



California Fair Political Practices Commission

June 21, 1989

James E. Lauth
Gray, Cary, Ames and Frye
1200 Prospect Street, Suite 575
La Jolla, CA 92037

Re: Your Request for Advice
Our File No. A-89-224

Dear Mr. Lauth:

You have requested advice on behalf of Judge Read Ambler concerning his disclosure responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTIONS

1. How should Judge Ambler report loans and income distributions received from a discretionary trust on his statement of economic interests?
2. Should Judge Ambler report a pro-rata share of the trust's assets, property and income on his statement of economic interests?

CONCLUSIONS

1. Loans to an elected official from two discretionary trusts and actual distributions of income from the trusts are disclosable income. The trust and trustees should be reported as the source of the income.
2. Since the judge has no irrevocable interest in the trust's income or principal, he need only report distributions of \$250 or more directly from the trust to him and not the income, investments or real property of the trust.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

Judge Ambler has received money from two separate family trusts. The Josabel L. Read trust (the "Josabel trust") was created by the judge's maternal grandmother for the benefit of her three daughters. Each of the daughters received a separate trust share, including Judge Ambler's mother, Marian Read Ambler (hereafter "Mrs. Ambler").^{2/}

The Josabel trust is a purely discretionary trust. The trustees have sole and absolute discretion on the distribution of income to the beneficiaries, Mrs. Ambler and her sisters. Any income that remains undistributed may be given to the beneficiaries' children at the sole discretion of the trustees. The judge's mother and cousin are cotrustees of the trust.

At her death Mrs. Ambler may appoint the person to take the proceeds of the trust. Mrs. Ambler may appoint anyone to receive the proceeds of the trust provided the proceeds are not retained by her estate or given to her creditors. Thus, while Judge Ambler may be appointed to take the proceeds of the trust in Mrs. Ambler's will, he has no irrevocable right to income or principal of the trust. The judge will, however, take in default if Mrs. Ambler does not designate another in her will.

The Elbert A. Read trust ("Elbert trust") was similarly established for the benefit of the judge's mother and her sisters. The Elbert trust was created by the judge's maternal grandfather. However, unlike the Josabel trust, the Elbert trust was created as three separate trusts, one of which was for the benefit of Mrs. Ambler. The Elbert trust is also a discretionary trust, but it has no provision for the distribution of income to the children of the beneficiaries.

The only provision of the Elbert trust that is applicable to Judge Ambler is once again the power of appointment held by Mrs. Ambler. Mrs. Ambler may appoint anyone to receive the proceeds of the trust provided the proceeds are not retained by her estate or given to her creditors. If no appointment is made, the trust proceeds will be distributed to the Mrs. Ambler's heirs as determined by the probate law of Iowa. The judge is Mrs. Ambler's only child.

The judge has received money from the Josabel trust on two occasions, once, as a distribution of income and once as a loan from the trust. The judge has received income once from the

^{2/} Both Josabel and Elbert Read actually created three separate interests in the trusts, one for each of their daughters. The only interests that are relevant to this discussion are those of Marian Read Ambler, the judge's mother.

Elbert trust as a loan made in the regular course of business from the trust.

ANALYSIS

Under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) As a judge, Judge Read Ambler is a public official who is required to disclose investments and interests in real property of \$1,000 or more; sources of income of \$250 or more; and gifts of \$50 or more.

Reporting Loans Received from a Discretionary Trust

Section 82030 defines "income" as a payment received, including but not limited to any salary, wage, advance or loan. Income does not include:

(9) Any loan from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, or first cousin, or the spouse of any such person, provided that a loan from any such person shall be considered income if the lender is acting as an agent or intermediary for any person not covered by this paragraph.

