

**YES, I'LL ORDER THAT TRUST FULLY LOADED:
A REPORT OF THE ACTEC TASK FORCE ON TRUST DRAFTING¹**

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TABLE OF CONTENTS

1. OVERVIEW	1
2. FLEXIBILITY TO DISTRIBUTE INCOME TO CHARITY	3
3. FLEXIBILITY TO ALLOCATE ITEMS OF INCOME AND GAIN BETWEEN TRUST AND BENEFICIARY	7
4. AVOIDING APPLICATION OF THE 2% FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS	11
5. MINIMIZING EXPOSURE TO THE 3.8% NET INVESTMENT INCOME TAX	12
6. GRANTOR TRUST STATUS	13
7. FLEXIBILITY TO QUALIFY AS ELIGIBLE TRUST TO HOLD S CORPORATION SHARES	20
8. DYNASTY TRUSTS FORMED AT DEATH – POUR OVER FROM REVOCABLE TRUST	25
9. CONDUIT SEE-THROUGH TRUSTS	26
10. ACCUMULATION SEE-THROUGH TRUSTS	34
11. APPORTIONMENT OF EXPENSES AND DEATH TAXES ON RETIREMENT PLANS	48
12. FLEXIBILITY TO MANAGE STATE FIDUCIARY INCOME TAX	49
13. MANAGING WHETHER DYNASTY TRUST IS SUBJECT TO ESTATE VS. GST TAX AT BENEFICIARY'S DEATH	52
14. STATE-SPECIFIC DRAFTING CHALLENGES: CALIFORNIA PROP. 13 AND TEXAS TAX CODE SECTION 11.13	55
15. DECANTING AND TRUST PROTECTOR POWERS TO MODIFY	57
16. UNITRUST DISTRIBUTIONS TO INDIVIDUAL BENEFICIARIES	65
17. SAMPLE INTER VIVOS DYNASTY TRUST	69

YES, I'LL ORDER THAT TRUST FULLY LOADED

1. OVERVIEW

Trusts that last for the lifetime of children or other descendants (sometimes referred to as "dynasty" trusts) are an important element in many estate planning strategies because they have the potential to accomplish several different tax and non-tax objectives:

- Multi-generational transfer tax efficiency is fundamental to the design of a dynasty trust and, in some cases, the choice of trust situs.
- Protection of trust assets from the beneficiary's creditors can be an important non-tax objective for certain clients.
- Income tax efficiency is becoming more and more important as rates increase (including the 3.8% net investment income tax) and estate planners pay more attention to cost basis.
- "Stretch-out" of retirement plans² is another important objective, since more and more clients have significant balances in retirement plans.³
- State-specific objectives may also come into play. For example, the design of a trust may determine whether California property tax is reassessed, or whether the trust is subject to state income tax in one or more jurisdictions other than the jurisdiction of the grantor's residence.

Planning and drafting to accomplish any one of these objectives may be difficult enough, but for the client who "wants it all," planning and drafting to accomplish multiple objectives can be particularly challenging.

Task Force – Materials as Practical Guide. A Task Force was formed by two substantive committees of the American College of Trust and Estate Counsel ("ACTEC").⁴ The charge to the Task Force was to compile sample forms or sample language illustrating how a dynasty trust can be drafted to accomplish different possible objectives, and to address the coordination that may be needed when drafting to accomplish multiple objectives. The resulting materials run well over 300 pages, some of which is reproduced in this outline.

These materials are intended as a guide to experienced estate planners who are already familiar with the underlying concepts of the dynasty trust, particularly those related to estate, gift, and generation skipping transfer tax. The Task Force chose to devote more attention to some issues than others, focusing on current trends in the law. In particular, the Task Force gave emphasis to income-tax-related issues, since income tax efficiency is more important than ever. As one might imagine based upon the ACTEC subcommittees involved, income tax efficiency in this context relates to both reducing and deferring income taxation of trust income.

These materials focus primarily on the design and drafting of dynasty trusts that will be formed during the grantor's life, but much of the discussion applies equally to trusts that are not intended to last for the lifetime of the beneficiary, and to trusts (dynasty or otherwise) that may arise at death. The application of these principles in other contexts is important for two reasons.

First, even when dynasty trusts are established during life, additional assets may pass to dynasty trusts at death. See Chapter 8 for a discussion of coordinating lifetime and death-time transfers.

² The term "retirement plan" is used broadly in these materials, and includes IRAs and Roth IRAs.

³ "Stretch-out" refers to the ability to take minimum required distributions over the life expectancy of a younger heir, which in the context of a dynasty trust, is likely the primary beneficiary of the trust. Such a trust is often called a "see-through trust."

⁴ Substantive committees of ACTEC frequently take on specialized projects to assist Fellows and other practitioners. These projects are often undertaken by a standing or ad hoc "subcommittee" of volunteers who work on the project and report back to the full committee. When two or more substantive committees work together on a project, the work group is given the lofty title of "Task Force." In this case, the Task Force was comprised of members from two substantive committees: the Fiduciary Income Tax Committee and the Employee Benefits in Estate Planning Committee. The Task Force consists of Jonathan Blattmachr, Mickey Davis, Steve Gorin and Steve Trytten. Steve Trytten has served as the unofficial chair of the task force.

Second, retirement plan assets generally do not pass until death. But retirement plan issues should be considered when drafting an inter vivos dynasty trust since the trust may be designated as the beneficiary of retirement plans. See Chapters 9-11 for discussion of drafting considerations related to retirement plan issues.

Organization of Materials. In order to create reference materials that will be useful in a wide range of situations, the Task Force organized these materials as follows:

- Chapters 2 to 16: *Sample Clauses and Comments.* Sample clauses and commentary are provided that focus on 15 specific planning objectives. These objectives (listed by Chapter number) are:
 2. Flexibility to Distribute Income to Charity
 3. Flexibility to Allocate Items of Income and Gain Between Trust and Beneficiary
 4. Avoiding Application of the 2% Floor on Miscellaneous Itemized Deductions
 5. Minimizing Exposure to the 3.8% Net Investment Income Tax
 6. Grantor Trust Status
 7. Flexibility to Qualify as Eligible Trust to Hold S Corporation Shares
 8. Dynasty Trusts Formed at Death – Pour Over from Revocable Trust
 9. Conduit See-Through Trusts
 10. Accumulation See-Through Trusts
 11. Apportionment of Expenses and Death Taxes on Retirement Plans
 12. Flexibility to Manage State Fiduciary Income Tax
 13. Managing Whether Dynasty Trust is Subject to Estate vs. GST Tax at Beneficiary's Death
 14. State Specific Drafting Challenges; California Prop. 13 and Texas Tax Code Section 11.13
 15. Decanting and Trust Protector Powers to Modify
 16. Unitrust Distributions to Individual Beneficiaries
- Chapter 17: *Sample Dynasty Trust.* Jonathan Blattmachr graciously contributed an inter vivos, irrevocable dynasty trust template (the "template") generated from estate planning document assembly software marketed by Interactive Legal Solutions.⁵ As you will see, the template itself contains numerous features that even experienced estate planners might not consider standard in a "plain vanilla" dynasty trust. The Task Force chose as its template a directed-trustee, Alaska dynasty trust that contemplates that neither the grantor nor the beneficiary will serve in any office of the trust.⁶ For purposes of this material, the Alaska language has been modified where appropriate to apply Texas law.

The Task Force materials were presented in a panel discussion at the 51st Annual Heckerling Institute on Estate Planning on January 11, 2017. The Heckerling material includes several appendices that have been omitted from this outline due to their length, but which provide addition in-depth discussions of substantive issues, including:

- Appendix A: Blattmachr, Boyle, and Fox, *Planning For Charitable Contributions by Estates and Trusts*
- Appendix B: Gorin, *Income Tax Trap - Reduction in Trust's S Corporation Charitable Deduction*
- Appendix C: Gorin, *Trusts and the 3.8% Tax on Net Investment Income*
- Appendix D: Gorin, *Selected Fiduciary Income Tax Issues*
- Appendix E: Gorin, *Passive Loss Rules for Trusts*
- Appendix F: Trytten, *Drafting See-Through Trusts*

⁵Interactive Legal was co-founded in 2003 by Jonathan and Michael Graham.

⁶The beneficiary or the grantor can, however, act in certain positions, such as making investment decisions except for insurance on his or her life or, as to the grantor, voting stock that would be described in IRC § 2036(b). The provisions are not limited to Texas governing law.

2. FLEXIBILITY TO DISTRIBUTE INCOME TO CHARITY

Background: Assume it is contemplated that the trust's beneficiary will want to make charitable contributions from time to time, and that the grantor determines that it is within the trust's purpose to assist in funding these contributions. The Trustee can make distribution to the beneficiary, who would then make the donation and claim a "below the line" deduction that may or may not offset "above the line" income dollar for dollar.⁷ Instead, it will probably be more income tax efficient for the trust to distribute the funds directly to charity, if the distribution qualifies for the charitable deduction under Code Section 642(c).⁸ Special drafting will be required to make these direct distributions possible. The sample clauses below illustrate three alternate approaches.

*Sample Clauses Authorizing Trustee to Distribute Income to Charity:*⁹

The following clause tracks the language of Code Section 642(c) that allows distribution of income for a "charitable purpose," and provides a veto power for the beneficiary.

DISTRIBUTION OF INCOME FOR CHARITABLE PURPOSE

The Trustee may distribute from the gross income of the trust for a purpose specified in Code Section 170 (c) (defining charitable contributions) such amounts as the Trustee determines to be appropriate, taking into consideration the charitable objectives of the grantor[s] and the Beneficiary, as well as the possible income and transfer tax effects of any such distribution; provided, however, that (i) the Trustee shall notify the Beneficiary of the proposed distribution or distributions not less than thirty days prior thereto; and (ii) the Beneficiary shall have an absolute right to veto any such distributions, by providing written notice thereof to the Trustee within twenty days after receive such notice. If the Beneficiary is Incapacitated, such notice shall be given to the guardian or other similar representative of the Beneficiary and the guardian or other similar representative shall have the veto right described above.

As an alternative, the following clause authorizes distributions to charitable organizations. This may not be as broad a standard as a "charitable purpose," but it may be broad enough, and it may be more comfortable and understandable to clients and other advisors.

DISTRIBUTION OF INCOME TO CHARITY

The Trustee may distribute from the gross income of the trust to such one or more organizations described in Code Section 170 (c) (defining charitable contributions) such amounts as the Trustee determines to be appropriate, taking into consideration the charitable objectives of the grantor[s] and the Beneficiary, as well as the possible income and transfer tax effects of any such distribution; provided, however, that (i) the Trustee shall notify the Beneficiary of the proposed distribution or distributions not less than thirty days prior thereto; and (ii) the Beneficiary shall have an absolute right to veto any such distributions, by providing written notice thereof to the Trustee within twenty days after receive such notice. If the Beneficiary is Incapacitated, such notice shall be given to the guardian or other similar representative of the Beneficiary and the guardian or other similar representative shall have the veto right described above.

*Sample Clause Granting Beneficiary Power to Appoint Income to Charity:*¹⁰

The beneficiary, in the beneficiary's individual capacity, shall have the continuing discretionary power to Appoint all or any part of the gross income, as such term is used in Code Section 642(c) and the regulations and pronouncements thereunder, to one or more Charities; however, no

⁷ An "above-the-line" deduction refers to a deduction taken from gross income to arrive at adjusted gross income ("AGI"). A "below-the-line" deduction is one that is taken from adjusted gross income to arrive at taxable income. Below-the-line" deductions are subject to numerous limitations and offset. Charitable contributions made by individuals are allowed only to the extent that they do not exceed 50% (or in many instances, 30% or 20%) of the donor's taxable income, and then only as itemized deductions. As noted below, itemized deductions for individuals (other than medical expenses, investment interest, casualty and theft losses, or gambling losses) are subject to reduction if the donor's adjusted taxable income exceeds a prescribed threshold. IRC §§ 68(a), 170. These deduction limitations do not apply to permitted distributions of gross income to charity by a trust. IRC § 642(c).

⁸ Reference to Code Sections are to section of the Internal Revenue Code.

⁹ Contributed by Mickey Davis.

¹⁰ Contributed by Steve Gorin.

interest in a Benefit Plan or that Benefit Plan's proceeds may be Appointed in a manner that would change the identity of the individual whose life expectancy would otherwise apply under the Minimum Distribution Rules. The beneficiary may authorize his or her agent to exercise this power to Appoint.

*Sample Clause Granting Beneficiary Broad Lifetime Power to Appoint That Could Be Used to Appoint Income to Charity:*¹¹

The beneficiary, while at least ___ years of age, in the beneficiary's individual capacity, shall have the continuing discretionary power to Appoint all or any part of the income, principal, or both of the trust to or for the benefit of any person, but may not increase the authority, if any, to make distributions to or for the benefit of the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate; however: (a) no interest in a Benefit Plan or that Benefit Plan's proceeds may be Appointed in a manner that would change the identity of the individual whose life expectancy would otherwise apply under the Minimum Distribution Rules, and (b) if the trust is an electing small business trust under Code Section 1361(e)(1), the beneficiary may not exercise the power to Appoint in a manner that might cause the corporation to violate Code Section 1361(b)(1). Any such Appointment may be exercised either to effect immediate distribution to the appointee or to take effect upon the occurrence of a future event, such as the beneficiary's death.¹²

Task Force Comments. In some cases, a trust must be of a specific structure or must not contain certain provisions in order to qualify for certain tax or other special tax treatment. For example, a trust, transfers to which are intended to qualify for the marital deduction for federal estate and gift tax purposes, must, in general, require that all fiduciary accounting income be distributed to the spouse of the person creating the trust and for no one else during the spouse's lifetime. See Code Section 2056 and 2523.

However, many trusts not intended to qualify for the marital deduction, such as one for descendants, may be very flexible in allowing for the distribution of income and corpus (principal) to the beneficiaries. These trusts may and often should permit distributions to charity. That may be advantageous to the trust beneficiaries for four reasons.

First, under Code Section 170, individuals may never reduce their taxable income (technically, their adjusted gross income specially computed) by more than 50%.¹³ In addition, under Code Section 68(a), taxpayers with income above certain inflation-adjusted thresholds must reduce their itemized deductions by up to 80%, at the rate of 3% of their adjusted gross income in excess of the threshold.¹⁴ Trusts, under Code Section 642(c), may be allowed an unlimited deduction (so their taxable income can be reduced to zero) for their gross income paid for a charitable purpose if paid pursuant to the terms of the governing instrument (such as the will or trust agreement). (Nonetheless, it should be noted that, under Code Section 682, the Code Section 170 adjusted gross income limitations will apply to the trust to the extent the gross income paid to charity consists of unrelated business income.)

