



FEATURE: PHILANTHROPY

By **Conrad Teitell**, **Patricia R. Beauregard** & **Stefania L. Bartlett**

Patching Up Mucked Up CRTs

Guidelines for doing it right; how defective trusts can be reformed to qualify

Why are some charitable remainder trusts (CRTs) mucked up?

Even though CRTs (unitrusts and annuity trusts) have been around for almost a half century (since passage of the Tax Reform Act of 1969 (TRA 69)), for troglodyte practitioners, a small minority, the existence of this “new” law’s requirements aren’t in sight. (“High Speed Overview,” p. 22, explains the various types of CRTs.)

But even Homer nods. Not even the most vigilant and expert practitioners are immune from error. The numerous rules are complicated, and foot faults can be punishable by loss of income, gift and estate tax charitable deductions. Side effects can include taxation of capital gains and loss of marital deductions. And, the unfortunate draftsman can suffer from dry mouth and malpractice damages. (See “Drafting Checklist,” p. 24, for the tools you need to keep you and your clients out of hot water.)

Helpful Resources

The Internal Revenue Service in 2003 and 2005 issued specimen charitable remainder annuity trusts (CRATs) and charitable remainder unitrusts (CRUTs) covering numerous situations.¹

Reading a footnote (or an endnote), it’s been said, is like having to go downstairs to answer the doorbell while

engaged in a passionate activity upstairs. However, it will be worth the trip down to endnote 1 to read the cited revenue procedures before drafting CRTs. The revenue procedures say that if the specimens are substantially followed, you’ll have qualified CRTs. The annotations in the revenue procedures are a graduate course in the CRT rules. Of course, be sure to choose the appropriate trust for your client’s situation and the type of property that will fund the trust, and check out state law.

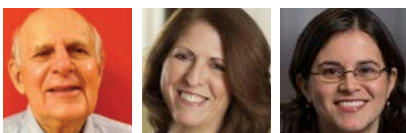
Overview of CRT Requirements

Here are 16 requirements for CRTs:

1. The CRT must be irrevocable² and valid under local law.
2. The CRT must be either a CRAT or a CRUT³ and provide for a sum certain to be paid to the non-charitable beneficiary at least annually, expressed as either a stated dollar amount or as a percentage of the net fair market value (FMV) of the property placed in the trust.
3. The percentage payout must be no less than 5 percent and no more than 50 percent of the net FMV of the property (determined either when funded if it’s an annuity trust or annually if it’s a unitrust).⁴
4. On the termination of the required payments, the balance of the assets must be transferred to the charity (or charities) named in the trust as the charitable remainder organization(s) (CRO), or the trust can be continued for the benefit of the charity for a charitable purpose.⁵ **Caution:** The continuing trust will be a private foundation (PF) even if the CRO is a public charity.
5. At least one non-charitable beneficiary⁶ must receive the percentage payout, and there can be more than one as long as all individuals are living at the time of the trust’s creation. The non-charitable beneficiaries

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- should include only those individuals who'll be the measuring lives for the trust's term.
6. The percentage payment can be paid for a term of years not to exceed 20 years or for the individual's lifetime.⁷
 7. Language in the trust must detail the computation of the annuity or unitrust amount to be paid to the non-charitable beneficiaries in a trust's short taxable year.⁸
 8. Trust language must detail how to cure a potential incorrect valuation of the trust's net FMV.⁹
 9. Additional contributions to an annuity trust must be prohibited.¹⁰ For a unitrust, either prohibit additions or, if you permit additions, spell out how to compute the unitrust amount for any additions.¹¹
 10. Other than the percentage payment, no other assets can be paid to anyone other than the charitable organization(s).¹²
 11. The value of the charity's remainder interest must be at least 10 percent of the initial net FMV of all property placed in the trust.¹³
 12. The trustee must be given power to designate charities to receive the remainder if the named charity doesn't qualify at the trust's termination as an organization to which contributions qualify for income and gift tax charitable deductions.
 13. Internal Revenue Code Section 664 has no explicit prohibitions or limitations on permissible funding assets. Generally, don't fund the trust with assets that would result in unrelated business income tax.¹⁴ For tax years beginning after Dec. 31, 2006, a CRT doesn't lose its tax-exempt status in any year that it has unrelated business income, but that income is taxed at 100 percent.¹⁵ A CRT can't hold S corporation stock because it can't be the subject of a qualified subchapter S trust election under IRC Section 1361(d)(2),¹⁶ nor will a CRT qualify as an electing small business trust under IRC Section 1361(e).¹⁷
 14. If the trust is determined to be a grantor trust, it will be disqualified. Don't permit the grantor to retain, for example, the nonfiduciary power to reacquire or substitute trust assets.¹⁸
 15. Because PF prohibitions apply to CRTs, don't provide powers or administer the trust in a way that runs

