an appropriate index for the purpose of adjusting such amounts for the effect
of inflation since the date this trust agreement was executed.\[^v\]

2. **Productivity: Earn a Dollar, Get a Dollar.** Gainful employment is probably the most common goal a client has for his children in this context. This objective seems simple enough. In a very simple example the trust might say, “the Trustee shall pay to my son John, in each calendar year, an amount equal to John’s wages, salary, etc. as indicated on line 7 of his individual tax return,” but as we will see, such a simple direction is not satisfactory. For instance, under what circumstances might this requirement be excused?

**Example.** The Trustees may distribute to a beneficiary on a quarterly, annual, or other basis, as much as one dollar of the net income, and, to the extent the net income is insufficient, the principal, of the trust for each dollar of income earned by such beneficiary. The Trustees’ determination of the amount of income and principal distributable to the beneficiary under this paragraph, if any, shall be absolute and binding upon all persons interested in the trust estate. The Trustees may, for example, equate the income earned by the beneficiary to his or her adjusted gross income for federal income tax purposes, reduced by investment or passive income (such as rents, dividends, and interest), income from relief of indebtedness, capital gains, and government benefits, if any, and such other adjustments as the Trustees deem appropriate under the circumstances. The Trustees may make interim distributions to a beneficiary prior to their final termination of such beneficiary’s earned income based upon documentation of earnings as the Trustees deem appropriate, including, without limitation, the beneficiary’s W-2 forms, pay stubs, business profit or loss statements, or draft tax returns. No reimbursement shall be required of any beneficiary who has received a distribution under this paragraph based upon an estimate of his or her adjusted gross income if such estimated adjusted gross income for the year in question is subsequently determined to be less than that estimated, or if such estimated adjusted gross income is reduced as a result of an audit of, or amendment to, the beneficiary’s federal income tax return, provided, however, that the Trustees may, in their discretion, reduce distributions in subsequent years to such beneficiary pursuant to this paragraph to reflect such prior overpayment. The distributions authorized under this paragraph shall be made to the beneficiary as soon as practicable after the amount of such distribution, if any, has been determined by the Trustees. In no event shall the distributions to a beneficiary under this paragraph exceed ONE HUNDRED THOUSAND DOLLARS ($100,000.00), collectively, in any calendar year.\[^vi\]

**Comment.** This form does a good job of addressing some of the issues, including, how income is to be defined. Some other issues include whether or not to include the beneficiary’s spouse’s income, and if so, how to define “spouse.” For example, what if the beneficiary is a stay-at-home mom? More problematic is the unfairness that such a provision can generate between otherwise similarly situated siblings whose earned income is not the same. For instance, how do you compare a brain surgeon with a registered nurse? What about the beneficiary who is disabled and cannot work, or chooses to stay at home and raise children? The client may prefer to encourage his child to stay at home with the children, but couldn’t this become the equivalent of private welfare? Some of these concerns are addressed in the following example,
thus:

Example.
1. Subject to the provisions of subparagraph 2 of this paragraph, after a beneficiary has reached the age of 23 years, the Trustee may make no distribution of net income or principal to that beneficiary pursuant to this paragraph unless the beneficiary shall be gainfully employed on a full-time basis, as determined by the Trustee in the Trustee’s sole discretion.