Second, the trust is entitled to the income tax deduction for the year such income is paid for a charitable purpose even if paid from income from prior years not previously paid to charity or deemed distributed to charitable beneficiaries pursuant to Code Sections 651 and 661.

Third, if a payment of gross income for a charitable purpose is made after the close of a tax year of the trust and before the end of the following tax year from gross income earned in the year preceding the year it is paid, the trust is entitled to elect pursuant to Code Section 642(c)(1) to treat the payment as having been made in such preceding taxable year (that is, the year in which the gross income was earned).

¹¹ Contributed by Steve Gorin. Steve also notes that one might want to expressly mention charities as included in the class of potential appointees.

¹² The clause used here is intended to be used when the grantor would have distributed the entire trust outright but instead is leaving it in trust with maximum control given to the beneficiary.

¹³ IRC § 170(b)(1).

¹⁴ IRC § 68(a). For 2017, these thresholds are \$313,800 for married taxpayers filing jointly (half that amount for married taxpayers filing separately); \$287,650 for heads of household, and \$261,500 for single taxpayers. Rev. Proc. 2016-55, 2016-45 IRB 707

Fourth, an individual cannot reduce his or her net investment income for purposes of the net investment income tax imposed by Code Section 1411 by making a charitable contribution. However, a trust may reduce its net investment income by paying its gross income to the extent it is treated as consisting of net investment income pursuant to the terms of the trust's governing instrument for a charitable purpose.

Accordingly, it may be appropriate to authorize distributions of gross income to charity. Even though those payments are not mandated, they should qualify as paid "pursuant to the terms of the governing instrument" as required by Code Section 642(c)(1). Although it is beyond the scope of this discussion to present the matter in full detail, it may be possible to direct that the payments are first to come from gross income that is not unrelated business income.

The authorization to pay to charity could be granted to the trustee and/or one or more beneficiaries. Even if a beneficiary were deemed to have made the transfer for gift tax purposes, the payment should qualify as charitable gift for gift tax purposes as long as it is made to an organization transfers to which qualify for the gift tax charitable deduction.

When designing a trust that authorizes distributions of income to charity, consider whether checks and balances should be included to ensure the distribution makes sense to both the trustee and the beneficiary. For example, the first clause could be adjusted to require beneficiary consent, and the second clause could be adjusted to require trustee consent. Consent could be required in all cases, or only with respect to certain distributions or appointments (for example, only those made to charities other than public charities, or only those made to specified charities).

Depending on the trust purpose, a more restrictive approach (such as the trustee power) could apply until the beneficiary reaches a certain age and then a less restrictive approach (such as the beneficiary's special power of appointment) could apply.

Care should be exercised when using these clauses since the sample clauses shown above could interfere with other trust objectives. For example:

- If creditor protection is one of the objectives of the trust, the trustee distribution approach (with someone other than the beneficiary as trustee) is preferred over granting a special power of appointment to the beneficiary.
- If the trust will be holding S corporation shares:
 17. Neither clause is compatible with a QSST, since all income must be distributed to the primary beneficiary; and
 18. With non-QSST trusts, consider including a limitation that prevents a distribution of S corporation shares to any charity or other person ineligible to hold S corporation shares.
- Care must be taken to ensure that clauses facilitating distributions to charity do not undermine stretch-out of retirement plans if that is one of the purposes of the trust, thus:
 19. With a conduit trust, the clauses must not interfere with requirement that all plan distributions be distributed to the beneficiary.
 20. With an accumulation trust, the clauses must not allow distribution of retirement plan assets or accumulations to any charity or other person that could shorten the deferral period.

It is not entirely clear whether or the extent to which the payment to charity must be traced directly to gross income actually received by the trust (or an estate). Compare the following cases with each other: *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379 (1937); *U.S. v. Benedict*, 592 U.S. 692 (1950); *Crestar Bank v. Internal Revenue Service*, 47 F. Supp. 2d 670 (1999); *Van Buren v. Commissioner*, 89 T.C. 1101 (1987); *Riggs National Bank v. U.S.*, 352 F.2d 812 (1965); *Frank Trust of 1931 v. Commissioner of Internal Revenue*, 145 F.2d 411 (1944); *Freund's Estate v. Commissioner*, 303 F.2d 30 (2nd Cir. 1962); *Sid W. Richardson Foundation v. U.S.*, 430 F.2d 710 (5th Cir. 1970); *Estate of Esposito v. Commissioner*, 40 T.C. 459 (1963), acq. 1964-1 CB (pt. 1) 4. In any case, it seems that some type of tracing of the contribution to gross income received by the trust (or estate) is required to support a deduction under Code Section 642(c).

Tracing might be problematic when a trust (or a decedent's estate) owns an interest in a "pass through" entity such as a partnership (including many hedge fund investment entities). Income may be imputed to the trust as a partner (or other owner) but without a corresponding receipt of gross income.¹⁵ Income of a pass through entity is deemed distributed to a partner (or other owner) even if not received and, if and when the income is distributed, it typically is treated as a receipt other than gross income. Note that under Code Section 702(a)(4), charitable contributions made by a partnership pass through to the partners. A trust that is a partner must take into account its distributive share of the partnership's income, gain, loss, deductions (including charitable contributions). In Revenue Ruling 2004-5,¹⁶ the Service ruled that a trust was allowed a deduction under section 642(c) for the trust's distributive share of a charitable contribution made by the partnership from the partnership's gross income, even though the governing instrument of the trust neither authorized nor directed the trustee to make distributions to charity. However, when a partnership makes a charitable contribution from gross income, that income is never available to the trust. In the ruling, it seemed important that the partnership made the charitable contribution from its own gross income. In any case, to try to establish that gross income from the pass through entity has been paid to charity, it may be appropriate for the trust (or estate) to make its investments in pass through entities through an entity, such as a partnership or LLC, it controls (the "Control Entity"). The Control Entity will be treated as receiving the income from the pass through investment entities. The trust (or estate) will be treated as receiving gross income from the Control Entity and, by funding the Control Entity with cash in addition to the pass through entity investments, it can distribute cash to the trust (or estate) as its partner (or owner) which should satisfy any requirement that the gross income can be traced to what the trust (or estate) in turn distributes to charity.

¹⁵ In the context of an estate, the Tax Court has permitted the flow-through of partnership charitable deductions. *See Estate of Lowenstein v. Comm'r*, 12 T. C. 694 (1949); *Estate of Bluestein v. Comm'r*, 15 TC 770 (1950).

¹⁶ Rev. Rul. 2004-5, 2004-1 C.B. 295. *See also* Chief Couns. Adv. 200928029. Under I.R.C. § 6110(k)(3), neither National Office Technical Advice Memorandum nor a Private Letter Ruling may be cited or used as precedent.

3. FLEXIBILITY TO ALLOCATE ITEMS OF INCOME AND GAIN BETWEEN TRUST AND BENEFICIARY

Background: The income tax rules that apply to trusts and individuals are very complicated. Trusts have a highly compressed rate structure, and income tax rates have risen in recent years. Computerized income tax projections may be needed to be maintained to guide the trust and its beneficiary(ies) in implementing the distribution strategy that optimizes income tax (balanced, of course, against other purposes of the trust).

Dynasty trusts generally do not mandate distribution of income to the beneficiary. This approach provides greater flexibility in setting distribution strategy and may also support other trust objectives (for example, to support creditor protection, or to limit distributions that might not serve the trust's purpose).

Under the Uniform Principal and Income Act, gains are allocated to trust accounting principal by default, although the trust can override this default. Including the ability to override this default may provide added flexibility in setting a distribution strategy. Special drafting may be required to accomplish this goal. The following sample clauses illustrate how this drafting can be done.

Other techniques are also discussed in this section to increase flexibility in a distribution strategy, such as segregating assets that produce one category of income in a separate trust, or allocating deductions more to one class of income than another.

*Sample Clause Granting Non-Interested Trustee Discretion to Allocate Certain Gains to Income:*¹

A. Allocate Gain to Income or Principal. The Trustee (other than any Interested Trustee) may allocate within the meaning of Reg. §1.643(a)-3(b) to income or to principal, or partly to income and partly to principal, all or part of the realized gains from the sale or exchange of trust assets; provided, however, that, if income is defined under an applicable state statute as a unitrust amount and the trust is being administered pursuant to such statute, the allocation of gains to income must be exercised consistently and the amount so allocated may not be greater than the excess of the unitrust amount over the amount of distributable net income determined without regard to Reg. §1.643(a)-3(b).

B. Character of Unitrust Amount Paid. The Trustee (other than any Interested Trustee) may, within the meaning of Reg. §1.643(a)-3(e), specify the tax character of any unitrust amount paid hereunder. The Trustee (other than any Interested Trustee) may take any action that may be necessary in order for such specification to be respected for tax purposes.

C. Distributions as Paid from Capital Gains. The Trustee (other than any Interested Trustee and other than the Grantor) may deem, within the meaning of Reg. §1.643(a)-3(e), any discretionary distribution of principal as being paid from capital gains realized during the year. The Trustee (other than any Interested Trustee and other than the Grantor) may take any action that may be necessary in order for such deeming to be respected for tax purposes.

*Sample Clause Providing General Authority to Apportion Income and Expenses:*²

Section ____. **Apportion Income and Expenses.** The trustee is authorized to apportion any receipt or disbursement between principal and income, notwithstanding the apportionment that would apply under RSMo3 apart from this provision; to determine the depletable, depreciable or amortizable interest of the principal and income in any property included among the trust estate subject to being depleted, depreciated or amortized, and to apportion the amount received from such property between principal and income; to maintain reasonable reserves for depletion, depreciation, amortization and obsolescence; to allocate to income or principal of the trust estate any gains or losses realized upon the sale or disposition of any part of the trust estate; to determine what part, if any, of the actual income received upon a wasting investment or upon any security purchased or acquired at a premium shall be returned and added to principal to prevent a diminution of principal upon exhaustion or maturity thereof; and to determine what payment, if any, should be made to any income beneficiary as compensation for losses of income due to the acquisition or retention of property returning no income or slight income; provided, however, that

¹ See Article XXI, Sections O, P, and Q of sample trust contributed by Jonathan Blattmachr.

² Contributed by Steve Gorin.

³ "RSMo" means the Revised Statutes of Missouri, including all amendments thereto and successor laws.

the trustee, in taking any action under this Section, must reasonably and fairly balance the interests of the income and remainder beneficiaries.

*Sample Clause Providing General Authority to Allocate Between Principal and Income, and Additional Authorities to Non-Interested Trustee:*⁴

1.1 Allocate Between Principal and Income. The Trustee is authorized to determine what is principal and income of the trust estate and what items shall be charged or credited to either. In making these determinations, the Trustee shall act reasonably and treat the beneficiaries impartially consistent with the Trustee's fiduciary duties, and the Trustee may not exercise these powers in any way that departs fundamentally from traditional principles of income and principal within the meaning of Treasury Regulations Section 1.643(b)-1. No inference of imprudence or partiality shall arise solely because the Trustee exercises the Trustee's discretion to determine what is principal and income in a manner that deviates from default rules of law that arbitrarily allocate fixed percentages of receipts to principal and income.

In addition to the powers vested in the Trustee in the foregoing provisions of this Section __, the Trustee, other than an Interested Person, is further authorized:

(a) To exercise the power to make adjustments between principal and income pursuant to Texas Property Section 116.005⁵ (or comparable provision under any other applicable law), subject to the requirements or any further limitations of said Code Section (or comparable provision). For purposes of this Section __ only, the term "Interested Person" shall be deemed to also include a beneficiary of the trust within the meaning of Texas Property Code Section 116.005(c)(6) (or comparable provision under any other applicable law).

(b) To allocate, within the meaning of Treasury Regulations Section 1.643(a)-3(b), to income or to principal, or partly to income and partly to principal, all or part of the realized gains from the sale or exchange of trust assets; provided, however, that, if income is defined under an applicable state statute as a unitrust amount and the trust is being administered pursuant to such statute, the allocation of gains to income must be exercised consistently and the amount so allocated may not be greater than the excess of the unitrust amount over the amount of distributable net income determined without regard to Treasury Regulations Section 1.643(a)-3(b).

(c) To specify, within the meaning of Treasury Regulations Section 1.643(a)-3(e), the tax character of any unitrust amount paid hereunder if an ordering rule is not provided under applicable state law or this instrument, and take any action that may be necessary in order for such specification to be respected for tax purposes.

(d) To deem, within the meaning of Treasury Regulations Section 1.643(a)-3(e), any discretionary distribution of principal as being paid from capital gains realized during the year and to take any action that may be necessary in order for such deeming to be respected for tax purposes.

1.2 Interested Person.⁶ The term "Interested Person," with respect to a trust created hereunder, means: (a) a Settlor, (b) a Current Beneficiary of such trust or a person designated or appointed as an Officer of such trust by a Current Beneficiary unless such person is a Qualified Person with respect to such Current Beneficiary, (c) a Successor Beneficiary of such trust, and (d) a disclaimant of property held by such trust (but such disclaimant shall only be deemed to be an Interested Person with respect to the portion of such trust consisting of the disclaimed property).

1.3 Qualified Person. A person or entity is a "Qualified Person" with respect to an individual (the "Individual") if the person is a corporation, partnership, limited liability company or an individual qualified to act as a trustee in the United States or any other common law jurisdiction. However, a Qualified Person shall specifically exclude: (a) a Settlor, (b) the Individual, (c) a beneficiary of any trust created hereunder, and (d) a person who is a "related or subordinate party" (as such term is defined in Code Section 672) with respect to a Settlor, the Individual or a beneficiary of any trust created hereunder.

⁴ Contributed by Steve Trytten. This clause is similar to Jonathan's, but is more explicit about the scope of power held by an interested person serving as trustee.

⁵ The clause integrates Texas's implementation of the "power to adjust" under the 1997 UPIA.

⁶ Steve Trytten's definition of interested person is similar to Jonathan's, except it also generally includes any person designated or appointed as an officer of the trust by a current beneficiary.

Task Force Comments. The clauses shown above illustrate tools that can be applied to optimize the aggregate income tax paid by the trust and its beneficiaries.