afoul of the PF rules.¹⁹ For example, if the trustee can lend trust assets to the grantor or beneficiary, those activities would constitute self-dealing.

16. The trust must be prohibited from bearing the cost of any administrative expenses and debts.²⁰ Any trust created after Oct. 3, 1982 must provide that on the death of the primary beneficiary, the vesting of the interest of the secondary beneficiary is contingent on the secondary beneficiary's payment of any death taxes attributable to his income interest.²¹

For CRTs that can't be reformed, the draftsman can be subject to malpractice claims.

What Can and Can't Be Done

Even if the draftsman follows the above rules, problems can arise when the situation is complex and additional trust provisions are required. Here are some permissible provisions and identification of some of the pitfalls. A CRT can be mucked up in many ways; not all pitfalls are listed.

1. The grantor can make additional contributions to a CRUT²² but specific language must so state and explain how to compute the unitrust payments. Additional contributions to a CRAT²³ aren't permitted.
2. The grantor may retain a testamentary power to revoke or terminate the interest of a non-charitable beneficiary and may also retain the power to substitute one CRO for another.²⁴ The trustee may—and should—be given the power to amend the trust in any manner required for the sole purpose of ensuring that the trust qualifies as a CRT. This power, however, can help cure minor deficiencies only. Neither the grantor nor the trustee should be given the power to invade, alter, amend or revoke the trust for the benefit of a person other than the CRO.²⁵



High Speed Overview

Types of charitable remainder trusts (CRTs) and annuity trusts

StanCRUT—Standard (fixed percentage) charitable remainder unitrust. Pays the income beneficiary an amount determined by multiplying a fixed percentage of the net fair market value (FMV) of the trust assets, revalued each year. On the death of the beneficiary or survivor beneficiary (or at the end of the trust term if the trust is measured by term of years—not to exceed 20 years), the charity gets the remainder. The fixed percentage can't be less than 5 percent nor more than 50 percent, and the remainder interest must be at least 10 percent of the initial net FMV of all property placed in the trust. These percentage requirements also apply to the CRTs described below.

NIMCRUT—Net income with makeup charitable remainder unitrust. Pays only the trust's income if the actual income is less than the stated percentage multiplied by the trust's net FMV. Deficiencies in distributions (that is, when the unitrust income is less than the stated percentage) are made up in later years if the trust income exceeds the stated percentage.

NICRUT—Net income charitable remainder unitrust. Pays the fixed percentage multiplied by the trust's net FMV or the actual income, whichever is lower. Deficiencies aren't made up.

FlipCRUT—A trust set up as a NIMCRUT or NICRUT. On a qualifying triggering event specified in the trust instrument (for example, the sale of the unmarketable asset used to fund the trust) it switches (flips) to a StanCRUT. The regulations sometimes refer to this trust as a "combination of methods unitrust."

FlexCRUT—That's our name for a FlipCRUT drafted so as to give flexibility in determining when—if ever—a NIMCRUT or NICRUT will flip to a StanCRUT. If you want a NIMCRUT or NICRUT to flip on the sale of a parcel

of real estate or on a specified date or event, say so in the CRT. But, if you want maximum flexibility, specify that the trust is to flip on the sale of an unimportant unmarketable asset that's one of the assets used to fund the trust. That way you have flexibility in determining when—if ever—a NIMCRUT or NICRUT will flip to a StanCRUT.