2. Subparagraph 1 of this paragraph shall not apply to a beneficiary who falls within the scope of any of the following exemptions, as determined by the Trustee in the Trustee’s sole discretion:
   (a) The beneficiary is student at an accredited college, university, graduate school, professional school, specialized school (such as a fine arts school), vocational school or similar institution and maintains the equivalent of a grade point average of 2.5 or better on a scale in which a 4.0 is an “A” grade, and the beneficiary’s course of study is progressing towards the completion of a degree at the rate of a full-time student;
   (b) The beneficiary works at least 35 hours per week (“full-time”), with or without compensation, in a socially useful vocation (examples of such a vocation include, but are not limited to, the fields of social work, teaching, religious service and charitable work);
   (c) The beneficiary is either (i) occupied on a full-time basis caring for other family members such as children or disabled or elderly relatives, or (ii) married and being the homemaker for the family, and, in either case, the beneficiary’s spouse, if any, works full-time or is unable to work full-time for medical or other reasons;
   (d) The beneficiary is employed in or pursuing a career in the fine arts (examples of such careers include, but are not limited to, careers in the fields of art, dance, music, theater and creative writing);
   (e) The beneficiary is unable to work full-time for medical reasons as determined by one or more physicians selected by the Trustee who have an appropriate expertise and have examined the beneficiary; or
   (f) The beneficiary is unable to work full-time for such other reason as the Trustee determines to be reasonable (such as the fact that the beneficiary is actively seeking, but has not yet acquired, employment).

Comment. The potential exceptions are so numerous that perhaps, in the end, we wind up back where we started, with a general statement of intent and broad discretion in the trustee. Without such broad discretion, a deserving child may be effectively disinherited.

3. Other Goals.

   a. Charitable Giving. An incentive trust may encourage charitable giving by the beneficiaries by, for example, matching contributions, or paying a set percentage of income to charity each year and making the beneficiaries meet to decide where the charitable dollars will be spent.

   b. Religious or Community Endeavors. For example, the trust may pay for or give an incentive for mission trips, seminary courses, community service, etc.
c. **Marriage.** To encourage marriage, a reward may be given for waiting until a certain age to marry, or for marriage to the “right” sort of person. Similarly, there may be a disincentive for illicit cohabitation or other conduct deemed undesirable by the trustor.

d. **Saving for Retirement.** For example the trustee may be directed to reimburse the beneficiary dollar for dollar for contributions to IRA’s or retirement plans. There is some income tax benefit to deferral of W-2 or self-employment of income and living out of inherited wealth, especially where the inherited property has a stepped-up basis or where in the § 691(c) deduction for estate tax paid on income in respect of a decedent is available.

IV. **ADVANTAGES AND DISADVANTAGES OF INCENTIVE TRUSTS.** The perceived advantages of incentive trusts compared with purely discretionary trusts include:

A. **Advantages.**

1. **Objective Criteria.** The objective criteria are thought to simplify the distribution decision-making process by objectifying it. This is thought to eliminate emotional blackmail of the trustee by the beneficiary or similarly to prevent the beneficiary from manipulating the trustee or taking advantage of ambiguity in the trust instrument to extract discretionary distributions.

2. **Dignity to the Beneficiary.** The incentive trust gives some measure of dignity to the beneficiary. For instance, “earn a dollar, get a dollar” encourages work but not necessarily any particular sort of work, so the beneficiary who is a plumber is treated the same as one who is a brain surgeon.

3. **Encourages Good Behavior.** The beneficiary is, in fact, encouraged to meet the objective standards of good behavior set out by the trustor.

B. **Disadvantages.**

1. **Lack of Flexibility.** For instance, in the typical “earn a dollar, get a dollar provision,” what happens when one of the children is unable to earn a dollar through no fault of his own. Are clients and drafters of trusts really able to consider every possibility that could come along in the future and address the objective standard accordingly?

2. **Problems of Enforcement.**

   a. **Enforcement Mechanisms.** Almost all incentive provisions require some measurement mechanism. This means the trustee must gather the information necessary to enforce the incentive provision. This creates much more work for the trustee and gives the trustee an incentive to pry into the personal business of the beneficiaries. The beneficiaries may rightly find this intrusion unwarranted and degrading, and refuse to cooperate. For instance, if there are rewards for being drug-free, the trustee may be required to force the beneficiary to submit to regular urinalysis. Other more manipulative beneficiaries may take a shortcut and cheat by falsifying drug test results, income tax returns, W-2’s, etc. The family bitterness that can arise from these sorts of enforcement mechanisms needs to be carefully considered. On the one hand, if the trustee makes a payment in good faith believing that a particular beneficiary has
obtained the objective criteria when in fact the beneficiary has not, the trustee may liable to the other beneficiaries for having made an improper distribution. On the other hand, if the distribution is not made, the trustee could be liable to the beneficiary.