To the extent a fiduciary exercises discretion to make (or not make) allocations, tax and non-tax consequences should be considered. A discussion of these potential consequences is beyond the scope of this paper, but for more information see two leading articles in this area:

- Jonathan's article, "The Tax Effects of Equitable Adjustments: An Internal Revenue Code Odyssey," 18th University of Miami (Heckerling) Estate Planning Institute ¶ 1400 (1984).
- Dobris, "Equitable Adjustments in Postmortem Income Tax Planning: An Unremitting Diet of Worms," 65 Iowa L. Rev. 103 (1979).

It is widely believed that income taxes will be higher if an item of income is taxed at the trust level than at the individual level. This belief arises from the low exemptions and compressed income tax brackets that apply to trusts. However, if the individual beneficiary is already in the top income tax bracket, taxation at the trust level will not necessarily increase the overall income tax bill and might even reduce it.

There are many differences in the income tax rules that apply at the trust and individual levels, but as one example, trusts and estates are not subject to the "3% of AGI haircut" of itemized deductions (other than medical expenses, investment interest, casualty and theft losses, or gambling losses).⁷

This is particularly significant if the trust is receiving retirement plan distributions that qualify for the "IRD deduction" for estate taxes paid on the retirement plan.⁸ If the trust accumulates the retirement plan distributions, it will benefit from the IRD deduction without application of the 3% haircut. On the other hand, if the trust distributes the retirement plan distributions to the beneficiary, the IRD deduction will follow the distribution, and will be subject to the 3% haircut in the beneficiary's hands if the beneficiary's adjusted gross income exceeds his or her applicable threshold.

If the beneficiary is already in the top income tax bracket, overall income taxes will probably be lower if the trust can accumulate the retirement plan distribution. Further, the beneficiary will have a lower AGI and may get better mileage out of his or her other deductions.

A lower AGI may also mean the beneficiary will pay less 3.8% net investment income tax ("NIIT"). Although retirement plan distributions are not directly subject to the NIIT, they can indirectly increase the NIIT by pushing the individual beneficiary's modified adjusted gross income ("MAGI") above the threshold at which the tax begins to apply. On the other hand, the NIIT threshold for trusts is so low (\$12,501 in 2017), that accumulating taxable retirement plan distributions is unlikely to result in any increase in the trust's NIIT.

Given these advantages related to the IRD deduction and the NIIT, it may make sense in many cases for trusts to accumulate retirement plan distributions (particularly Roth IRA distributions). However, when a trust receives more than one category of income (for example, part retirement plan and part non-retirement plan), any distribution that carries income out to a beneficiary is generally considered to carry out a pro rata portion of each category of income. So if the beneficiary will need distributions, it may not be possible to accumulate all of the retirement plan distributions.

However, flexibility to accumulate retirement plan distributions is possible if retirement and non-retirement assets are segregated in separate discretionary trusts. The "multiple trust rule," which requires certain trusts to be treated as a single trust for federal income tax purposes, must be considered in designing the separate trusts.⁹ Under Code Section 643(f), two trusts are treated as one trust if (i) they have substantially the same grantors and primary

⁷ IRC § 68.

⁸ IRC § 691(c).

⁹ IRC § 643(f).

beneficiaries; and (ii) a principal purpose of such trusts is the avoidance of income tax. This Code Section's original purpose of limiting multiple "bracket rides"¹⁰ is less an issue now that trust brackets are severely compressed.

Code Section 643(f) shouldn't apply in this situation. This two-trust arrangement is not the abusive "multiple bracket ride" strategy that Code Section 643(f) was designed to curtail. The primary purpose in creating the separate retirement plan trust is to address specialized minimum distribution rules that apply to those assets. The separate retirement plan trust will be an accumulation see-through trust, which requires specialized drafting that should only apply to retirement assets and not to non-retirement assets.¹¹ For example, beneficiaries will be limited either by age or by class, as will the permissible appointees under any power of appointment. It will also be necessary to track accumulations that came from retirement plan distributions and treat them separately from other accumulations.

To assert that the two-trust arrangement has a principal purpose of avoiding income tax seems a tough hill to climb when one considers that part of the tax benefit of the two-trust arrangement is tax deferral (not avoidance) through stretched-out retirement plan distributions and possible reduction in the NIIT (which is not an income tax).

Whether or not a two-trust arrangement is used, it may also be helpful to focus on how indirect expenses (expenses that are not directly allocable to a particular asset or activity) are allocated among various categories of income. If a trust has tax-exempt income, a portion of indirect expenses is deemed allocable to tax-exempt interest and is disallowed.¹² Otherwise, the trustee may allocate those expenses against various categories of income in any fashion.¹³

¹⁰ *Estelle Morris Trusts v. Comm'r*, 51 TC 20 (1968), *aff'd per curiam*, 427 F2d 1361 (9th Cir. 1970) (twenty trusts for two beneficiaries recognized as separate trusts). The IRS succeeded in consolidating numerous multiple trusts in two earlier cases, *Sence v. United States*, 394 F2d 842 (1968) (nineteen trusts for a single beneficiary), and *Boyce v. United States*, 296 F2d 731 (5th Cir. 1961) (ninety identical trusts for one beneficiary).

¹¹ See the discussion of see-through trusts in Chapters 9-10.

¹² IRC § 265; Reg. § 1.652(b)-3(b).

¹³ Treas. Regs. § 1.662(c)-4(e).

4. AVOIDING APPLICATION OF THE 2% FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS

Background: A trust is allowed "above the line" deductions for expenses incurred in connection trust administration that would not have been incurred if the property were not held in the trust.¹ The balance of the trust's expenses are likely to be treated as miscellaneous itemized deductions, deducted "below the line" and subject to a "2% of AGI floor" (and disallowed as a deduction for alternative minimum tax).

The rules for determining the expenses "that would not have been incurred if the property were not held in trust" were the subject a series of court cases and two sets or proposed regulations before they were finalized with final regulations issued in 2014.² Among other things, these regulations require that certain trustee, legal, or other fees need to be "unbundled" to determine the appropriate portion that can be deducted "above the line."

The Task Force determined that there is not much that can be done from a drafting standpoint to maximize "above the line" deductions, other than preserving flexibility in the trustee's ability to hire outside advisors and to receive compensation. For example, if an outside investment advisor is paid separately for the investment duties that would have been incurred even if the property were not in trust, then the trustee's fees may not get cut back.

¹ IRC § 67(e). "Above the line" deduction refers to a deduction taken from gross income to arrive at adjusted gross income ("AGI").

² TD 9664, 79 Fed. Reg. 26,616, adopting Treas. Regs. § 1.67-4 (May 9, 2014).

5. MINIMIZING EXPOSURE TO THE 3.8% NET INVESTMENT INCOME TAX

Background: The 3.8% tax on net investment income¹ adds another layer of tax to trusts and beneficiaries. It also complicates the process of optimizing income tax between the trust and its beneficiary(ies) because the threshold at which the tax applies is much lower for trusts than it is for individuals.

Task Force Comments.

The 3.8% tax can be reduced by any expense that can be deducted "above the line," such as Trustee fees. From a drafting perspective, it will be helpful to avoid any blanket prohibition on trustee compensation. A beneficiary or other family member who might otherwise waive trustee fees might appreciate the flexibility to take fees if it produces net income tax savings.

However, in the absence of a blanket prohibition of fees, the trustee who prefers not to take fees needs to be mindful that there may be a limited time period for the fiduciary to waive fees without income or gift tax consequence.² It will also be helpful if the trust instrument addresses the manner in which a trustee waives fees.

*Sample Clause Setting Trustee Compensation and Providing When and How Trustee Can Waive Fees:*³

Section ____ . COMPENSATION OF TRUSTEE.

(a) **Individual Trustee.** An individual trustee, other than my spouse or me while I am living, is entitled to receive compensation out of the assets of the trust estate. The amount of the individual's compensation shall be reasonable in view of the time required of the individual, the nature and value of the assets in the trust estate and the amount of compensation provided for comparable services for comparable trusts in the market where the trust is situated, under the published fee schedules of corporate trustees in effect at the time the individual trustee's services are rendered.

(b) **Corporate Trustee.** A corporate trustee shall receive such compensation for its services as trustee as provided for in its published schedule of fees in effect at the time such services are rendered, or such lesser amount as it may, from time to time, agree. Anything herein to the contrary notwithstanding, no corporate trustee shall be entitled to a termination fee, a distribution fee, or a fee resulting from the resignation or removal of such corporate trustee.

(c) **Any Trustee.** Any trustee may waive its compensation, either expressly or by implication, in whole or in part. Any trustee, whether individual or corporate, is entitled to be reimbursed for such expenses as may be incurred by the trustee in connection with the administration of the trust.

¹ IRC § 1411.

² Rev. Rul. 66-167, 1966-1 C.B. 20; *Breidert v. Commissioner*, 50 T.C. 844, 848 (1968).

³ Contributed by Steve Gorin.

6. GRANTOR TRUST STATUS

Background: Drafting to make an inter vivos irrevocable trust a grantor trust under Code Sections 671-677 can be complicated. This Chapter presents multiple sample forms for consideration.

Whether Swap Power is Held by Grantor or Third Party. The power, held in a non-fiduciary capacity, to reacquire trust property by substituting other property of equivalent value (the "swap power") plays a prominent role in many practitioners' grantor trust forms. There has been concern over the years as to whether this power could cause estate inclusion if it extends to life insurance on the grantor's life or to stock in a controlled corporation that is subject to Code Section 2036.

The IRS has conceded that a grantor's retained swap power does not result in inclusion of the assets subject to the power under Code Sections 2036 and 2038,¹ and does not result in inclusion of life insurance on the grantor's life under Code Section 2042(2).²

Could a grantor's retained swap power cause inclusion of voting stock in a controlled corporation under Code Section 2036(b)? Some practitioners believe that this is not a concern, but others are not so sure and think that the safest course is to vest the swap power in someone other than the grantor.³ The first sample clause below illustrates a third party swap power.

*Sample Grantor Trust Form (Third Party Holds Swap Power):*⁴

ARTICLE XXVII The Selector

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Selector. Until the Grantor's death, the Selector is authorized, acting in an individual capacity and not in a fiduciary capacity, at any time and from time to time, to add one or more of organizations described in Code Sec. 2055 to the class of beneficiaries of any trust under this Agreement; provided, however, that in no event may the Selector add the Selector to such class of beneficiaries; provided, further, that in no event may the Selector add to the class of beneficiaries of any trust hereunder which may qualify (by election or otherwise) for the Federal marital deduction.

Any Selector may cease to act as Selector by delivery of a written and acknowledged notice to the Trustee. If the Selector should cease to act for any reason without having fully released the power to add to the class of beneficiaries pursuant to this Article, the successor Selector shall be such individual (other than the Grantor or any person who may be added as a beneficiary pursuant to this Article or any person who is a related or subordinate party within the meaning of Code Sec. 672(c) with respect to the Grantor or any person who may be added as a beneficiary) as shall be designated by a written and acknowledged instrument executed by the Trustee. If at any time prior to the complete release of the power to add to the class of beneficiaries under this Article there is no Selector acting hereunder, the Trustee (but acting in an individual capacity and not in a fiduciary capacity) shall exercise the Selector's powers under this Article until the appointment of a successor Selector as provided in this Article.

The Selector may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Grantor releasing such power. Any such release made by the Selector shall be irrevocable, and shall be binding upon all current and successor Trustee and the current and successor Selector and all persons interested hereunder, and no person shall thereafter have the power to add to the class of beneficiaries under this Article to the extent of such release.

ARTICLE XXVIII Power to Substitute Property

¹ Rev. Rul. 2008-22, 2008-16 I.R.B. 796. Although the ruling holds that inclusion does not arise under § 2036, there is no analysis devoted to closely-held voting stock. Thus, the holding may not necessarily extend to § 2036(b).

² Rev. Rul. 2011-28, 2011-49 I.R.B. 830.

³ See *Danforth and Zaritsky*, BNA Portfolio E,G&T #819-1st, Section XII.C.3. for a succinct argument supporting the position that a third party who is non-adverse may hold this power.

⁴ See Articles XXVII - XXIX of sample trust contributed by Jonathan Blattmachr.

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Substitutor. During the Grantor's lifetime, the Substitutor shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity (within the meaning of Code Sec. 675(4)) without the approval or consent of any person in a fiduciary capacity within the meaning of that section, to acquire or reacquire any asset or assets forming part of the trust estate of any trust held under this Agreement (other than any direct or indirect interest in stock that would, by reason of such power of substitution, be included in the gross estate of the Substitutor for Federal estate tax purposes under Code Sec. 2036(b)) by substituting other property of an equivalent value, determined as of the date of such substitution. With respect to any such "2036(b)" stock described in the immediately preceding sentence, the Trustee shall appoint another individual, who is not a person in whose estate such stock would be so included if such person held the power, directly or indirectly, to vote such stock, to hold such power of substitution with respect to such assets, such person so appointed with respect to such assets being the "Substitutor" only with respect thereto. The Grantor directs that this power is not assignable, and any attempted assignment will make this power void. Without reducing or eliminating the fiduciary duties imposed on the Trustee hereunder or by applicable law, the Substitutor shall exercise this power to substitute property by certifying in writing that the substituted property and the trust property for which it is substituted are of equivalent value, and the Trustee shall have a fiduciary obligation to ensure the Substitutor's compliance with the terms of this power by being satisfied in advance of completing the substitution that the properties acquired and substituted are in fact of equivalent value, within the meaning of Revenue Ruling 2008-22. This power to substitute property cannot be exercised in a manner that can shift benefits among the trust beneficiaries. Without limiting the foregoing prohibition upon shifting benefits among trust beneficiaries, the Trustee shall have, with respect to any trust which is not being administered as a unitrust or the distributions from which are not limited to discretionary distributions of principal and income (so that the power to reinvest the principal of the trust and the duty of impartiality are not required in order to avoid this power of substitution potentially causing a shift of benefits among trust beneficiaries, all within the meaning of Revenue Ruling 2008-22), the power to reinvest the principal of the trust and the duty of impartiality with respect to trust beneficiaries at all times while this power of substitution is in effect. The foregoing grant of a power of reinvestment and imposition of a duty of impartiality are included herein for compliance with Revenue Ruling 2008-22, and whenever such power and duty are not granted and imposed under this Article, the remaining provisions of this Agreement shall determine whether and to what extent such power and duty are granted and imposed. The Substitutor may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Trustee. Any such release made by the Substitutor shall be irrevocable, and shall be binding upon all current and successor Trustees, the current and any successor Substitutor, and all persons interested hereunder, and no person shall thereafter have the power to substitute trust property under this Article to the extent of such release. Any Substitutor may cease to act as Substitutor by delivery of a written and acknowledged notice to the Trustee. If the Substitutor should cease to act for any reason without having fully released the power to substitute property as provided under this Article, and if no successor Substitutor has otherwise been named, the successor Substitutor shall be such individual as shall be designated by a written and acknowledged instrument executed by the Trustee. If at any time prior to the complete release of the power of substitution there is no Substitutor acting hereunder, the Trustee (but acting in an individual capacity and not in a fiduciary capacity) shall exercise the Substitutor's powers under this Article until the appointment of a successor Substitutor as provided in this Article.