Capital Gains NIMCRUT—That's our name for a CRT that provides for post-transfer-to-the-trust capital gains (governing state law permitting) being treated as income for purposes of paying income to the income beneficiary. This provides a way of making up NIMCRUT deficits in payments from earlier years.

Full Monty CRUT—That's our coinage for a FlipCRUT that goes all the way—has FlexCRUT and capital gains CRUT provisions.

CRAT—Charitable remainder annuity trust. Pays the income beneficiary a fixed dollar amount (at least annually) specified in the trust instrument. On the death of the beneficiary or survivor beneficiary (or at end of trust term if trust measured by a term of years—not to exceed 20 years), the charity gets the remainder. The fixed dollar amount must be at least 5 percent but not more than 50 percent of the initial net FMV of the transferred assets, and the remainder interest must be at least 10 percent of the initial net FMV of all property placed in the trust. Additional contributions after the initial contribution may not be made to a CRAT.

Caveat: A CRAT must meet "the 5 percent probability test" of Revenue Ruling 77-374. (*But see Estate of George H. Moor v. Commissioner*, 43 T.C.M. 1530 (1982).)

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3. Review state law and negate any state law that's inconsistent with IRC Section 664 and its regulations. For example, negate a state law that would give a trustee the power to invade the trust for the benefit of the grantor and income beneficiaries.²⁶ Another state law that would disqualify a CRT is one that provides that a grantor's spouse may satisfy his elective share from the assets of the CRT. A grantor's spouse can waive that elective share right.²⁷ The IRS has provided a safe harbor so that the existence of the right of election, if the spouse hasn't waived that right, doesn't disqualify the trust; provided, however, that the spouse doesn't actually exercise the right of election.²⁸

Fix-Up Legislation

In 1974, Congress enacted a temporary law that permitted reformation of some defective CRTs (charitable lead trusts too). Congress extended the fix-up legislation several times, for a year at a time, until the Tax Reform Act of 1984 amended IRC Section 2055(e)(3) to provide permanent rules for reforming some defective split-interest charitable trusts. **Surprise!** Malpractice insurers are rumored to have been the driving force behind all the reformation legislation.

Not good news. Some CRTs are so deficient that they can't be reformed under the fix-up laws. Even when reformation is possible, it can be expensive and



time-consuming. For CRTs that can't be reformed, the draftsman can be subject to malpractice claims. Except for minor defects that can often be corrected by an amendment by the trustee—if the trust instrument so provides—you'll generally need a judicial reformation and an approving private letter ruling.

Reforming Defective Trusts

The intention-to-comply CRT. The trust is nearly perfect, it looks like a CRUT or CRAT. It pays a fixed percentage of the net FMV of trust assets or specified dollar amounts.²⁹ It is, however, defective because it has incorrect or missing governing instrument provisions, for example, missing provisions for short taxable years, additional contributions and payments in the year that the life interest terminates. Because there was an intention to comply with the TRA 69 requirements, the CRT can be reformed. As noted, if the trust instrument so provides, the trustee can cure minor defects by amending the CRT. If a judicial reformation is required, state law reformation procedures govern. Generally, all the parties to the trust must be involved, and the state attorney general's participation is often required.

No deadline is imposed for reforming this trust, but commence the proceeding as soon as possible. First, you want to keep potential interest costs down; and second, if the IRS later maintains that the trust doesn't pay specified dollar amounts or a fixed percentage of the net FMV, you want to have met the 90-day deadline, discussed soon, for the no-intention-to-comply CRT.

Special rules govern a testamentary CRT when the income beneficiary dies or the trust terminates under its terms by the due date (including extensions) for filing the estate tax return. If a reformable interest is in a wholly charitable trust or passes directly to a person or for a charitable use, a deduction is allowed for the reformable interest if it met the requirements of IRC Section 2055(e)(2) on the date of the decedent's death, meaning there was a bona fide attempt to comply with TRA 69.³⁰ Because of the timely death of the income beneficiary or the termination of the trust before the due date of the estate tax return, the trust is deemed reformed, and the 90-day rule doesn't apply.³¹ This is good news for everyone, except, of course, the deceased income beneficiary.