You stated that the judge has received both income and loans from the Josabel trust. In addition, the judge has received loans from the Elbert trust. Clearly, an income distribution from a trust is income for the purposes of the disclosure and disqualification provisions of the Act. The definition of "income" also includes loans from any source. Therefore, unless the loans fall within one of the enumerated exceptions to the definition, they must also be reported on Judge Ambler's statement of economic interests as income.^{3/}

Section 82030(b)(9) excludes loans to an official from the official's family members from the definition of "income." However, even though the settlor, trustees and beneficiaries of the trust are family members, generally, none is considered to be the source of the loan. (Christiansen Advice Letter, No.

^{3/} In your advice requests you specifically asked about the exception to the definition of income in Section 82030(b)(9). The only other exception that might be applicable would be Section 82030(b)(3), which excludes any devise or inheritance from the definition of "income". This exception, however, would only be applicable where the judge took under his grandparent's respective wills or by intestate succession.

I-77-142, copy enclosed.) This is because the settlor has conveyed his entire interest in the trust res to the trustee for the benefit of the beneficiaries and retains nothing. (Finnie v. Smith (1927) 83 Cal. App. 707, 710.) At the time the loans were provided to Judge Ambler, both settlors were deceased. Neither trust instrument created by the settlors provided that the judge was to take anything more than a contingent interest under the trust. Consequently, since the settlors provided no interest to the judge in the trust instruments, it could not be said that the settlors loaned the money to the judge.

Similarly, while the beneficiaries of a discretionary trust have a beneficial right to the trust res and may sue to enforce the provisions of the trust instrument, they take no legal interest in the trust res. (Estate of Johnson (1961) 198 Cal. App. 2d 503, 510.) In this case, Mrs. Ambler, as beneficiary, could not control the distributions of the fully discretionary trusts.

And, finally, while the trustee holds legal title to the trust and may control the trust at his discretion, he in fact takes no true ownership interest in the res of the trust. (Estate of Getty (1978) 85 Cal. App. 3d 755, 760; Regulation 18234(d), copy enclosed.) The trustee may not treat the res as his own property, even pursuant to a fully discretionary trust. (Coberly v. Superior Court (1965) 231 Cal. App. 2d 685, 688-689.) Thus, the exception in Section 82030(b)(9) is not applicable to income distributions and loans from a trust, even where all the parties are family members.

This is consistent with the rationale behind the disclosure provisions of the Act. The disclosure requirements are to insure that public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) Thus, the Act requires disclosure of any economic interest that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c).)

Consequently, the judge is required to report the loans and the income distributions on his statement of economic interests. In this situation, even though the trust is a purely discretionary family trust, the trust is still regarded as the true source income. (Davidge Advice Letter, No. A-88-022, copy enclosed.) The trustees should also be disclosed as the persons who are administering the trust.

Reporting Interests in a Discretionary Trust

Income of an individual also includes a pro-rata share of any income of any trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or

greater. (Section 82030.) However, even where the filer's interest in the trust is 10 percent or greater, Regulation 18234 (copy enclosed) limits the circumstances under which the beneficiary of a trust must disclose his or her pro-rata share of interests in real property and investments of the trust, and income to the trust. (Van de Kamp Advice Letter, No. A-88-169, copy enclosed.)

Regulation 18234 requires disclosure of the pro-rata share of property and investments of the trust, and income to the trust, where the beneficiary who owns a 10-percent or greater interest:

(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable and:

1. No powers exist to consume, invade or appoint the principal for the benefit of beneficiaries other than the filer or if there are such powers they are limited by an ascertainable standard relating to the health, education, support or maintenance of said beneficiaries; or

2. Under the terms of the trust, no one else can designate the persons who shall possess or enjoy the property or the income therefrom.

Regulation 18234(c)(2).

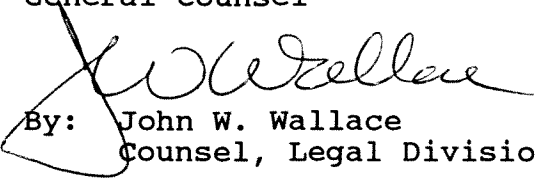
Under the terms of both the Josabel and Elbert trusts, the judge will receive income only at the discretion of the trustees. The beneficiary of a discretionary trust has, at most, a mere expectancy. (Estate of Johnson, supra at 510.) Therefore, the judge has no more than an expectancy interest in the income of the trust. Moreover, the principal of both trusts is subject to the power of appointment of Mrs. Ambler and she may appoint anyone with the exception of her own estate. Thus, at most, the judge has an expectancy interest in the principal of both trusts. Since he has no irrevocable interest in the trusts, he need only report income distributions directly from the trust to him and not any income, investment or real property interest of the trust itself.