ARTICLE XXIX

Power to Compel Trustee to Loan Without Adequate Security

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Loan Director. During the Grantor's lifetime, the Loan Director shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity (within the meaning of Code Sec. 675) without the approval or consent of any person in a fiduciary capacity within the meaning of that section, to compel the Trustee to loan some or all of the trust property to the Grantor without adequate security within the meaning of Code Sec. 675(2) although with adequate interest within the meaning of that section. The Grantor directs that this power is not assignable. In the event that Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder dies before the Grantor dies, the successor Loan Director shall be such individual (other than the Grantor, any person acting as a Trustee under this instrument or anyone who is an adverse party within the meaning of Code Sec. 672) whom Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder shall have designated by instrument in writing. Any

person other than Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder acting as a Loan Director hereunder shall also have the power to name a successor Loan Director by an instrument in writing. In the event that no one else is acting as a Loan Director hereunder, the oldest individual acting as a Trustee hereunder (or if none, the corporation or other entity acting as Trustee hereunder) shall be the Loan Director but acting only in a non-fiduciary capacity.

The person acting as the Loan Director hereunder may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Grantor releasing such power. Any such release made by the Loan Director shall be irrevocable, and shall be binding upon all current and successor Trustees and the current and any successor Loan Director and all persons interested hereunder, and no person shall thereafter have the power to compel the Trustee to make loans to the Grantor without adequate security.

*Sample Grantor Trust Forms (Swap Powers for Single Grantor, Two Grantors, Swap Power by Third Party, and Community Property Clause):*⁵

SINGLE GRANTOR SWAP POWER:

Notwithstanding any contrary provision, I may reacquire any of my grantor property from any trust created under this instrument by substituting other property of an equivalent value. For purposes of the preceding, my "grantor property" means the property (or portion of property) with respect to which I am the grantor for federal income tax purposes. I may irrevocably release this power in whole or in part by notice to the Trustee. I may exercise (or release) this power: (i) in a non-fiduciary capacity and without the consent of any person; and (ii) through a duly appointed guardian or a duly authorized attorney-in-fact. I hold this power in a non-fiduciary capacity, and may exercise it without the approval or consent of the Trustee or any other person. However, the Trustee, acting in a fiduciary capacity shall have a duty to ensure that the property substituted has equivalent value, and to that end, shall provide me with sufficient information regarding the assets of the trust to enable a suitable valuation of the assets to be performed. I intend that the trusts created under this instrument constitute "grantor trusts" for income tax purposes under the Code whenever (and to the extent that) this power exists but not otherwise; this instrument shall be administered and interpreted in a manner consistent with this intent and any provision which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

TWO GRANTOR SWAP POWER:

Notwithstanding any contrary provision, each of us who is then living may reacquire any of his or her grantor property from any trust created under this instrument by substituting other property of an equivalent value. For purposes of the preceding, a person's "grantor property" means the property (or portion of property) with respect to which that person is the grantor for federal income tax purposes. Each of us may irrevocably release this power in whole or in part by notice to the Trustee. Each of us may exercise (or release) this power: (i) at any time and any number of times; (ii) in a non-fiduciary capacity and without the consent of any person; and (iii) through a duly appointed guardian or a duly authorized attorney-in-fact. Each of us holds this power in a non-fiduciary capacity, and may exercise it without the approval or consent of the Trustee, the other of us, or any other person. However, the Trustee, acting in a fiduciary capacity shall have a duty to ensure that the property substituted has equivalent value, and to that end, shall provide us with sufficient information regarding the assets of the trust to enable a suitable valuation of the assets to be performed. We intend that the trusts created under this instrument constitute "grantor trusts" for income tax purposes under the Code whenever (and to the extent that) this power exists but not otherwise; this instrument shall be administered and interpreted in a manner consistent with this intent and any provision which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

SWAP POWER EXCISED BY THIRD PARTY:

Notwithstanding any contrary provision, the Administrative Agent named below may reacquire any of my grantor property from any trust created under this instrument by substituting other property of an equivalent value. For purposes of the preceding, my "grantor property" means the property (or portion of property) with respect to which I am the grantor for federal income tax purposes. The Administrative Agent may irrevocably release this power in whole or in part by notice to the Trustee. The Administrative Agent may exercise (or release) this power: (i) at any time and any number of times; (ii) in a non-fiduciary capacity and without the consent of any

⁵ Contributed by Mickey Davis.

person; and (iii) through a duly appointed guardian or a duly authorized attorney-in-fact. The Administrative Agent holds this power in a non-fiduciary capacity, and may exercise it without the approval or consent of the Trustee or any other person. However, the Trustee, acting in a fiduciary capacity shall have a duty to ensure that the property substituted has equivalent value, and to that end, shall provide the Administrative Agent with sufficient information regarding the assets of the trust to enable a suitable valuation of the assets to be performed. I intend that the trusts created under this instrument constitute "grantor trusts" for income tax purposes under the Code whenever (and to the extent that) this power exists but not otherwise; this instrument shall be administered and interpreted in a manner consistent with this intent and any provision which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent. For purposes of this instrument, the Administrative Agent shall be [Name of Administrative Agent], or if his/she fails to serve, [Name of Successor Administrative Agent]. Until the power conferred in this Section is wholly released, each Administrative Agent shall designate a successor Administrative Agent to act in the event that the person(s) named above die, resign, or otherwise cease to act.

COMMUNITY PROPERTY ISSUES IN GENERAL:

Character Of Beneficial Interests. All interests provided under this instrument (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me to the beneficiary, and shall not be the community property of the beneficiary and his or her spouse.

*Sample Grantor Trust Form (Swap Power; Grantor is Trustee):*⁶

Section __. Power to Exchange Assets. During my lifetime, I, acting alone in my individual capacity and not in any fiduciary capacity, shall have the power, with respect to any trust created under this Agreement, to reacquire the trust corpus by substituting other property of an equivalent value. The power described in this Section may be exercised by me or by an agent of mine appointed under a durable power of attorney or through any other means, whose actions shall be conclusive and binding. Neither the consent of the trustee nor the consent of any other person shall be required. Upon exercise of this power, I shall notify the person designated in Section __ to succeed me as trustee, and such person shall serve as special trustee for purposes of this Section, ignoring any exercise by me of powers under Section __; my spouse shall hold all powers described in Section __ to change the person(s) designated to serve as this special trustee as if I were incapacitated; and, if there is a total vacancy that my spouse does not fill, then I shall appoint a special trustee who is not a related or subordinate party (as defined in Code Section 672(c)) with respect to me. This special trustee shall comply with Rev. Rul. 2008-22 or Rev. Rul. 2011-28, as applicable, including satisfying himself or herself that the properties acquired and substituted pursuant to this Section are in fact of equivalent value and that the that the proposed substitution will not have the effect of shifting beneficial interests among trust beneficiaries. The power described in this Section may be released by a written statement executed by me or by an agent appointed under a durable power of attorney or through any other means (whose actions shall be conclusive and binding), and delivered to the trustee.

*Sample Grantor Trust Form (Married Settlers Funded With Community Property):*⁷

1.1 Grantor Trust Provisions. For purposes of this Section __, the term "Grantor Trust Rules" refers to Code Sections 671 through 679 and comparable rules of any applicable state or other jurisdiction.

(a) Settlor's Grantor Portion. A Settlor's "Grantor Portion" refers to that portion of the trust estate as to which such Settlor is the grantor. If the Settlers transferred property in trust that was owned by them as joint tenants with right of survivorship or as community property, then each Settlor is deemed to be the grantor as to a 50% portion of said property.

(b) Substitution Power. Subject to Section [Cross references our Controlled Corporation Stock provision] regarding Controlled Corporation Stock, each Settlor, acting in a non-fiduciary capacity, without the approval or consent of any person acting in a fiduciary capacity, shall have the power to reacquire all or any part of his or her Grantor Portion of any trust created hereunder by substituting other property of equivalent value, determined as of the date of such substitution

⁶ Contributed by Steve Gorin.

⁷ Contributed by Steve Trytten.

(such power vested in each Settlor is referred to in this instrument as a Settlor's "Substitution Power"), subject to the following:

(i) No Settlor's Substitution Power may be exercised in a manner that shifts benefits among the trust beneficiaries within the meaning of Revenue Rulings 2008-22 and 2011-28.

(ii) Without reducing or eliminating the fiduciary duties imposed upon the Trustee, a Settlor shall exercise this Substitution Power by certifying in a written instrument that the substituted property and the trust property for which it is substituted are of equivalent value, and the Trustee, other than a Settlor, shall have a fiduciary obligation to ensure, with respect to any exercise of the Substitution Power, that the properties acquired and substituted by such Settlor have equivalent value within the meaning of Revenue Rulings 2008-22 and 2011-28.

(iii) Each Settlor may, acting in a non-fiduciary capacity, irrevocably relinquish his or her Substitution Power. Any such relinquishment shall be made in a written instrument delivered to the other Settlor, if then living, and each then serving Trustee, and shall be effective as of the date of its execution.

(iv) Unless relinquished sooner, the Substitution Power with respect to a Settlor's Grantor Portion shall terminate at that Settlor's death.

(c) Power to Vest Borrowing Power. The Trust Protector shall have the power to vest each Settlor with the power to borrow all or some of such Settlor's Grantor Portion of any trust created hereunder without the requirement of adequate security notwithstanding any provision to the contrary in Section *[Cross references to our Power to Lend provision]* (the Trust Protector's power is referred to in this instrument as the "Power to Vest Borrowing Power"). The Power to Vest Borrowing Power shall be exercised by the Trust Protector in a written instrument delivered to each then living Settlor and each then serving Trustee. The Trust Protector may irrevocably disclaim or release the Power to Vest Borrowing Power in a written instrument delivered to each then living Settlor and each then serving Trustee, and such release or disclaimer shall be effective as of the date of its execution, unless a later date is specified in such written instrument.

(d) Power to Add Charitable Beneficiaries. Until the death of a Settlor, the Trust Protector shall have the power to designate one or more Charities as additional beneficiaries ("Power to Add Charitable Beneficiaries") of the principal and/or income of that Settlor's Grantor Portion of any trust created hereunder, and to specify prospectively what amounts or proportions of the income or principal (or both) of such Settlor's Grantor Portion, without limitation, shall be distributed to each such additional beneficiary or beneficiaries and the time or times for distributions. In addition, the Trust Protector shall have the power to change or terminate any prior designation made pursuant to the Trust Protector's Power to Add Charitable Beneficiaries. Any designation of a Charity as a beneficiary, change to such designation, or termination of beneficiary status of a Charity under this Section ___ shall be effectuated by the Trust Protector in a written instrument delivered on or before the death of such Settlor to each Charity affected thereby, to each then living Settlor, and to each then serving Trustee. The Trust Protector may irrevocably disclaim or release the Power to Add Charitable Beneficiaries in a written instrument delivered to each then living Settlor and each then serving Trustee, and such release or disclaimer shall be effective as of the date of its execution unless a later date is specified in such written instrument.

(e) Intention to Be Treated as Owner of Grantor Trust Portion. For so long as any of the Substitution Power, the Power to Vest Borrowing Power, or the Power to Add Charitable Beneficiaries is in effect for all or any part of a Settlor's Grantor Portion of any trust created hereunder (such Settlor's "Grantor Trust Portion"), such Settlor intends that he or she be treated for income tax purposes as the owner (within the meaning of the Grantor Trust Rules) of such Grantor Trust Portion. *The Trustee is urged to consult with tax advisors as early as possible to determine the income tax reporting requirements for each trust created hereunder that is a grantor trust.*

2. Office of Special Agent. The provisions of this Section apply to the office of Special Agent.

2.1 Selection of Special Agent; Successors. The Settlers intend that the Trustee of each trust hereunder have the ability to appoint a Special Agent on an "as needed" basis whose only purpose would be to hold and have the ability to exercise the powers set forth below. A Special Agent who so serves shall serve solely for such purposes and shall serve in a non-fiduciary capacity. The office of Special Agent shall be vacant at the time an irrevocable trust is first established. If at any time the office of Special Agent is vacant, the Trustee shall have the power

to select one or more persons to so serve who are (a) Qualified Persons⁸ with respect to each then living Settlor, each Current Beneficiary, and each Successor Beneficiary of such trust, and (b) not currently serving as a Trustee or Trust Protector. Any such appointment shall be made in a written instrument delivered to the appointee and filed with the records of the trust. Said appointee assumes the office of Special Agent upon the delivery of written acceptance to the Trustee of such office and remains in office until said Special Agent resigns or is otherwise unwilling or unable to serve.

2.2 Non-Fiduciary Capacity. The powers vested in the Special Agent shall be held in a non-fiduciary capacity. Thus, the Special Agent is not a Trustee or a Fiduciary and has no duty to the beneficiaries of the trust. Further, the Special Agent is not liable or accountable as a Trustee or Fiduciary when performing or declining to perform the express powers granted to the Trust Protector under this instrument. The Settlers realize that pursuant to the terms of this instrument, an individual serving as Special Agent may be concurrently serving as a Trustee or (or in any other fiduciary capacity under this instrument), and as a result, may hold some powers in a fiduciary capacity and others in a non-fiduciary capacity, and intends this result.

2.3 Powers of Special Agent. The Special Agent shall have the following powers, which may be exercised (or not exercised) in the Special Agent's sole discretion:

(a) During any period that either Settlor is treated as the owner of all or any portion of the assets of a trust hereunder for purposes of Code Sections 671 through 679, the Special Agent shall have the power to vest divest, or revest the Trust Protector with the power, exercisable in the Trust Protector's sole discretion, to apply (or not apply), all, any portion, or none of said assets, to pay all, any portion, or none, of any personal income tax liability imposed on such Settlor under Code Sections 671 through 679 (or comparable provisions of any other state or jurisdiction) with respect to the income or other income tax attributes arising from said assets and from any disposition of any of said assets, subject to the requirement that any such payment must be made directly to the taxing authority and may not be made to such Settlor.⁹ The Special Agent, Trust Protector, and Trustee are urged to consult with tax advisors in advance of vesting this power in the Trust Protector to evaluate any tax implications that might result from vesting this power in the Trust Protector, or from the Trust Protector's exercise of this power.