Generally, the reformation proceeding for major defects must be commenced prior to audit,³² but the correction of minor defects will be allowed on audit as long as there was a good faith attempt to comply with TRA 69.³³

The no-intention-to-comply CRT. The draftsman never heard of TRA 69, and the trust isn't an attempted CRUT or a CRAT. The trust simply pays income to the beneficiary with the remainder to charity. The Congressional Committee reports state that a trust doesn't evidence an attempt to comply with TRA 69 "if the governing instrument provides for powers of invasion for a non-charitable beneficiary of any sort."³⁴

If all else fails, it may be possible to judicially modify a CRT based on a claim of scrivener's error.

Stand-up comedian to audience member: 'Ask me, to what do you owe your success as a stand-up comedian?'

Audience member: 'To what do you owe your success . . . ?'

Standup comedian (interrupting audience member): 'T-I-M-I-N-G!'

If there's no intention to comply, the reformation must meet a 90-day deadline. Timing is crucial. A

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Drafting Checklist

Tips for creating charitable remainder trusts (CRTs)

1. Understand the meaning of every provision.
2. Spousal right of election: Remember the Internal Revenue Service has provided a safe harbor so that if there's a right of election, the trust won't be disqualified unless the spouse exercises the election (Notice 2006-15). A good practice, as a precaution, is to obtain a waiver from a current spouse now.
3. Double check that the trust contains all the required governing instrument provisions.
4. A specimen—no matter how good—is lousy if it doesn't cover or isn't amended to cover the client's situation.
5. Yesterday's form—no matter how good—is terrible if it doesn't take today's changes in the law into account.
6. CRTs must, of course, comply with the federal tax laws. But, state laws must also be taken into account.
7. The trust should reflect how the funding assets are owned—separate property, joint property, tenancy-by-the-entirety, tenancy-in-common or community property. Ascertain the holding period and cost basis of each asset. That information is essential in determining the charitable deduction and how payments are taxable to the beneficiaries.
8. Confirm that no mortgages are on property used to fund a CRT. Funding a trust with mortgaged property will disqualify it.
9. Has the trust been drawn to avoid gift taxes (when possible) on an income beneficiary's life interest?
10. Confirm that the spouse is a U.S. citizen. If not, take into account the special rules that apply to alien spouses. (There's a difference between an alien spouse and an alienated spouse. The latter may well be a U.S. citizen.)
11. In 2003, the IRS issued specimen charitable remainder annuity trusts (CRATs) that are excellent.¹ In 2005, the IRS issued excellent specimen charitable remainder unitrusts (CRUTs).² Of course, one size doesn't fit all. The IRS recognized this fact by including ample annotations to many of the provisions and furnishing alternate provisions. Use the IRS specimens as your guide. But make sure to read the annotations and, in many cases, you'll want to mix and match and make your own modifications.
12. No matter how skillfully the trust is drawn, make sure that CRUTs and CRATs pass the 5 percent minimum payout requirement, the maximum 50 percent payout requirement, the 10 percent minimum remainder interest requirement and for CRATs, the 5 percent probability test of Revenue Ruling 77-374.³
13. Make sure the trust has an appropriate trustee—for example, an independent trustee for hard-to-value assets in a unitrust (or provide for a qualified appraiser) and for a sprinkling CRUT or CRAT.
14. Make sure the payments are made and are timely lest you run afoul of the rule that requires that a CRT not only meet the IRC's requirements, but also be administered according to its terms. In *Atkinson*,⁴ the U.S. Court of Appeals for the Eleventh Circuit held that an inter vivos CRAT's failure to make payments resulted in complete loss of the estate tax charitable deduction (there were four survivor beneficiaries). And, that was so even though substantial sums would go to charity. The loss of the charitable deduction cost the estate \$2,654,976.
15. The trust should meet state law investment requirements, for example, prudent investor rules.⁵
16. Check whether there's a tax strategy patent on a plan involving the contemplated CRT. Effective Sept. 16, 2011, tax strategy patents are no longer issued.
17. Don't fund the trust with Subchapter S corporation stock. Doing so will kill the S election.
18. Check if there are any Securities and Exchange Commission restrictions on transferring securities to the CRT.
19. If life insurance-wealth replacement is part of the plan, make sure that the insurance is obtained before signing and funding the CRT.
20. Is a right retained to substitute public charities for named private foundation remainder organizations? Doing so can avoid self-dealing concerns on terminating a CRT and dividing the assets between the income beneficiary and the charitable remainder organization (CRO). The client can also receive a larger charitable deduction on a contribution of the remaining life interest to a public CRO.
21. Add additional items to this checklist to cover things that should have been covered by this checklist.
22. Finally, trust no one. If your mother tells you that she loves you—check it out.