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I hope that this answers your questions. If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh
Enclosures

GORDON GRAY (1877-1967)
W. P. CARY (1882-1943)
WALTER AMES (1893-1980)
FRANK A. FRYE (1904-1970)

GRAY, CARY, AMES & FRYE
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April 10, 1989

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456-3028

Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95804-0807

Attention: Ms. Lynn Martin

Re: Judge Read Ambler Statement of Economic Interests

Dear Ms. Martin:

This letter summarizes the substance of our recent telephone conversations regarding whether and to what extent Judge Read Ambler should report income from and investments held by trusts created by his maternal grandparents. Judge Ambler spoke with you and wrote to you previously, and, following your direction, filed his annual statement with annotations indicating that he was looking into what should be reported regarding trust income or assets.

This letter also presents for your review our conclusions on two additional issues: 1) the question of what percentage interest a purely discretionary beneficiary has in a trust, and 2) the application of the reporting requirements to loans from family trusts.

Summary of Discussions

In our initial telephone conversation I explained that Judge Ambler is a purely discretionary current beneficiary of a trust created by his maternal grandmother, Josabel L. Read, and that the Judge has no irrevocable future interest in the trust. The Judge's mother is the principal current beneficiary of the trust, and Judge Ambler is a current beneficiary only to the extent that the trustee is granted the purely discretionary authority to make distributions to him under a provision for discretionary distributions to members of a class including the testator's grandchildren. Last year was the only year in which the trust made a distribution to the Judge under this discretionary power. Regarding future interests, the trust grants the Judge's mother a broad power to appoint who should receive the trust assets upon her death, and only if that power

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of appointment is not exercised would Judge Ambler receive any of the trust principal.

A similar trust primarily for the benefit of the Judge's mother was created by his maternal grandfather, Elbert Read, but Judge Ambler has even less of an interest in that trust. The Elbert Read trust does not include a similar discretionary distribution provision for grandchildren under which the Judge could receive distributions currently, and he would receive trust assets in the future again only if his mother did not exercise a power of appointment granted to her under the terms of the trust.

We discussed the application of Fair Political Practices Commission Regulation Section 18234 to the Judge's situation. Under that regulation, a filer must report the pro rata share of interests in real property, sources of income and investments of a trust if he has a direct, indirect or beneficial interest in the trust of ten percent or greater. The regulation specifies that a filer who is not the maker of a trust has an interest in a trust if he is a beneficiary who presently receives income or has an irrevocable future right to receive income or principal. The regulation does not address the question of how to determine the percentage of such an interest.

You said that you would speak to your division chief about these issues, and in a subsequent telephone conversation you reported the following as the proper application of the regulations to Judge Ambler's situation: Since another person has the power to determine the distributees and the Judge has no irrevocable future interest, there is no general requirement that the Judge report any interest in the trusts in his annual statement. However, the Judge would be considered a current beneficiary of the trust for any year in which he actually received a distribution. Therefore, for last year he must report the income from the trust. He must also report the trust's investments for that year if he has an interest in the trust of ten percent or greater. However, even in that instance he must report only interests in real property located in California, sources of trust income in California, and investments in businesses located in or doing business in California. In one conversation you explained that trust holdings in stock in companies doing business in California must be reported even if the stock is traded on a national exchange, but that any dividend income from such stock would have to be reported only if the Judge's pro rata share of a company's dividends exceeded \$10,000 during the reporting period.