(b) The Special Agent shall have the power to revest the Trust Protector with any one or more of the powers as the Trust Protector may have previously relinquished or restricted; provided, however, that the Special Agent may not revest the Trust Protector with the Power to Vest Borrowing Power or the Power to Add Charitable Beneficiaries described in Section ___ if the Trust Protector has relinquished such power.

Any exercise of said powers by the Special Agent shall be made in a written instrument delivered to the Trustee or otherwise filed with the records of the trust, and shall be effective as of the date of its execution.

2.4 Resignation. Each Special Agent shall have the right to resign by delivering written notice of his, her or its resignation to the Trustee.

2.5 Compensation. Each Special Agent shall be entitled to receive reasonable compensation for duties performed hereunder and shall be reimbursed for reasonable expenses incurred on behalf of the trust.

⁸ Another provision not shown here provides that a person or entity is a "Qualified Person" with respect to an individual (the "Individual") if the person is a corporation, partnership, limited liability company or an individual qualified to act as a trustee in the United States or any other common law jurisdiction. However, a Qualified Person shall specifically exclude: (a) either Settlor, (b) the Individual, (c) a beneficiary of any trust created hereunder, and (d) a person who is a "related or subordinate party" (as such term is defined in IRC § 672) with respect to either Settlor, the Individual or a beneficiary of any trust created hereunder.

⁹ The Special Agent is authorized to activate a so-called "tax reimbursement power," that would be held by the Trust Protector. The power is discretionary, consistent with the requirements of Rev. Rul. 2004-64, 2004-2 CB 7. However, caution is advised before activating such a power. Depending on the applicable state law, the existence of such a power may cause trust property to be reachable by the grantor's creditors. To the extent the grantor's creditors can reach the trust property, the property is includible in the grantor's estate, which is normally inconsistent with the estate planning objectives. To avoid estate inclusion, it may be possible to move the trust to a situs that will not allow creditors to reach the property.

2.6 Advancement of Expenses; Indemnification of Special Agent. Expenses incurred by any Special Agent shall be advanced, and any Special Agent who is an individual, other than an individual who is a Professional Trustee (as defined in Section *[Cross references our definition of Professional Trustee found in our Exoneration provision]*), shall be held harmless and indemnified, in the same manner as if said Special Agent were a "Trustee" within the meaning of Section *[Cross references our Exoneration provision]*, subject to the limitations contained therein.

7. FLEXIBILITY TO QUALIFY AS ELIGIBLE TRUST TO HOLD S CORPORATION SHARES

Background: Not all trusts are eligible to hold S corporation stock. If an ineligible trust holds the stock (or in some cases, continues to hold the stock after a cure period), the S corporation's election may be terminated, potentially resulting in adverse tax consequences to the shareholders and the corporation.¹ Trusts that are permitted to hold S corporation stock, include grantor trusts,² qualified Subchapter S trusts ("QSSTs")³ and electing small business trusts ("ESBTs").⁴ Any trust that may hold S corporation shares needs flexible mechanisms to allow the trust to maintain compliance as an eligible S corporation shareholder as circumstances change.

*Sample Clause Authorizing Non-Interested Trustee to Act to Preserve S Corporation Shareholder Status:*⁵

ARTICLE XXII S Corporation Stock

Before the date on which any "S Corporation Shares" (defined below) otherwise would pass to or be treated as held by an "Ineligible Trust" (defined below), the Trustee (excluding, however, any Interested Trustee) may elect to hold these S Corporation Shares in one or more separate trusts or shares as set forth in this Article. The Trustee (excluding, however, any Interested Trustee) may elect to hold such S Corporation Shares under the paragraph entitled "Qualified Subchapter S Trusts" or the paragraph entitled "Electing Small Business Trusts," as the Trustee (excluding, however, any Interested Trustee) shall deem appropriate, considering the changes that such provisions would require from the terms and conditions under which such shares otherwise would be held under this Agreement.

A. **Qualified Subchapter S Trusts.** Any S Corporation Shares held under this paragraph shall be on the following terms:

1. Each trust held under this paragraph shall be a separate trust or substantially separate and independent share, as defined in Code Sec. 1361(d)(3), held for the benefit of one beneficiary. Any reference in this paragraph to a beneficiary's separate trust shall refer equally to any substantially separate and independent trust share.

2. Until the "QSST Termination Date" (defined below), the Trustee shall annually distribute all the trust's "Net Income" (defined below) to the sole beneficiary of each trust held under this paragraph, together with as much of that trust's principal as is appropriate under the standard contained in the trust which otherwise would have held such S Corporation Shares. The Trustee shall not distribute income or principal to anyone other than the beneficiary to whom Net Income is distributable until the QSST Termination Date.

3. Upon the QSST Termination Date, the Trustee shall distribute the remaining trust assets to the beneficiary to whom Net Income was then distributable, if then living, or otherwise in accordance with the terms of the Trust which would otherwise have held such S Corporation Shares.

4. The Trustee shall notify the sole beneficiary of each trust held under this paragraph that he or she must timely and properly elect under Code Sec. 1361(d)(2) to cause such trust *held* to be treated as a Qualified Subchapter S Trust for Federal income tax purposes, and if the beneficiary fails or refuses to do so, the Trustee shall hold such S Corporation Shares under the paragraph entitled "Electing Small Business Trusts."

5. The Trustee (excluding, however, any Interested Trustee) shall administer any trust under this paragraph as a Qualified Subchapter S Trust, as defined in Code Sec. 1361(d)(3).

6. In the event there is more than one income beneficiary of an Ineligible Trust (defined below), the Trustee shall divide the S Corporation Shares that will be held under this paragraph into separate trusts, based on each beneficiary's interest in the income of the Ineligible Trust that otherwise would have held those shares. If no beneficiary was entitled to income of such Ineligible Trust at that time, the Trustee may divide the S Corporation Shares into separate trusts

¹ IRC § 1361.

² IRC § 1361(c)(2)(A)(i)

³ IRC § 1361(d)

⁴ IRC § 1361(c)(2)(A)(v).

⁵ See Article XXII of sample trust contributed by Jonathan Blattmachr.

for the beneficiaries of such Ineligible Trusts in such manner as the Trustee (excluding, however, any Interested Trustee) shall deem appropriate.

B. Electing Small Business Trusts. Any S Corporation Shares held under this paragraph shall be held on the following terms:

1. The Trustee (excluding, however, any Interested Trustee) shall apportion to the trusts under this paragraph a reasonable share of the unallocated expenses of all trusts under this Agreement in a manner consistent with the applicable Internal Revenue Code and Treasury Regulations.
2. The Trustee shall make that election required by Code Sec. 1361(e)(3) to qualify the trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).
3. The Trustee (excluding, however, any Interested Trustee) shall administer each trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).

C. Implementation. The Trustee (excluding, however, any Interested Trustee) shall manifest its selection of the form in which it shall hold any S Corporation Shares by written notice to all persons who would be eligible or entitled at the time of such writing to receive income from the Ineligible Trust that otherwise would hold such S Corporation Shares.

D. Definitions. The following definitions apply for purposes of this Article:

1. "Ineligible Trust" means a trust whose ownership of any S Corporation Shares would cause the termination of that corporation's election to be taxed under subchapter S of the Code.
2. "Net Income" means income, as defined in Code Sec. 643(b).
3. "S Corporation Shares" means shares of any stock of a corporation that then operates or that the Trustee shall deem likely to operate in the future under an election to have its earnings taxed directly to its stockholders under subchapter S of the Code.
4. The "QSST Termination Date" means, separately, with respect to each trust held under the paragraph entitled "Qualified Subchapter S Trusts," the earlier of the date on which the beneficiary dies and the date on which the trust terminates.

*Sample Clause Authorizing Trustee to Act to Preserve S Corporation Shareholder Status:*⁶

QSST SAVINGS LANGUAGE

1.1. Creation of S Trusts. If: (i) any trust created under this instrument (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Descendant's Trust or Contingent Trust, the term "Current Beneficiary" means the child, other descendant or other beneficiary for whom the trust is named. In the case of the Marital Trust or the Bypass Trust, the term "Current Beneficiary" means the Surviving Spouse. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. We intend that every S Trust qualify as a QSST within the meaning of Code Section 1361(d)(3). This instrument shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

⁶Contributed by Mickey Davis.

*Sample Clause Providing Trustee (or Trust Protector) With Authority to Act to Preserve Status as S Corporation Shareholder:*⁷

SECTION S CORPORATION.

(d) With respect to any separate trust established under this Agreement which may acquire or hold any stock in a corporation that qualifies for treatment under section 1361 et seq. of the Code as an "S corporation," the trustee may elect to treat the trust holding such stock as an "electing small business trust" or may, in the trustee's sole and absolute discretion, modify the trust in order to permit the primary beneficiary to elect to treat the trust as a "qualified subchapter S trust," any such modification being subject to the last two sentences of this subsection. The trustee may change such election from time to time in such manner as is authorized by the Code and the Treasury Regulations, as the trustee, in such trustee's sole and absolute discretion, determines is in the best interest of the trust and the beneficiaries thereof. If it is decided to make such trust eligible to be treated as a "qualified subchapter S trust" and such trust does not qualify as a "qualified subchapter S trust," then the following provisions shall apply:

(1) Segregation of Stock. The trustee shall segregate all such stock and hold such stock as a separate trust for the sole benefit of the individual who is the primary beneficiary of such original trust; provided, however, that if there is more than one primary beneficiary of the trust, the trustee shall segregate all such stock, pro rata, into separate shares of the trust and hold each such share as a separate trust for the benefit of each such primary beneficiary. Except as otherwise provided in this Section, each separate trust created hereunder shall be: (A) held, administered and distributed pursuant to the terms and conditions set out in the Article under which such trust was created; (B) held as a separate trust thereunder until the death of the beneficiary of the trust, regardless of whether such trust continues to be funded with S corporation stock; (C) if, upon the death of the beneficiary of the trust, such trust continues in trust for further beneficiaries and is funded in whole or in part with S corporation stock, such trust shall continue to be held, administered and distributed in accordance with this Section for such further beneficiaries; and (D) no person may exercise a power to Appoint to the extent that any such exercise would permit any distribution to any person other than the primary beneficiary during the primary beneficiary's life.

(2) Distribution of Income and Principal. Notwithstanding any other provision herein to the contrary, the trustee shall distribute the income of each such trust to the primary beneficiary of the trust, and no other person, in convenient regular installments, not less frequently than quarterly; however, if a QSST election is not in effect, a Qualified Trustee (as defined below) may eliminate this mandatory income requirement (effective no earlier than the beginning of the next calendar year) and instead the rules for distributions of income to the primary beneficiary (but not to any other beneficiary) that applied before the application of this Section shall be restored. The trustee's authority to use and apply principal of such trust granted to the trustee in the Article under which such trust was created is limited to the use of such principal for the beneficiary of such segregated share of the trust, and no other person.

(3) Request to Beneficiaries. The then current income beneficiary of any such trust, or his or her legal representative, is requested to enter into a consent to any election that may be required under the Code, in the time and manner provided therein, in order to qualify the trust of which he or she is the then current income beneficiary as a qualified subchapter S trust.

No primary beneficiary of any separate trust under this Agreement who is serving as trustee or co-trustee of such trust shall participate in the election authorized in this Section with respect to such trust, unless the primary beneficiary has a general power of appointment over the entire trust. Instead, such election shall be exercised exclusively by the primary beneficiary's co-trustee or co-trustees, who or which is a Qualified Trustee, or, if the primary beneficiary is serving as sole trustee, by the first person(s) designated to act under Section __ or Section __ who or which is a Qualified Trustee, then living, and not incapacitated. As used in this Section, a Qualified Trustee is a person who is either (i) a trustee not designated or appointed to serve as trustee by the primary beneficiary of the trust or (ii) a trustee who is designated or appointed to serve as trustee by the primary beneficiary of the trust and is not a related or subordinate party (as defined in Code section 672(c)) with respect to such beneficiary.

[If Trust Protector is used, this paragraph replaces the preceding paragraph:]

⁷ Contributed by Steve Gorin.

No primary beneficiary of any separate trust under this Agreement who is serving as trustee or co-trustee of such trust shall participate in any decision whether to modify such trust, unless the primary beneficiary has a general power of appointment over the entire trust exercisable either currently or at death. Instead, such decision shall be made exclusively by the Trust Protector (and, if no Trust Protector is then serving, a Trust Protector shall be appointed by the person so authorized under Section ____).]

(e) The following paragraphs apply upon the death of the beneficiary of a trust with respect to which a QSST election is in effect immediately before the beneficiary's death, if and to the extent not overridden by a power to Appoint:

(1) If the individuals to whom the S corporation stock is allocated do not share in the residue of the deceased beneficiary's estate (in this Agreement, Article __ determines the sharing of the residue of my estate, because my will bequeaths my estate to the Revocable Trust and Article __ bequeaths the residuary trust assets), then any distributions the S corporation makes to pay its shareholders' taxes with respect to their distributive shares of taxable income before the date of death shall be treated as income earned before the beneficiary's death and paid to the beneficiary's revocable trust entitled to the residue of the beneficiary's estate, if any, otherwise to the beneficiary's estate.

(2) If and to the extent that paragraph (1) __ does not apply, during trust administration, after the beneficiary's death and before separate trusts can be funded, the trust will not terminate but rather will continue as a single trust with separate shares pursuant to U.S. Treas. Reg. Section 1.1361-1(j)(9)(ii), Example (1), Section __ shall not apply, and the trusts for the beneficiaries will be amended under paragraphs (1) __, (2) __, and (3) of subsection (A) __.

(f) If stock in any S corporation is specifically allocated to one or more persons and subsection (b) does not apply, see Section ____.