b. Ambiguous Standards. In practice, many of the incentives clients desire are not well thought out and are anything but defined, leaving the trustee and the beneficiary in a position loaded with ambiguity. This puts the trustee in a very difficult situation, casts doubt on the enforcability of the provision itself and could encourage beneficiaries to rat on one another. The sort of family litigation that could arise from these types of provisions could cause the family inheritance to be dissipated faster than a prodigal heir. Drafting the standards correctly makes for a very long and complex trust document, about which a large number of clients seem to have a phobia.

c. Standards May Violate Public Policy. Section 29 of the Restatement (Third) of Trusts states that a provision in a trust is invalid if implementation would be contrary to public policy. Public policy concerns may arise, for example, in the case of provisions seen to interfere with a beneficiary’s freedom to marry, limiting the selection of a spouse or unduly postponing marriage. Likewise, provisions may be seen to restrict religious freedom. What a parent or grandparent regards as a “cult” can be or become an accepted religious faith.

V. PROTECTING THE TRUSTEE.

A. Use of Advisory Committee. As mentioned earlier, the choice of trustee becomes more crucial than ever when using incentive trusts. For obvious reasons, the use of an independent trustee is advisable, and for long-term trusts, this usually indicates a corporate trustee. Although corporate trustees may seem impersonal in the minds of some clients, impartiality may be more important in this case. Corporate trustees are experienced in exercising discretion impartially and have the resources to do the extra work that is required by incentive trust provisions. If the corporate trustee is uncomfortable making these decisions, the use of an advisory committee appointed by the trustor with succession provisions may give the trustee relief. The advisory committee may be advisory only, or final authority may be given the committee, however, in the latter case, the trustee has no obligation regarding distributions, so why have a corporate trustee in the first place?

Example. Notwithstanding anything herein to the contrary and to the extent not prohibited by law, I appoint an advisory committee comprising X, Y and Z. The committee shall have the duty to keep the Trustee apprized of the needs of each of the beneficiaries and shall, from time to time, recommend to the Trustee the amounts and intervals of distributions of trust funds to be made to the beneficiaries. The Trustee shall consult the committee on all matters regarding the exercise of discretion as to the payment or distribution of income or principal of the trust. The Trustee shall not be responsible nor liable to any beneficiary when in the exercise of good faith, it follows the recommendation of the committee concerning distributions to be made to the beneficiaries. The committee shall act by majority vote of its members. Should any member refuse or be unable to act then he or she may appoint his or her successor. If any resigning member fails to appoint his successor, the remaining member or members may appoint a successor or successors. The committee shall not be liable to the trust or to any person for the direct or indirect results of any agreement given to any action by the Trustee or for the appointment of a new Trustee under this paragraph or any other paragraph or provision of this document. The exercise of the powers of the committee hereunder shall be in the committee’s sole discretion. Neither the committee nor its members shall be required to post any bond, make any accounting to any
court or in any way obtain approval of its actions. The committee members shall be entitled to reasonable compensation and reimbursement for reasonable expenses incurred in the exercise of their duties.