Endnotes

1. See Revenue Procedure 2003-53, 2003-31 I.R.B. 230 through Rev. Proc. 2003-60, 2003-31 I.R.B. 274.
2. See Rev. Proc. 2005-52, 2005-34 I.R.B. 326 through Rev. Proc. 2005-59, 2005-34 I.R.B. 412.
3. See Revenue Ruling 77-374, 1977-2.
4. *Estate of Atkinson v. Commissioner*, 309 F.3d 1290 (11th Cir. 2002), cert. denied, 540 U.S. 946 (2003).
5. See *Americans for the Arts, The Poetry Foundation, and Lilly Endowment, Inc. v. Ruth Lilly Charitable Remainder Annuity Trust #1 National City Bank of Indiana, and Ruth Lilly Charitable Remainder Annuity Trust #2, National City Bank of Indiana*, 855 N.E. 2d 592 (Ct. App. Ind., 2006). See also *Fifth Third Bank and Elizabeth Gamble Reagan v. Firststar Bank, N.A.*, 2006 WL 2520329 (Ohio Ct. App., 2006). See also *Estate of Rowe*, 712 N.Y.S.2d 662 (N.Y. App. Div., 2000), (involving a charitable lead trust), superseded by N.Y. Est. Powers & Trusts Section 11-2.3 (McKinney 2010).

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timely commencement of a reformation proceeding is no later than 90 days after: (1) if an estate tax return is required to be filed, the last date (including extensions) for filing the return, or (2) if no estate tax return is required to be filed, the last date (including extensions) for filing the income tax return for the first taxable year for which such a return is required to be filed by the trust.³⁵ If the deadline is missed, the trust can't be reformed. The substantial compliance doctrine won't overcome the missed deadline.³⁶

Another special rule provides that a trust meeting the requirements of pre-TRA 69 law is exempt from the 90-day rule if the trust is in a will executed before Jan. 1, 1979 or is an inter vivos trust created before that date.³⁷

The hard-cheese (tough luck) CRT. There's no evidence that there was an intention or an attempt to comply with TRA 69, but the trust wouldn't have qualified even under pre-TRA 69 law. A pre-TRA 69 trust didn't, for example, qualify for tax benefits if the trustee had the power to invade principal for the non-charitable income beneficiary and the power wasn't based on an ascertainable standard (or, if it was, the possibility of invasion wasn't so remote as to be negligible). Or, the trust may have been defective because the trustee, under its investment or administrative powers (or under state law, if the instrument was silent), could pay principal to the non-charitable income beneficiary. This trust can't be reformed to obtain tax benefits.

Scrivener's error reformation. J.P. Morgan said, "I don't want a lawyer to tell me what I cannot do. I hire him to tell me how to do what I want to do."³⁸ Your client doesn't want to hear that his former lawyer's trust is so deficient that nothing can be done. If all else fails, it may be possible to judicially modify a CRT based on a claim of scrivener's error.³⁹ A scrivener's error can range from careless drafting to the draftsman's outright ignorance. This is the last-ditch effort, the Hail Mary Pass of trust law. This option can be expensive, time-consuming and unpleasant for the draftsman. It requires getting a judicial reformation and then an affirming PLR, with a current IRS fee of \$28,300 (plus attorney's fees).