*Sample Clauses at Start of Trust Highlighting Importance of S Corporation Shareholder Status and Compliance With Shareholder Agreements:*⁸

1.1 Qualified S Corporation Shareholder. The property contributed by the Settlor to this trust includes shares in a corporation that qualifies for income tax purposes as an "S corporation" (as defined in Code Section 1361(a)(1)). The Trustee shall review Section __ regarding the Trustee's and Trust Protector's powers with respect to trusts that own shares in a corporation that seeks to maintain status as an S corporation, and the Trustee shall take appropriate action, if any, to ensure, if possible, that each trust created under this instrument satisfies the requirements to be an eligible shareholder of an S corporation under Code Section 1361 for so long as the trust holds shares in any corporation that seeks to maintain status as an S corporation. It is possible that the Trustee (or the beneficiary) may need to make a tax election upon the establishment or change in status of a trust, and that there may be a limited period of time to make said election.⁹

1.2 Compliance with Ownership Agreements. The Settlor anticipates that each trust created hereunder will become a shareholder, partner, member or beneficial or equitable owner in one or more companies or co-ownership arrangements. As such, each Officer of a trust created hereunder is hereby directed and authorized to exercise its respective powers and administer such trust in such a way as to comply to the extent reasonably possible with the provisions of any applicable agreement (including any shareholder's agreement, operating agreement, partnership agreement, or co-ownership agreement) in effect from time to time governing any such interest of the trust. This Section shall not be construed as altering any of the dispositive provisions of this instrument.¹⁰

*Sample Clause Authorizing Trustee or Trust Protector to Act to Preserve S Corporation Status:*¹¹

1.3 S Corporation Stock. The following powers are provided, consistent with the intention of the Settlor that any trust created under this instrument holding shares in a corporation that desires to maintain S corporation status (hereafter "S Corporation Shares") do so without jeopardizing the corporation's status as an S corporation:

⁸ Contributed by Steve Trytten.

⁹ This clause can be included at the start of a trust for emphasis.

¹⁰ This clause can also be included at the start of a trust when the trust is expected to own an interest in an entity that is subject to the terms of a shareholders, partnership, or operating agreement.

¹¹ Contributed by Steve Trytten.

- (a) The Trustee, in the Trustee's sole discretion, is authorized to make tax elections (such as the Electing Small Business Trust election provided under Code Section 1361(e)) or to assist a trust's beneficiary in making tax elections (such as the Qualifying Subchapter S Corporation Trust election under Code Section 1361(d)) to qualify a trust as a qualifying S corporation shareholder or to change from one qualifying status to another;
- (b) The Trustee, other than an Interested Person, in its sole discretion, is authorized to distribute S Corporation Shares to the beneficiaries as if the trust had terminated, while directing the Trustee to continue to hold any other property in such trust;
- (c) The Trustee is reminded that the Trustee may, in the Trustee's sole discretion, exercise its powers to divide the trust under Section [*Cross references Division Into Separate Trusts provision*] to create two or more separate trusts;¹²
- (d) The Trust Protector is reminded that the Trust Protector may, in the Trust Protector's sole discretion, exercise its powers to amend the trust (or the one or more separate trusts created upon any division of the trust by the Trustee) under Section [*Cross references the provision in our trust granting the Trust Protector amendment powers*], in any manner that is necessary to accomplish any of the following and that does not otherwise exceed the scope of the Trust Protector's power under Section [*Cross references the same provision*].¹³
- (i) cause a trust to qualify as an eligible S corporation shareholder (including amending a trust to cause it to become a grantor trust, or amending a trust to require distribution of income to one beneficiary and to prohibit distributions of corpus to anyone other than said beneficiary, as is currently required for a Qualifying S Corporation Trust under Code Section 1361(d));
- (ii) cause a trust to change from one qualifying status to another; or
- (iii) cause a reduction in overall taxes paid by a trust or its beneficiaries (including causing a trust to make charitable contributions in any given year in amounts not exceeding the trust's pro rata share of charitable contributions made by the one or more S corporations in which the trust has an ownership interest).

¹² The Division Into Separate Trusts provision includes an example for dividing trusts: "... to avoid jeopardizing the S corporation status of any corporation seeking to maintain S corporation status as to which the trust is a shareholder."

¹³ The Trust Protector holds a power to amend, modify or terminate all or part of any trust in any manner that the Trust Protector determines is appropriate to carry out the purposes of the trust for its intended beneficiaries, which includes as an example of a reason to use this power: "to avoid jeopardizing S corporation status for any corporation seeking to maintain S corporation status as to which the trust is a shareholder." Further, all amendment powers held by the Trust Protector are restricted to ensure they do not "jeopardize the status of any trust created under this instrument as an eligible S corporation shareholder if such trust owns or is expected to own stock in a corporation seeking to maintain S corporation status." The Trust Protector holds these powers in a non-fiduciary capacity.

8. DYNASTY TRUSTS FORMED AT DEATH – POUR OVER FROM REVOCABLE TRUST

Background. For a high net worth family that has engaged in multi-generational planning, the family organization chart can get cluttered with many different trusts and entities. To help control the overall number of trusts, it may make sense to provide that additional amounts passing at death be added to the existing inter vivos trusts, rather than new trusts arising under the client's Will or revocable trust.

However, one should allow for the possibility that future events such as creditors' claims, tax disputes, or other litigation might render the inter vivos trust unsafe for additional assets passing at the client's death. Under the sample form below, the default is that the Trustee is to form a new trust based on the terms of the inter vivos trust, but the Trustee in its sole discretion may choose to pour over to the existing trust, instead.

*Sample Clause Pouring Over from Will or Revocable Trust:*¹

The following language appears in the Will or revocable trust directing how the assets passing at death are to be administered:

(iv) Any share so created under this Section [*Cross references the provision dividing the trust estate into shares for descendants*] for a descendant of the Settlor shall be allocated to a separate Descendant's Trust, to be held, administered, and distributed for the benefit of such individual upon the same terms and conditions as the Descendant's Trust established for such individual under the Family Irrevocable Trust dated June 1, 2017 (the "Irrevocable Trust"), as it exists at the time of the execution of this instrument. All of the terms of the Irrevocable Trust as it exists at the time of the execution of this instrument are hereby incorporated into this instrument by this reference and shall govern said separate Descendant's Trusts for such individuals. Alternatively, the Trustee, in the Trustee's discretion, may distribute part of all of any share so established for such individual to the Trustee of an existing Descendant's Trust for such individual established under the Irrevocable Trust, to be held, administered, and distributed as a part thereof (this is referred to as the "Pour Over Option"). The Settlor included the Pour Over Option to allow avoidance of multiple trusts arising for the same beneficiary under multiple trust instruments. However, the Settlor requests that the Trustee consider using the Pour Over Option only when doing so would not produce a disadvantage (such as exposing such share to claims or liens that have arisen in the existing Descendant's Trust). In addition, if the Trustee chooses the Pour Over Option for all or any part of a share of the property passing under this Section, the Trustee, in the Trustee's sole and absolute discretion, may direct the Trustee of the recipient trust to segregate such property as a separate trust under the Irrevocable Trust, having identical terms and conditions as those then in existence for such trust. The Settlor suggests that the Trustee consult with outside tax and legal advisors in making any determination on the manner in which each share for a descendant of the Settlor is allocated pursuant to this Section.

The following language appears in the inter vivos trust:

If property is received subject to instructions that said property is to be allocated to the Descendant's Trust under this instrument for a particular descendant of the Settlor, the Trustee shall apply said property to create or augment a Descendant's Trust under this instrument for such individual's benefit. If such instructions require that the property be segregated in a separate Descendant's Trust hereunder for a particular descendant (rather than being commingled with property already held in a Descendant's hereunder for such descendant), the Settlor instructs the Trustee to comply with that instruction by creating a separate Descendant's Trust for such descendant for the purpose of holding such property. Each Descendant's Trust so created shall be held by the Trustee and distributed for the benefit of the individual for whom said trust was created.

1.1 Additions to Trusts. Unless otherwise specified in this instrument or in any instrument of transfer, the following shall apply with respect to any addition to a trust created hereunder:

(a) General Rules Regarding Additions. Any addition to a trust created under this instrument that is not yet in existence at the time of such addition shall establish such trust. Any addition to a trust that was divided into multiple trusts prior to such addition shall augment proportionately the trusts into which such trust was divided at the time of the division. Any addition to a trust that was wholly distributed prior to such addition shall be distributed to the beneficiary or beneficiaries to whom such trust was distributed, in shares proportionate to the shares of such trust received by

¹ Contributed by Steve Trytten.

such beneficiaries. If any beneficiary is deceased upon the occurrence of the event requiring such addition, such deceased beneficiary's share shall be distributed to the person or persons presumptively entitled to then next eventual interest in such deceased beneficiary's share as determined by the Trustee, in the Trustee's discretion, taking into account the terms of this instrument. Any addition to a trust that was partially distributed prior to such addition shall augment proportionately the distributed and undistributed portions of such trust.

(b) Trustee's Authority to Create Separate Shares or Trusts With Additions to Trusts. In the event property is added to any trust created hereunder from the Settlor's estate, any other trust created by the Settlor or any other person, or pursuant to the exercise of a power of appointment, the perpetuities period applicable to such property may be shorter than the perpetuities period that would otherwise apply to the trusts created under this instrument and such property may have a different transferor for GST Tax purposes or a different grantor for income tax purposes than the trusts created under this instrument. The Settlor intends that the current and future beneficiaries of the various trusts arising under this instrument enjoy the maximum estate, gift and GST Tax benefits available to them, and that each such trust be allowed to continue in trust for as long as possible under the maximum perpetuities period allowed under applicable state law. To that end, the Trustee of any trust created hereunder is authorized (but shall not be required) to create separate shares or separate trusts for the Current Beneficiary of such trust (using the principles set forth in Section *[Cross references Division Into Separate Trusts provision]*) for the purpose of segregating assets with different transferors for GST Tax purposes, with different grantors for income tax purposes, or with different perpetuities periods.

1.2 Combining Trusts. The Trustee of a trust hereunder may participate in a transaction that combines the trust, in full or in part, with one or more other trusts established by the Settlor and/or the Settlor's spouse, provided the Trustee determines that such a combination will not defeat or substantially impair the purpose of the trust hereunder (including grantor trust status and other tax considerations) or the interests of the beneficiaries of the trust hereunder (excluding any beneficiary whose beneficial interest in the trust, taking actuarial considerations into account, is worth less than 5% of the trust). In particular, the Trustee may not combine GST Exempt assets with GST Non-Exempt assets. If any one or more of the trusts to be combined contain specific provisions relating to Tax Advantaged Accounts (e.g., so-called "conduit provisions") and any one or more of such trusts do not contain such provisions, the Trustee of the trust hereunder may participate in a combination provided that the specific provisions relating to Tax Advantaged Accounts continue to apply after said combination to all or substantially all (measured by aggregate value of such accounts) of the Tax Advantaged Accounts to which said provisions applied prior to the combination.

Although the Settlor generally intends that each trust arising hereunder be allowed to exist for as long as possible, the Settlor recognizes that the Trustee of each trust arising hereunder may need flexibility to combine trusts with different perpetuities period to minimize the administrative effort of administering multiple trusts that are similar, even if doing so might shorten the potential duration of the combined trust. Accordingly, if the Trustee, other than an Interested Trustee, determines that combining multiple trusts with different perpetuities periods serves the best interests of the beneficiaries of the trusts and is consistent with the purposes of the trusts, said Trustee may either:

- (i) combine said trusts and account separately or establish separate shares for the assets received from each trust, subject to the Settlor's request that the Trustee make distributions as much as possible from the assets with the shortest perpetuities period; or
- (ii) combine said trusts and modify the provisions of the combined trust to direct termination of the entire trust no later than the end of the shortest of the perpetuities periods that governed the multiple trusts so combined.²

9. CONDUIT SEE-THROUGH TRUSTS

As a general rule, trusts are not recognized as having a life expectancy for minimum distribution purposes. But there is an exception for trusts that meet certain specialized requirements. These trusts are sometimes called "See-Through Trusts." The life expectancy of a see-through trust is determined by looking through the trust to identify the trust beneficiaries and their respective measuring lives, and then applying the shortest measuring life.

² This section provides the Trustee (other than an interested Trustee) authority to combine trusts with multiple perpetuities periods, and provides two alternative approaches for dealing with the multiple perpetuities periods.

One type of see-through trust is called a conduit trust. To qualify as a conduit trust, the trust must require that any distribution from the retirement plan to the trust must then be distributed from the trust to the trust's beneficiary. In other words, the trust may not accumulate amount distributed from retirement plans.

Chapter 10 will cover see-through trusts that accumulate.

*Sample Conduit Trust Clause:*³

ARTICLE I Retirement Benefits

The following provisions concern Retirement Benefits payable or distributable to the Trustee under this Trust Agreement (whether directly or through the Grantor's estate) by reason of the Grantor's death. As used in this Trust Agreement, the term "Retirement Benefits" (of whatever type), includes any trust, contract, plan, benefit, account, annuity, or bond which arises out of an employer-employee relationship (or in the case of a self-employed person, is deemed or treated as if arising out of an employer-employee relationship), whether non-qualified, qualified under Code Sec. 401, an individual retirement arrangement under Code Secs. 408 or 408A, a tax-sheltered annuity under Code Sec. 403 or any other benefit subject to the distribution rules of Code Sec. 401(a)(9), as well as deferred compensation under any employment contract and other benefits normally considered as employee benefits. As used in this Trust Agreement, the term "Retirement Plan" shall mean any plan or agreement under which Retirement Benefits are payable.

The provisions of this Article are subject to any expressly contrary provisions contained in any beneficiary designation, Retirement Plan contract or agreement, or other controlling document.

A. Disposition of Participant's Interest. Retirement Benefits shall be disposed of in the same manner as the Grantor's Residuary Trust Fund under this Trust Agreement.

B. Selection of "Payout Schedule." The Trustee may exercise any right to determine the manner and timing of payment of Retirement Benefits that is available to the recipient of the benefits, but the Trustee must exercise such rights in a manner consistent with the Federal income tax rules governing required minimum distributions under Code Sec. 401(a)(9).

C. Conduit Trust Provisions for Descendants' Separate Trusts. The following provisions shall be applicable to each Descendant's Separate Trust held hereunder with respect to the Grantor's interest in any Retirement Benefits which are payable (either directly or by reason of the provisions above) to the Trustee thereof:

1. Each year, beginning with the year of the Grantor's death, the Trustee of such trust shall withdraw from any such Retirement Plan the Minimum Required Distribution for such Retirement Plan payable to such trust for such year, plus such additional amount or amounts as the Trustee (excluding, however, any Interested Trustee) deems advisable in the Trustee's sole discretion. All amounts so withdrawn (net of expenses) shall be distributed to the Beneficiary (as defined below in this paragraph) free of trust, if the Beneficiary is then living. If the Beneficiary is not then living, the Trustee shall instead distribute the amount which would have been distributed to the Beneficiary had the Beneficiary been then living, in the manner provided for the distribution of the principal of such trust upon the death of the Beneficiary.