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We discussed that it was possible that there would be no such California holdings since the trust that made the distribution is an Iowa trust that in the past held Iowa real estate, but we agreed that it would be necessary to determine the nature of the trust's current holdings if the Judge's interest passed the ten percent test.

I asked how to determine the percentage interest of a purely discretionary beneficiary. After checking with your division chief, you reported that the Commission cannot advise on determining the percentage of ownership (the term used in the statute) of a trust, and that the trustee should be consulted in that regard. I suggested that the most logical conclusion is that a purely discretionary beneficiary has a zero percent interest in the trust, and you said that you would see if your division chief had any comment on that. In a later conversation you confirmed that the Commission cannot advise about percentage interests in trusts and that we should consult the trustee.

Percentage Interest in Trust

We have consulted with the trustee of the trust that made a distribution to Judge Ambler last year. That trustee is the Judge's mother. We have also analyzed the situation further ourselves. We have still concluded that, since Judge Ambler has no definite or irrevocable interest in either income or principal of the trust, the most logical conclusion is that he has a zero percent ownership interest in it. Therefore, since all requirements for reporting trust assets and income apply only if the 10 percent interest threshold is met, it appears to us that Judge Ambler would not be required to report those items even for a year in which he received a distribution from the trust.

Loan From Trust

It has come to my attention since our last telephone conversation that Judge Ambler has received loans from both trusts and that both loans are still outstanding. Reviewing the instructions for Schedule E for loans received or outstanding during the reporting period, it appears that the loans from the Judge's grandparents' trusts probably are not covered by the reporting requirement. Under the instructions, loans from relatives - including parents and grandparents - are not required to be reported. That instruction offers the exception that a loan from any such person is reportable if the person is acting

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as an intermediary or agent for any person not covered by that provision.

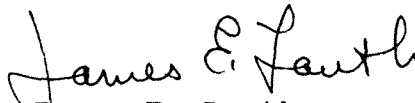
The loans from the trust are in effect loans from either Judge Ambler's mother or from his grandparents. If the loan is regarded as being from the person who established the trust, then those loans would be from the Judge's grandparents. This would seem to be the more logical interpretation in light of the policy to disregard intermediaries that is implicit in the exclusion described above for loans using a family member as an intermediary or agent. However, if the loan is not regarded as having been made indirectly from the Judge's grandparents, then it would be from the Judge's mother as trustee, and the loan would thus also not be required to be reported.

Please let me know your and the Commission's reactions to our conclusions regarding the zero percentage ownership of the trust and the exclusion from the reporting requirement of loans from a family trust.

Also, please contact me at your earliest convenience if you have any corrections to make to this summary of our telephone conversations.

Thank you very much for your assistance in this matter.

Sincerely,



James E. Lauth

for

GRAY, CARY, AMES & FRYE

JEL:bb:jfkh

cc: Judge Read Ambler
Melitta Fleck, Esq.



California Fair Political Practices Commission

June 21, 1989

James E. Lauth
Gray, Cary, Ames and Frye
1200 Prospect Street, Suite 575
La Jolla, CA 92037

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The Josabel trust is a purely discretionary trust. The trustees have sole and absolute discretion on the distribution of income to the beneficiaries, Mrs. Ambler and her sisters. Any income that remains undistributed may be given to the beneficiaries' children at the sole discretion of the trustees. The judge's mother and cousin are cotrustees of the trust.

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The Elbert A. Read trust ("Elbert trust") was similarly established for the benefit of the judge's mother and her sisters. The Elbert trust was created by the judge's maternal grandfather. However, unlike the Josabel trust, the Elbert trust was created as three separate trusts, one of which was for the benefit of Mrs. Ambler. The Elbert trust is also a discretionary trust, but it has no provision for the distribution of income to the children of the beneficiaries.

The only provision of the Elbert trust that is applicable to Judge Ambler is once again the power of appointment held by Mrs. Ambler. Mrs. Ambler may appoint anyone to receive the proceeds of the trust provided the proceeds are not retained by her estate or given to her creditors. If no appointment is made, the trust proceeds will be distributed to the Mrs. Ambler's heirs as determined by the probate law of Iowa. The judge is Mrs. Ambler's only child.