When considering modification based on a scrivener's error, contact the draftsman to learn the circumstances surrounding the drafting of the document. Determining the donor's intent is crucial. If the error was in the drafting, ask the draftsman to sign an affidavit confirming that the trust as drafted doesn't reflect

the donor's intent. Why would the draftsman say yes to this request? He should be interested in fixing the trust because it's the right thing to do. And then, there are potential malpractice damages. File a petition in the appropriate state court requesting a reformation. Generally, a court will condition the approval of the reformation on the petitioner obtaining a favorable PLR from the IRS that the reformation won't disqualify the trust as a CRT under IRC Section 664 and won't result in an act of self-dealing under IRC Section 4941(d)(1).

The attorney who made the error, or is accused of making an error that disqualified a CRT, should immediately notify his malpractice insurer. It pains us to say this, but ask the lawyer whom you believe is responsible for the CRT to sign an agreement tolling the malpractice statute of limitations. If the lawyer refuses to toll the statute of limitations, a lawsuit may have to be filed to protect the client if a corrective reformation isn't achieved.

Claims of Scrivener's Errors

Here are some examples of cases in which the IRS confirmed reformation approval of CRTs.

1. Donors created a trust with the intention that it qualify as a CRUT with a fixed percentage unitrust amount. An earlier draft of the trust contained net income with make-up CRUT provisions that were inadvertently included in the final version of the trust, as admitted by the drafting attorney's affidavit. The introductory paragraphs of the trust described a CRUT, and the trustee administered the trust as a CRUT. The donors sought a court order authorizing an amendment to the trust document to correct the scrivener's error. The court allowed the reformation, and the IRS confirmed that reformation wouldn't disqualify the trust as a CRT nor constitute an act of self-dealing.⁴⁰
2. Based on a claim of a scrivener's error, a court allowed an amendment to a CRUT to provide for a fixed percent payout, which was what the donors originally desired and the drafting attorney claimed he had prepared. Instead, the drafting attorney had included a provision that provided for the payment of the lesser of a fixed percent payout or trust income. The drafting attorney admitted that he had used the wrong form in his word processing system, and the donors furnished proof of their intent to create a CRUT with a fixed percent payout in the form of handwritten



notes from their meeting with the attorney. The IRS confirmed that reformation wouldn't violate any provisions under IRC Section 664 nor would it disqualify the trust as a CRT.⁴¹

3. Reformation of a CRUT was permitted to alter the definition of "charitable organization" when the drafting attorney used boilerplate language requiring that any charitable donee must be a public charity. This wasn't the intent of the donor, who wanted the trust remainder to pass to her PF. The error was discovered on the donor's death. The donor specifically identified her PF as the CRUT's remainder beneficiary. However, the PF didn't satisfy the definition of a charitable organization in the CRUT agreement. Affidavits submitted to the court by the trustee and draftsman indicated that it was the donor's specific and strong intention that the donor's PF be the ultimate beneficiary. The court was satisfied that a scrivener's error was made in drafting the definition of charitable organization, and the IRS confirmed that reformation wouldn't disqualify the trust as a CRT nor constitute an act of self-dealing.⁴²
4. Other examples of courts correcting scriveners' errors include the retroactive amendment of an incorrect unitrust percentage included in the CRUT agreement⁴³ and an amendment of a CRUT agreement that was originally drafted as a single-life trust rather than a two-life CRUT.⁴⁴
5. In some cases, a scrivener's error may be the omission or addition of a word or two, or it may be substantial noncompliance with CRT requirements. In all cases, a common theme throughout is the donor's intent. If it's clear at the creation of the trust that the donor intended to create a qualified CRT but the purpose couldn't be carried out because of drafting errors, the IRS is likely to find that the correction of the scrivener's error by trust reformation doesn't violate Section 664.