2. The following definitions shall apply in administering these provisions relating to such trust. The Minimum Required Distribution for any year shall be, for each Retirement Plan: (a) the value of the Retirement Plan determined as of the preceding year end, divided by (b) the Applicable Distribution Period; or such greater amount (if any) as the Trustee shall be required to withdraw under the laws then applicable to such Retirement Plan to avoid penalty. If the Grantor's death occurred before the Grantor's "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Beneficiary. If the Grantor's death occurred on or after the Grantor's "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Beneficiary, or if longer, the Grantor's remaining life expectancy.

3. Notwithstanding the foregoing, if the Grantor's death occurred on or after the Grantor's "required beginning date" with respect to such benefit, the Minimum Required Distribution for the year of the Grantor's death shall mean (a) the amount that was required to be distributed to the

³ Contributed by Jonathan Blattmachr.

Grantor with respect to such benefit during such year, minus (b) amounts actually distributed to the Grantor with respect to such benefit during such year.

4. Life expectancy, and the meaning of "required beginning date" and other terms in this paragraph, shall be determined in accordance with Code Sec. 401(a)(9).

5. As used in this paragraph to define the person to whom amounts are to be distributed, the term "the Beneficiary" shall refer to the person who is the primary Beneficiary of the trust under the terms and provisions of the Descendants' Separate Trusts hereunder.

D. Exclusion of Retirement Benefits from Creditors. Anything to the contrary in this Trust Agreement notwithstanding, any Retirement Benefits payable to the Trustee under this Trust Agreement shall never be or become part of the Grantor's probate or testamentary estate hereunder, and nothing in this Trust Agreement shall be deemed to subject those proceeds to payment of the Grantor's debts or expenses.

*Sample Conduit Trust Clause:*⁴

CONDUIT PLAN BENEFITS TRUST

1.2. Plan Benefits Trusts. To the extent that the **Trustee** is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this **instrument** is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer; otherwise, (B) **[subject to Section ____ (allocating all income in respect of a decedent to the Marital Deduction Amount),]**⁵to or among the trusts or individuals receiving my Remaining Property, substituting Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except with regard to required distributions outlined below, and (v) the Trustee shall deliver a copy of this **instrument** or alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, each year following my death, the Trustee of the Plan Benefits Trust shall withdraw from the Plan Benefits held by or payable to that trust an amount not less than the minimum amount required to be distributed pursuant to Code Section 401(a)(9) as applicable to those Plan Benefits (the "Minimum Required Distribution Amount"). **If the Current Beneficiary is serving as Trustee, any determination by the Trustee to withdraw more than the Minimum Required Distribution Amount in any year shall be treated as a discretionary distribution as described in Section [Cross reference to Section "Restrictions on Beneficially Interested Trustee].** The Trustee shall distribute all amounts withdrawn (the "Withdrawn Amount") as follows: (i) the Withdrawn Amount shall be paid directly upon receipt to the Current Beneficiary of such trust; (ii) the Current Beneficiary shall be the sole beneficiary of the Withdrawn Amount; and (iii) no Withdrawn Amount shall be accumulated in the trust during the Current Beneficiary's lifetime for the benefit of any other beneficiary. In the case of any Descendant's Trust or Contingent Trust, the term "Current Beneficiary" means the child, other descendant or other beneficiary for whom the trust is named. **In the case of the Marital Trust or the Bypass Trust, the term "Current Beneficiary" means the Surviving Spouse.** I intend that the Plan Benefits Trust qualify as a conduit trust described in Treasury Regulation Section 1.409(a)(9)-5, A-7(c)(3), Example 2, and that except for persons whose interests are contingent solely upon the death of a prior beneficiary, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This **instrument** shall be administered and interpreted in a manner consistent with this intent. Any provision of this **instrument** which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent. The Trustee may amend the Plan Benefits Trust in any manner necessary for the sole purpose of ensuring that the trust qualifies and continues to qualify as a conduit trust described in Treasury Regulation Section 1.409(a)(9)-5, A-7(c)(3), Example 2. Each amendment must be in writing and must be filed among the trust records.

⁴ Contributed by Mickey Davis.

⁵ Bold language is included if marital deduction formula gift includes a specific bequest of all income in respect of a decedent.

*Sample Conduit Trust Clause Including Lifetime Power of Appointment:*⁶

The first subsection (c) follows an example in the regulations under Code § 401(a)(9) for conduit trusts and limits benefits to the primary beneficiary. The alternative subsection (c) sprinkles among the primary beneficiary and the primary beneficiary's descendants and follows the regulations' spirit but is not referenced in the example.

(c) **Benefit Plans.** If the trust is the beneficiary of any Benefit Plan subject to Code Section 401(a)(9) or comparable provisions (the "Minimum Distribution Rules"), the trustee shall withdraw from the Life Trust's portion of the Benefit Plan the amount required under the Minimum Distribution Rules and may make additional withdrawals for the purposes set forth in subsection (a). If and to the extent necessary to enable the Benefit Plan to use the beneficiary's life expectancy for purposes of applying the Minimum Distribution Rules without considering the identity or life expectancy of any other beneficiary (whether current or future, vested or contingent) of the trust, the trustee shall distribute to the beneficiary each withdrawal from a Benefit Plan, whether or not such withdrawal is required under the Minimum Distribution Rules.

[(c) **Distribution from Benefit Plans.** This subsection applies if the Life Trust is the beneficiary of any Benefit Plan subject to Code Section 401(a)(9) or comparable provisions (the "Minimum Distribution Rules"). If and to the extent necessary to enable the Benefit Plan to use the beneficiary's life expectancy for purposes of applying the Minimum Distribution Rules without considering the identity or life expectancy of any other beneficiary (whether current or future, vested or contingent) of the trust, the trustee shall distribute each withdrawal from a Benefit Plan to the individual(s) to or for whom that withdrawal is being made, whether or not such withdrawal is required under the Minimum Distribution Rules. The trustee shall withdraw from the Life Trust's portion of the Benefit Plan the amount required under the Minimum Distribution Rules, and such amounts withdrawn shall be distributed in the following priority:

- (1) for the purposes as described in subsection (a) [distributions for the primary beneficiary]; then
- (2) for the purposes as described in subsection (b) [distributions for the primary beneficiary's descendants]; then
- (3) to the beneficiary, but if and to the extent that the second sentence of this subsection does not require distributions to be made to one or more individuals, such amount may be accumulated in the Life Trust.

The trustee may withdraw such additional amounts from the Benefit Plan as the trustee shall deem appropriate for the purposes described in subsections (a) and (b), and shall distribute such additional amounts so withdrawn for such purposes.]

SECTION . SPECIAL POWER OF APPOINTMENT WHILE LIVING. The beneficiary, while at least <AGE 3> (___) years of age, in the beneficiary's individual capacity, shall have the continuing discretionary power to Appoint all or any part of the income, principal, or both of the trust to or for the benefit of any person, but may not increase the authority, if any, to make distributions to or for the benefit of the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate; however: (a) no interest in a Benefit Plan or that Benefit Plan's proceeds may be Appointed in a manner that would change the identity of the individual whose life expectancy would otherwise apply under the Minimum Distribution Rules, and (b) if the trust is an electing small business trust under Code Section 1361(e)(1), the beneficiary may not exercise the power to Appoint in a manner that might cause the corporation to violate Code Section 1361(b)(1). Any such Appointment may be exercised either to effect immediate distribution to the appointee or to take effect upon the occurrence of a future event, such as the beneficiary's death.

⁶Contributed by Steve Gorin.

*Sample Conduit Trust Clause:*⁷

1.1 Descendant's Trust is a "Conduit" for Distributions from Retirement Plans.

(a) Conduit Distributions. To the extent the Trustee of a Descendant's Trust receives distributions (either Minimum Required Distributions or Excess Distributions)⁸ from a Stretch-Out Retirement Account⁹ as to which the Primary Beneficiary is the Stretch-Out Retirement Beneficiary, the Trustee shall distribute to or apply for the benefit of¹⁰ the Primary Beneficiary all of said distributions (net of expenses, and net of income, estate, inheritance, generation-skipping transfer tax, or any other tax, to the extent said expenses and taxes are properly chargeable to either the distributions received or to the balance remaining in said Stretch-Out Retirement Account),¹¹ for as long as the Primary Beneficiary shall live¹² or until the earlier termination of his or her trust. A distribution made under this Section 1.1(a) may be referred to as a "Conduit Distribution."

(b) Limitation on Power of Tax-Sensitive Trustee. Notwithstanding any other provision of this instrument or any power granted to the Trustee by law, for so long as the Primary Beneficiary of a Descendant's Trust is the Stretch-Out Retirement Beneficiary of a Stretch-Out Retirement Account, the Trustee's power to take Excess Distributions from that Stretch-Out Retirement Account may be exercised only by the Trustee, other than: (i) a Settlor; (ii) the Primary Beneficiary; (iii) any individual who made a qualified disclaimer of any interest in said Stretch-Out Retirement Account; and (iv) any individual who owes a legal obligation of support to the Primary Beneficiary.¹³

(c) Stretch-Out Retirement Account. The term "Stretch-Out Retirement Account" means, with respect to a particular Descendant's Trust, an interest in a Retirement Account or portion thereof if the provisions governing said Retirement Account or portion thereof (including any death beneficiary designation in effect at the Participant's death and any other relevant circumstances) permit the Trustee of the trust to take post-death distributions over a time period based on the life expectancy of an individual, assuming said trust otherwise qualifies to do so under the Minimum Distribution Rules.¹⁴

⁷ Contributed by Steve Trytten. These clauses are designed for inclusion in a dynasty style trust (a "Descendants' Trust") to make it a "see-through trust" for minimum distribution purposes. Thus, retirement and non-retirement assets would be held in the same trust. This approach may be appropriate when the retirement plan is modest and simplicity is preferred over maximum tax efficiency. When maximum tax efficiency is preferred, consider using either the "age restriction" or "last one standing" approaches in Chapter 10 to allow accumulations of retirement distributions, and consider creating separate trusts so that the respective trustees have more flexibility in deciding whether to distribute income from retirement or non-retirement assets.

⁸ We've seen so many practitioners administer conduit trusts as if only the MRDs are required to be distributed, we've chosen to be very explicit in directing that all plan distributions must be distributed.

⁹ We used the defined term "Stretch-Out Retirement Plan" to ensure that the conduit requirements are only imposed on plans that allow stretch-out over the current beneficiary's life expectancy (or the oldest member of a class to which the current beneficiary belongs). This safeguard may be particularly helpful if the Obama Greenbook proposal to limit post-death stretch-out to five years is enacted.

¹⁰ The phrase "or apply for the benefit of" is included to give greater flexibility to the Trustee in applying amounts for a beneficiary when outright distribution may not be the best option. Although Treas. Regs. do not specifically address this issue, there is indirect support in the marital deduction area. See Reg. § 20.2056(b)-5(f)(4).

¹¹ Although Treas. Regs. do not specifically address this issue, it would be irresponsible to require distribution to the beneficiary of all amounts received from Stretch-Out Retirement Plans without allowing for expenses and taxes that would normally be charged against such amounts.

¹² This limitation is intended to avoid application of the conduit provisions any longer than necessary to qualify as a "see-through trust."

¹³ When you combine the Trustee's power to take distributions from the Stretch-Out Retirement Plan with the conduit provision, you potentially create the equivalent of a general power of appointment, which should not be held by certain tax sensitive trustees, including an individual who has made a qualified disclaimer. This clause limits the Trustee's power to take distributions from the Stretch-Out Retirement Plan if any of these tax sensitive persons are serving.

¹⁴ The term "Stretch-Out Retirement Account" is important, in that it is used to limit see-through trust provisions to those plans that actually provide stretch-out. A plan might not allow stretch-out either because its own terms are more restrictive, or because the law has changed to curtail post-death stretch-out.

(d) Stretch-Out Retirement Beneficiary. The term "Stretch-Out Retirement Beneficiary" means, with respect to a Descendant's Trust that holds a Stretch-Out Retirement Account, the individual trust beneficiary whose life expectancy is to be used by the Trustee in determining post-death Minimum Required Distributions (or would be so used but for the fact the Minimum Distribution Rules are not applied separately to the Descendant's Trust under the so-called "separate account rule" contained in Treas. Regs. Section 1-401(a)(9)-8, A-2.).¹⁵

(e) Excess Distributions. The term "Excess Distributions" means, with respect to an interest in a Stretch-Out Retirement Account, any distribution in excess of those amounts reasonably necessary to: (a) comply with the Minimum Distribution Rules; (b) provide for the beneficiary's health, education, and support; (c) comply with the legal obligation to pay income, estate, inheritance, GST Tax, or other taxes properly chargeable to distributions received from or the balance remaining in said Stretch-Out Retirement Account; and (d) provide for payment of trust expenses properly allocable to distributions received from or the balance remaining in said Stretch-Out Retirement Account.

(f) Prohibition Against Certain Amendments, Modifications, Decantings, or Terminations. No power to amend, modify, decant, or terminate this trust, whether arising under this instrument or by operation of applicable law, may be exercised in such a way as to reduce or eliminate the conduit distributions to the Primary Beneficiary that are required under the rules of Section 1.1(a), or to allow any distributions (either Minimum Required Distributions or Excess Distributions) from a Stretch-Out Retirement Account to be distributed to anyone other than the Primary Beneficiary during the Primary Beneficiary's lifetime.¹⁶

Here are selected provisions from the administrative sections of the trust instrument:

11. Trust as Beneficiary of Retirement Account.

11.1 Trusts to Benefit from Maximum Extended Deferral. The Settlor intends that each trust hereunder that owns an interest in a Retirement Account benefit from the maximum extended deferral period under the Minimum Distribution Rules that is available based upon the terms of such trust. Accordingly, the following shall apply:

(a) The Trustee of a trust so designated shall, within the time limit prescribed under the Minimum Distribution Rules, deliver documentation required under said rules to the respective administrators and custodians of each Retirement Account.

(b) When the Trustee makes a distribution or an allocation of an interest in a Retirement Account to or for the benefit of a beneficiary of a trust hereunder, the Trustee is to assign all of the Trustee's interests in and powers over said Retirement Account interest (e.g., to direct investments and withdrawals) to said individual or trustee, as the case may be, and nothing under this instrument shall be interpreted as requiring the Trustee to arrange for the assets held in the Retirement Account to be withdrawn from said Retirement Account. The Settlor specifically intends that any such distribution or allocation of a Retirement Account shall be handled in a manner that (i) results in zero, or the minimum possible amount of income tax payable by either the trust, said individual, or said other trust, and (ii) results in no change, or the minimum possible amount of change, to the deferral period that applies to the Retirement Account.