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Elbert trust as a loan made in the regular course of business from the trust.

ANALYSIS

Under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) As a judge, Judge Read Ambler is a public official who is required to disclose investments and interests in real property of \$1,000 or more; sources of income of \$250 or more; and gifts of \$50 or more.

Reporting Loans Received from a Discretionary Trust

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(9) Any loan from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, or first cousin, or the spouse of any such person, provided that a loan from any such person shall be considered income if the lender is acting as an agent or intermediary for any person not covered by this paragraph.

You stated that the judge has received both income and loans from the Josabel trust. In addition, the judge has received loans from the Elbert trust. Clearly, an income distribution from a trust is income for the purposes of the disclosure and disqualification provisions of the Act. The definition of "income" also includes loans from any source. Therefore, unless the loans fall within one of the enumerated exceptions to the definition, they must also be reported on Judge Ambler's statement of economic interests as income.^{3/}

Section 82030(b)(9) excludes loans to an official from the official's family members from the definition of "income." However, even though the settlor, trustees and beneficiaries of the trust are family members, generally, none is considered to be the source of the loan. (Christiansen Advice Letter, No.

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I-77-142, copy enclosed.) This is because the settlor has conveyed his entire interest in the trust res to the trustee for the benefit of the beneficiaries and retains nothing. (Finnie v. Smith (1927) 83 Cal. App. 707, 710.) At the time the loans were provided to Judge Ambler, both settlors were deceased. Neither trust instrument created by the settlors provided that the judge was to take anything more than a contingent interest under the trust. Consequently, since the settlors provided no interest to the judge in the trust instruments, it could not be said that the settlors loaned the money to the judge.

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And, finally, while the trustee holds legal title to the trust and may control the trust at his discretion, he in fact takes no true ownership interest in the res of the trust. (Estate of Getty (1978) 85 Cal. App. 3d 755, 760; Regulation 18234(d), copy enclosed.) The trustee may not treat the res as his own property, even pursuant to a fully discretionary trust. (Coberly v. Superior Court (1965) 231 Cal. App. 2d 685, 688-689.) Thus, the exception in Section 82030(b)(9) is not applicable to income distributions and loans from a trust, even where all the parties are family members.

This is consistent with the rationale behind the disclosure provisions of the Act. The disclosure requirements are to insure that public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) Thus, the Act requires disclosure of any economic interest that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c).)

Consequently, the judge is required to report the loans and the income distributions on his statement of economic interests. In this situation, even though the trust is a purely discretionary family trust, the trust is still regarded as the true source income. (Davidge Advice Letter, No. A-88-022, copy enclosed.) The trustees should also be disclosed as the persons who are administering the trust.

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Income of an individual also includes a pro-rata share of any income of any trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or

greater. (Section 82030.) However, even where the filer's interest in the trust is 10 percent or greater, Regulation 18234 (copy enclosed) limits the circumstances under which the beneficiary of a trust must disclose his or her pro-rata share of interests in real property and investments of the trust, and income to the trust. (Van de Kamp Advice Letter, No. A-88-169, copy enclosed.)

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(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable and:

1. No powers exist to consume, invade or appoint the principal for the benefit of beneficiaries other than the filer or if there are such powers they are limited by an ascertainable standard relating to the health, education, support or maintenance of said beneficiaries; or

2. Under the terms of the trust, no one else can designate the persons who shall possess or enjoy the property or the income therefrom.

Regulation 18234(c)(2).