B. Exoneration Clauses. The following language is advisable in connection with an incentive trust:

I intend that the Trustee shall be free to exercise the rights and powers granted hereunder with the greatest possible discretion. In particular, I am concerned that one or more beneficiaries hereunder may challenge the conduct of the Trustee as a means of attempting to influence the Trustee's exercise of discretion under this instrument or otherwise defeat my intent to vest absolute discretion in the fiduciaries hereunder. Accordingly, I direct that the Trustee's exercise or non-exercise of powers and discretions shall be conclusive on all persons. The Trustee shall be deemed to have acted within the scope of its authority, to have exercised reasonable care, diligence and prudence, and to have acted in good faith and in the best interest of the beneficiaries unless the contrary be proved by clear and convincing evidence. The Trustee shall not be liable for any loss, injury or damage to the trust estate or any beneficiary unless the Trustee contributed to such loss, injury or damage through willful default, willful misconduct, or gross negligence. Furthermore, the Trustee shall be indemnified and held harmless from any claim, action, suit or proceeding brought against it by any third party by reason of the fact that it is or was the Trustee against any and all liabilities and expenses incurred by the Trustee in connection with such claim, action, suit or proceeding if the Trustee acted in good faith and reasonably believed that its conduct was in the best interest of the trust and its beneficiaries. In no event; however, shall the Trustee be entitled to indemnification: (a) in connection with a proceeding by or on behalf of a beneficiary in which the Trustee is adjudged liable to the beneficiary or the trust, or (b) in connection with any other proceeding charging improper personal benefit to the Trustee, whether or not involving action in its official capacity, in which the Trustee is adjudged liable on the basis that personal benefit was improperly received by it.

C. In Terrorem Clauses.

Example. If any beneficiary hereunder shall contest the probate or validity of this Will or any provision thereof, or shall institute or join in (except as a party defendant) any proceedings to contest the validity of this Will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such interest shall pass to the residuary beneficiaries of this Will (other than such beneficiary or his issue) in the proportion that the share of each such residuary beneficiary bears to the aggregate of the effective shares of the residuary. If all of the residuary beneficiaries join in such contest or proceedings, then such benefits shall pass to those persons (other than the persons joining in such contest who are living at the time of my death and who would have been my distributees had I died intestate a resident of the State of Mississippi and had the person or persons contesting my Will died immediately before me without issue. Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the
provisions of this Will, and the provisions of this Item are an essential part of each and every benefit.

**Comment.** In terrorem clauses are not favored in the law and are narrowly construed. They should never be used in connection with a spouse, if qualifying for the marital deduction is an issue. Total disinheritance is a draconian measure. Less punitive sanctions can be devised. Due to the possibility of ambiguity in the incentive standards, total disinheritance for questioning the application of a standard by the trustee should be avoided.

D. Separate Shares for Family Lines. This should be considered strongly as it will decrease the opportunity of complaint from one child that unauthorized distributions were made to another child.

VI. **CONCLUSION.**

The verdict is still out on the efficacy of incentive trusts. It seems clear that they cannot cure bad parenting or “fix” a problem child. Some families need counseling, healing and reconciliation. An incentive trust can be viewed as harsh and manipulative, especially where it is imposed without prior warning. At the very least, parents should have frank discussions with their children to explain their philosophy and intentions while they are alive. Otherwise, an incentive trust can compound family strife and bitterness. The children may feel cheated and hurt that their parent did not trust their values and abilities. Since children’s values tend to become fixed rather early in life, attempts to control behavior will doubtless be ineffective in the case of a rebellious child and unnecessary in the case of a responsible child. Where the incentives go beyond a mere expression of intent or general philosophy, crucial flexibility is lost and drafting for possible contingencies becomes an overwhelmingly meticulous task. In the end, it is not possible to anticipate every future circumstance. This failure to anticipate puts the trustee in a bad position and could breed trustee litigation.

Parents who are concerned that putting too much money into the hands of their children may diminish the children’s productivity may prefer to simply limit the amount each child inherits and leave the rest to charity. In this regard, for wealthier clients, the private foundation with the children serving as board members is an excellent way to keep wealth under family control while teaching children the responsibility of managing money and the pleasure of philanthropy.

**ENDNOTES**

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[i] The author wishes to acknowledge the invaluable assistance of his law partner, R. David Marchetti, in preparing this manuscript.


[iii]. Id.

[iv]. Id.

[v]. Id.

[vi]. Id.

[vii]. Id.