Some Final Tips

When drafting a CRT, make sure you understand the donor's intent and that the final draft of the trust reflects that intent. Double check that the CRT contains all the required provisions and none of the prohibited ones. Before the trust is executed, check the trust provisions against the relevant code and regulation sections, and have another attorney review the trust.⁴⁵ A qualified

professional should be responsible for ensuring that a CRT is properly administered.⁴⁶

The Monk's Tale

The consequences of a scrivener's error can go way beyond trust and other legal documents. This is illustrated by the following tale. When a new monk arrived at the monastery, the abbot told him that every day his job would be to make longhand copies of the rules of the monastery's order. He was given the last copy made by Brother Elliot, his predecessor. The new monk asked to see the original, but he was assured that the last copy was correct. Indeed, for over 100 years, each new monk assigned to the task was given the last copy made by his predecessor. Nevertheless, the new monk persisted. So, the abbot sent Brother Elliott to the archives to retrieve and examine the original. When he didn't return after seven hours, the abbot went down to the archives to investigate. There he found Brother Elliot sobbing. He was saying over and over again: "It says 'celebrate.'"

P.S. Pay your malpractice insurance premiums on time. 

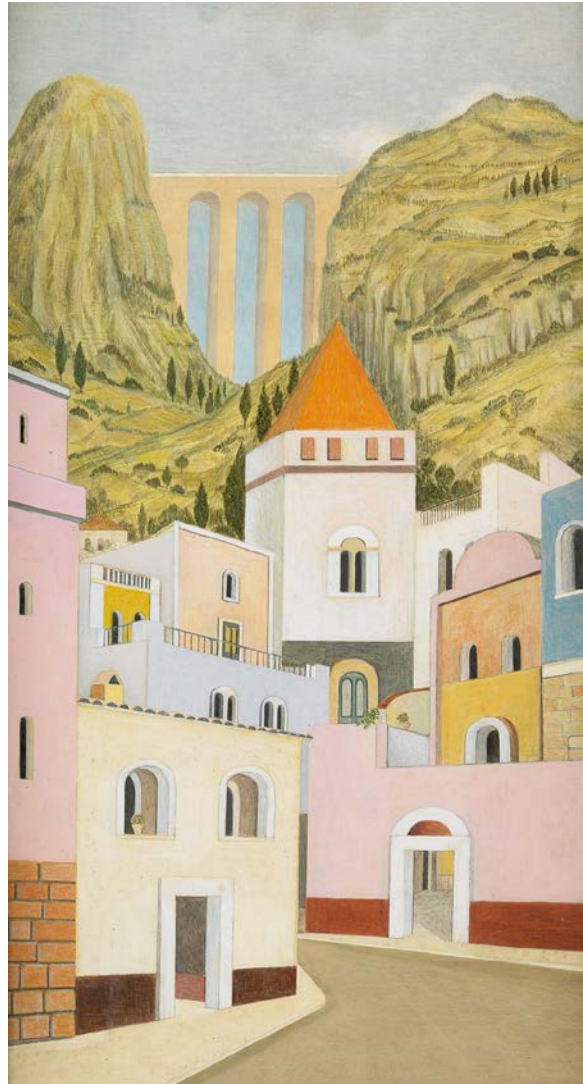
Endnotes

1. Revenue Procedure 2003-53, 2003-31 I.R.B. 230 through Rev. Proc. 2003-60, 2003-31 I.R.B. 274, have specimen charitable remainder annuity trusts. And, Rev. Proc. 2005-52, 2005-34 I.R.B. 326 through Rev. Proc. 2005-59, 2005-34 I.R.B. 412 have specimen charitable remainder unitrusts.
2. Treasury Regulations Section 1.664-1(a)(1)(i).
3. Treas. Regs. Section 1.664-1(a)(2).
4. Internal Revenue Code Sections 664(d)(1)(A) and 664(d)(2)(A).
5. IRC Sections 664(d)(1)(C) and 664(d)(2)(C).
6. IRC Sections 664(d)(1)(A) and 664(d)(2)(A). A non-charitable beneficiary is defined as one "which is not an organization described in section 170(c)." See also Private Letter Ruling 200108035 (Nov. 28, 2000).
7. IRC Sections 664(d)(1)(A) and 664(d)(2)(A).
8. Treas. Regs. Sections 1.664-2(a)(1)(iv)(a) and 1.664-3(a)(1)(v)(a).
9. Treas. Regs. Sections 1.664-2(a)(1)(iii), 1.664-3(a)(1)(iii) and 1.664-1(d)(4)(ii).
10. Treas. Regs. Section 1.664-2(b).
11. Treas. Regs. Section 1.664-3(b).
12. IRC Sections 664(d)(1)(B) and 664(d)(2)(B). There's an exception for a qualified gratuitous transfer of qualified employer securities in IRC Section 664(g).
13. IRC Sections 664(d)(1)(D) and 664(d)(2)(D).
14. IRC Sections 511-515.
15. Treas. Regs. Section 1.664-1(c)(3).
16. Revenue Ruling 92-48, 1992-1.
17. IRC Section 1361(e)(1)(B)(iii).