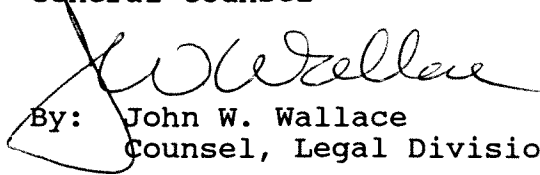
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Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh
Enclosures

89-204

GRAY, CARY, AMES & FRYE

GORDON GRAY (1877-1967)
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May 18, 1989

John Wallace, Esq.
Legal Department
Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95804-0807

MAY 19 8 59 AM '89

Re: Judge Read Ambler Statement of Economic Interests

Dear Mr. Wallace:

Enclosed per your request are copies of the documents for the trusts established by Judge Read Ambler's grandparents. We asked Judge Ambler and his mother, Marian Read Ambler, for permission to send these documents, which they immediately granted. As you and I discussed on the telephone, to avoid the burden of asking permission from all of the other individuals named in the documents, the names of individuals other than Judge Ambler, his mother, and his grandparents have been deleted from the document.

The trust established by Judge Ambler's grandmother, Josabel L. Read, was amended in full in 1963, and it is that amendment and restatement that is included with this letter. The dispositive provisions for the share of the trust now held for the benefit of Judge Ambler's mother are presented in paragraphs C and F of Article IV. Paragraph C (1) grants the trustee "sole and absolute discretion" in making distributions of trust income, first to Mrs. Ambler, and secondarily to her children or grandchildren. Paragraph C (2) grants a testamentary power of appointment to Judge Ambler's mother to give trust property to anyone or any organization other than herself, her estate, or the creditors of either. Paragraph C (3) provides that, upon default of exercise of that testamentary power of appointment, the trust property will be divided among the beneficiary's descendants. Any property distributed under

John Wallace, Esq.
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Paragraph C (3) is subject to trust terms provided in Paragraph D. Paragraph F grants the trustee discretion within certain standards to distribute trust principal to the beneficiaries. Paragraph H expressly provides that the discretionary power created by Paragraph F is "purely discretionary in the Trustee and shall not create any legal or equitable right or power whatsoever in any beneficiary."

The trust created by Judge Ambler's grandfather, Elbert A. Read, is a testamentary trust, so the document enclosed is his last will. Article III provides the terms for the trust that was created for Mrs. Ambler. Section 1 grants the trustee discretion to make distributions of income and principal to Mrs. Ambler, but, unlike the other trust, makes no provision for distributions to any other beneficiaries. Section 2 grants to Mrs. Ambler a testamentary power of appointment similar to that provided in the other trust. That section goes on to provide that in default of the exercise of that power of appointment the trust property will be distributed to her heirs in accordance with the laws of intestate succession in effect in the State of Iowa on the date of the will.

Lastly, I would like to discuss briefly the treatment of loans from trusts. I respectfully suggest that loans from these family trusts -- trusts established by family members, with family members as trustees -- would most appropriately be regarded as within the family exception for purposes of the loan reporting requirements.

Decisions regarding trust administration are made through a combination of decisions by the trustor, who created the trust, and the trustee or co-trustees, who implement the trustor's instructions. The trustee of a trust holds legal title to the trust property but administers those assets pursuant to the instructions of the trustor as provided in the trust document. Sometimes the trustor grants discretion for the trustee to interpret those instructions or to make decisions depending on the needs of the beneficiary, and trustees frequently must also deal with circumstances that are not covered by the instructions in the trust document. Therefore, trust administration decisions are a combination of the decisions of those who created the trust and those who administer it.

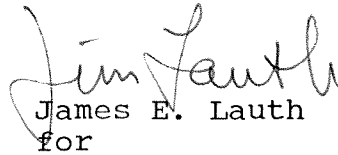
In this instance, all of the individuals who contribute to decisions about trust administration are relatives of Judge Ambler's. Therefore, loans from the trusts are like loans from

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family members, and the policy that excepts loans from family members from the reporting requirements would also seem to apply in these circumstances.

Thank you for your attention to this matter. Please do not hesitate to call if you need any further information.

Sincerely,

A handwritten signature in cursive script that reads "Jim Lauth". The signature is written in dark ink and is positioned above the typed name.

James E. Lauth
for

GRAY, CARY, AMES & FRYE

JEL:lkw
Enclosures
cc: Judge Read Ambler
Mrs. Marian Read Ambler