18. The grantor trust tax rules are in IRC Sections 671-679.
19. The excise tax rules are in IRC Sections 4940-4948.
20. Treas. Regs. Sections 1.664-2(a)(4) and 1.664-3(a)(4).
21. Rev. Rul. 82-128, 1982-2.
22. Treas. Regs. Section 1.664-3(b).
23. Treas. Regs. Section 1.664-2(b).
24. Treas. Regs. Sections 1.664-2(a)(4) and 1.664-3(a)(4).
25. *Ibid.*
26. See Rev. Rul. 77-58, 1977-1.
27. Rev. Proc. 2005-24, 2005-16 I.R.B. 909, *modified* by Notice 2006-15.
28. Notice 2006-15.
29. In determining whether payments are expressed as a fixed percentage of fair market value, the special rule of IRC Section 664(d)(3), allowing so-called “net income” and “net income with make up” variations, will be taken into account.
30. IRC Section 2055(e)(3)(F).
31. Though death can sometimes “reform” a faulty trust, it only works for “reformable interests”: dying won’t help unless the trust pays a unitrust or annuity trust amount.
32. The Committee Reports accompanying the Tax Reform Act of 1984 explicitly rejected reformations initiated in response to an IRS audit.
33. H.R. Rept. No. 98-432 (Part 2), at 1517 (1984); S. Rept. 98-169 (Vol. 1), at 732 (1984).
34. H.R. Rept. No. 98-432 (Part 2), at 1519 (1984).
35. IRC Section 2055(e)(3)(C)(iii).
36. See *Estate of J. Tamulis v. Commissioner*, 509 F.3d 343, 347 (7th Cir. 2007): “The doctrine of substantial compliance ‘seek[s] to preserve the need to comply strictly with regulatory requirements that are important to the tax collection scheme and to forgive noncompliance for either unimportant and tangential requirements or requirements that are so confusingly written that a good faith effort at compliance should be accepted’” [citations omitted].
37. IRC Section 2055(e)(3)(C)(iv). But, note that the law is silent whether a codicil executed after Jan. 1, 1979 to a will executed before Jan. 1, 1979 acts to republish the will and therefore won’t be exempted from the 90-day rule or if the will retains its original execution date prior to the codicil. Courts have refused to apply the doctrine of republication when it would defeat a testator’s probable intention and result in a substantial reduction in the amount passing to charity.
38. Quoted in Ida M. Tarbell, *The Life of Elbert H. Gray* (1925).
39. Judicial reformations of trusts in non-charitable cases have also been allowed. See PLR 201442046 (June 18, 2014), in which the reformation of a trust, which was the remainder beneficiary of grantor retained annuity trusts, was allowed to correct a scrivener’s errors.
40. PLR 201030015 (Feb. 2, 2010). See also PLR 201133004 (April 26, 2011) and PLR 200930048 (May 1, 2009).
41. PLR 9822041 (March 2, 1998).
42. PLR 201011034 (Dec. 23, 2009). See also PLR 201016033 (Jan. 12, 2010).

43. PLR 201026005 (March 16, 2010).
44. PLR 201048031 (July 13, 2010).
45. See “Drafting Checklist,” p. 24.
46. *Ibid.*, Item 14, p. 24.



SPOT LIGHT

Structured

“Italian Architecture with Aquaduct” (29⁷/₈ in. by 16 in.) by Jared French, sold for \$5,000 at Swann Auction Galleries’ American Art sale in New York on June 4, 2015. French’s wife, Margaret Hoening French, was also an artist and together with Paul Cadmus, they formed a photographic collective.