(c) The administrators, custodians, or other fiduciaries of the respective Retirement Accounts shall incur no liability to the trust or to any of its beneficiaries for acting upon the written instruction of the Trustee pursuant to this Section 11.1.

11.2 Power to Exercise Retirement Account Options.

In addition to the powers granted to the Trustee by law or under other provisions of this instrument, the Trustee is authorized to exercise any power or right over a Retirement Account that is available to the Trustee as beneficiary or successor owner of such Retirement Account, including powers to (a) take distributions, make elections, or otherwise select payment options,

¹⁵ It is important in defining this term to allow for the possibility that stretch-out will be over the oldest member of a group, and that the trust's primary beneficiary is not necessarily the oldest member.

¹⁶ This savings clause is important to ensure the trust will qualify as a conduit see-through trust. It is drafted to describe the substantive changes that are prohibited, rather than something like, "no power... may be exercised in a way that causes the trust to fail to qualify as a conduit see-through trust." This avoids any sort of "chicken and egg" argument that the savings clause is insufficient to accomplish the intended purpose.

(b) direct investments, and (c) direct tax-free rollovers from one Retirement Account to another (and to establish any new Retirement Account that is to receive the rollover, if applicable).

11.3 Retirement Related Definitions.

(a) Participant. The term "Participant" means the employee, plan participant, or account owner of said Retirement Account as those terms are commonly used under the Minimum Distribution Rules.

(b) Retirement Account. The term "Retirement Account" means a Tax-Advantaged Account that is subject to the Minimum Distribution Rules.

(c) Tax-Advantaged Account. The term "Tax-Advantaged Account" means any plan, contract, or other arrangement (other than a life insurance contract) that is allowed under the Internal Revenue Code to accumulate any part of its income in a tax-advantaged manner (e.g., income tax-deferred or income tax free) for the benefit of an owner, beneficiary, or successor, including a qualified or non-qualified annuity, a deferred compensation plan, or a retirement or individual retirement account arrangement established under Code Section 401, 403, 408, 408A, or 457. A plan account or arrangement that is otherwise a "Tax-Advantaged Account" and that owns one or more life insurance contracts among its assets is a "Tax-Advantaged Account." A plan, contract, or other arrangement that is reasonably believed to qualify for tax-advantaged treatment under the Internal Revenue Code is a "Tax-Advantaged Account" even if it is subsequently determined it did not so qualify.

Our provisions governing division and combination of trusts specifically address specialized trust provisions that may apply to Tax-Advantaged Accounts, including Retirement Accounts.

15.11 Division Into Separate Trusts. The Trustee of a trust hereunder may divide the trust into two or more separate trusts having the same terms and conditions as the original trust in order to accomplish any purpose the Trustee determines is consistent with the purpose of the trust. For example, but not by way of limitation, a trust may be divided:

- (a) To enable Tax-Advantaged Accounts to be segregated from other trust assets;
- (b) To avoid holding GST Exempt and GST Non-Exempt assets together in the same trust; and
- (c) To avoid jeopardizing the S corporation status of any corporation seeking to maintain S corporation status as to which the trust is a shareholder.

When dividing a trust under this Section 15.11, the Trustee shall generally have the discretion to select the assets to be allocated to the trusts arising from such a division in any manner that is fair and equitable, except that with respect to any division into GST Exempt and GST Non-Exempt trusts, the Trustee shall allocate assets to the trusts arising from such a division in a manner consistent with the requirements of Treasury Regulation Section 26.2654-1(b)(1) (or any related or successor rule or regulation).

Any separate trusts resulting from the division of an original trust pursuant to this Section 15.11 may be given descriptive names to distinguish them from one another. For example, a Marital Trust that is divided to avoid holding GST Exempt and GST Non-Exempt assets together in the same trust may be referred to respectively as a "GST Exempt Marital Trust" and a "GST Non-Exempt Marital Trust."

15.12 Distributions from Divided Trusts. If any trust created hereunder is divided into separate trusts for the same beneficiary pursuant to Section 15.11, any other provision of this instrument or by court order, the following shall apply:

- (a) If such trust requires distribution of a fraction or a percentage of such trust, such distribution may be made by multiplying such fraction or percentage by the aggregate value of all such separate trusts for such beneficiary and by making such distribution from any one or more of such separate trusts, notwithstanding the terms of the separate trusts.
- (b) Any discretionary distributions payable from such trust may be made from any one or more of the separate trusts for such beneficiary, or partially from each of such trusts, as the Trustee (or other Officer, if applicable) determines, taking into account any other guidelines set forth in this instrument.
- (c) If such trust requires distribution of a pecuniary amount, such distribution shall not be duplicated and may be made from any one or more of the separate trusts for such beneficiary, as the Trustee (or other Officer, if applicable) determines.

(d) The Settlers suggest that, in the case of such trust that was divided for GST Tax purposes, all distributions therefrom be made first from the separate trust with the greatest inclusion ratio (as defined in Code Section 2642) for GST Tax purposes.

15.13 Combining Trusts. The Trustee of a trust hereunder may participate in a transaction that combines the trust, in full or in part, with one or more other trusts established by either or both of the Settlers, provided the Trustee determines that such a combination will not defeat or substantially impair the purpose of the trust hereunder (including tax considerations) or the interests of the beneficiaries of the trust hereunder (excluding any De Minimis Beneficiary as defined in Section 16.4). In particular, the Trustee may not combine GST Exempt assets with GST Non-Exempt assets. If any one or more of the trusts to be combined contain specific provisions relating to Tax Advantaged Accounts (e.g., so-called "conduit provisions") and any one or more of such trusts do not contain such provisions, the Trustee of the trust hereunder may participate in a combination provided that the specific provisions relating to Tax Advantaged Accounts continue to apply after said combination to all or substantially all (measured by aggregate value of such accounts) of the Tax Advantaged Accounts to which said provisions applied prior to the combination. (Please refer to Section 10.6 regarding the Trust Protector's power to amend a trust created hereunder to enhance the overall after-tax value of any Tax-Advantaged Account held in such trust.)

Although the Settlers generally intend that each trust arising hereunder be allowed to exist for as long as possible, the Settlers intend that it is even more important for the Trustee of each trust arising hereunder to have broad latitude to combine trusts to minimize the administrative effort of administering multiple trusts that are similar, even if doing so might shorten the potential duration of the trust. Thus, when it is necessary to shorten the potential duration of a trust arising hereunder in order to accomplish a combination that will minimize the administrative effort of administering multiple trusts (e.g., if the trusts to be combined are subject to different termination dates under applicable law or under so-called "Perpetuities Savings Clauses" such as Section 15.23 of this instrument), the Trustee may shorten the duration of the trust arising hereunder that is to be combined by amending Section 15.23 as it applies to said trust.

10. ACCUMULATION SEE-THROUGH TRUSTS

Background. See Chapter 9 for discussion of conduit see-through trusts.

This Chapter discusses see-through trusts that can accumulate retirement plan distributions (and thus, do not qualify as conduit trusts).

In some cases, there may be substantial non-retirement plan assets to make full use of available GST exemptions, and it may be most practical to simply include a conduit clause in the non-exempt dynasty trust and designate retirement plan assets to that trust.¹

In other cases, a conduit clause may not be the solution. For example: (i) the asset mix may be such that it is not as clear whether retirement assets will be passing to the exempt dynasty trust, the non-exempt trust, or partly to each; (ii) the projected amount of distributions that would arise under a conduit clause may be too large in light of the projected needs of the beneficiaries; or (iii) the best tax strategy may be for retirement assets (particularly if a Roth IRA) to pass to and accumulate in the exempt dynasty trust. In cases like these, a non-conduit approach may be needed, as discussed next.

There are three approaches to drafting an accumulation see-through trust that commentators consider safe:

- Outright to Next Level Beneficiaries (must pass outright to next level heirs after primary beneficiary's death).
- Age Restriction (trust cannot have any beneficiary or permissible appointee older than a specified age).
- Last One Standing (trust cannot have any beneficiary or permissible appointee outside a defined class of persons).

Exempt Retirement Assets. The choice of method may be more difficult for retirement assets that pass into a trust to which the transferor's generation-skipping transfer tax exemption is allocated. The conduit trust approach generally is not the best choice for "exempt" retirement assets, as there may be valuable transfer tax benefits if plan distributions can be accumulated in the trust and ultimately pass to grandchild or more remote descendants. An accumulating trust is likely to provide stronger creditor protection, as well.

Also, accumulating taxable distributions at the trust level does not always produce higher income tax than if distributed to the beneficiary, and in some cases the trust level income tax may be lower. Variables such as the alternative minimum tax can cause variations from year to year, and careful planning on a year-to-year basis to set the optimal level of distributions may produce the lowest combined income tax over time.

The "outright gift to 'second tier' beneficiary" approach usually is not the best choice for "exempt" retirement assets, either, as the dynasty trust is generally intended to continue for as long as possible, rather than terminate at the death of the initial beneficiary.

Thus, for most dynasty trusts, the two remaining alternatives are either the "age restriction" or the "last one standing" approaches.

The "age restriction" approach should be viewed as the default choice. Although this approach is more complex to draft, and could arbitrarily exclude certain contingent beneficiaries if they are too old, it provides greater overall flexibility.

The "last one standing" approach is less complex to draft, but it carries a significant disadvantage – the trust will terminate and distribute outright at such time that only one class member remains, regardless of the class member's age, health, or other circumstances. This outcome conflicts generally with the objective of continuing a dynasty trust for as long as possible, and could result in serious problems in specific situations involving young,

¹ However, the power of tax-deferred compounding is such that designating retirement plan assets to fund an "exempt" trust may produce a greater after-tax benefit than selecting non-retirement assets.

disabled, or spendthrift beneficiaries. The problems of a young beneficiary can be mitigated somewhat with an appropriate facility of payment provision (including, for example, a provision for an UTMA account until age twenty-one), but this is obviously not a complete solution.

A client with a large number of descendants may be so confident that there will always be more than one descendant that the "last one standing" approach will be best. But in most cases, the "age restriction" approach (using the oldest child's age as the "target age") will probably be best.

Non-Exempt Retirement Assets. Once the technique has been determined for GST "exempt" retirement plan assets, the next step is to assess whether to use the same or a different technique for "non-exempt" assets. This determination may vary with each case, and will reflect an overall comparison of the advantages and disadvantages of each option.

For example, some clients may prefer to use a standard conduit arrangement on "non-exempt" retirement assets even though it does not make sense for "exempt" retirement assets.

Generally, it is best to extend the same technique selected for "exempt" retirement assets to the "non-exempt" retirement assets, except when the disadvantage of doing so is significant enough to indicate that a conduit approach should be used instead. In that event, it is important to pay close attention to the coordination of retirement plan designations that is discussed next.

Coordinating Retirement Plans and Division Between Exempt and Non-Exempt Trusts. It is common for the instrument that provides for a dynasty trust to allow the trustee to subdivide the trust into an "exempt" and "non-exempt" dynasty trust, based on how the decedent's GST exemption is allocated.

If retirement assets will simply be designated to the dynasty trust, the exempt and non-exempt dynasty trusts should be drafted using the same see-through trust approach. There are two reasons for this.

The first reason has to do with the generation-skipping transfer tax. The division of the dynasty trust into exempt and non-exempt subtrusts is allowed for generation-skipping transfer tax purposes provided that the requirements of Regulation Section 26.2654-1(b)(1) are satisfied. These requirements are:

- Assets of the dynasty trust may be divided on a pecuniary basis only if required in governing instrument, with assets divided in a "fairly representative" manner and appropriate interest paid;
- Otherwise assets of the dynasty trust must be divided on a fractional basis and may be divided non pro rata based either on date of funding values or "fairly representative" manner; and
- The two new subtrusts may have differing provisions, so long as the terms in the aggregate provide for the same succession of interests and beneficiaries as provided in the original subtrust.

The second reason has to do with the see-through trust rules. If the dynasty trust is designated, it is the dynasty trust that will be analyzed on a *pre-split* basis under the see-through trust rules. If the exempt and non-exempt subtrusts use different see-through trust mechanisms, the dynasty trust as a whole will not qualify under any one mechanism and may fail to qualify as a see-through trust with the intended beneficiary as the measuring life.

When different techniques will be used, it is essential that the division of the retirement assets as between the exempt and non-exempt subtrusts is "hard-wired" in the death beneficiary designation or governing document of the retirement plan. This is a situation where a Trusteed IRA can be particularly helpful, as a custom-drafted Trusteed IRA document can contain a sophisticated formula clause governing the division of the IRA as between the exempt and non-exempt subtrusts.

The following sample clauses illustrate three Age Restriction versions and one Last One Standing version.

*Sample Age Restriction Accumulation See-Through Trust Clause:*²

ARTICLE II Retirement Benefits

The following provisions concern Retirement Benefits payable or distributable to the Trustee under this Trust Agreement (whether directly or through the Grantor's estate) by reason of the Grantor's death. As used in this Trust Agreement, the term "Retirement Benefits" (of whatever type), includes any trust, contract, plan, benefit, account, annuity, or bond which arises out of an employer-employee relationship (or in the case of a self-employed person, is deemed or treated as if arising out of an employer-employee relationship), whether non-qualified, qualified under Code Sec. 401, an individual retirement arrangement under Code Secs. 408 or 408A, a tax-sheltered annuity under Code Sec. 403 or any other benefit subject to the distribution rules of Code Sec. 401(a)(9), as well as deferred compensation under any employment contract and other benefits normally considered as employee benefits. As used in this Trust Agreement, the term "Retirement Plan" shall mean any plan or agreement under which Retirement Benefits are payable.

The provisions of this Article are subject to any expressly contrary provisions contained in any beneficiary designation, Retirement Plan contract or agreement, or other controlling document.

A. **Disposition of Participant's Interest.** Retirement Benefits shall be disposed of in the same manner as the Grantor's Residuary Trust Fund under this Trust Agreement.

B. **Selection of "Payout Schedule."** The Trustee may exercise any right to determine the manner and timing of payment of Retirement Benefits that is available to the recipient of the benefits, but the Trustee must exercise such rights in a manner consistent with the Federal income tax rules governing required minimum distributions under Code Sec. 401(a)(9).

C. **Designated Beneficiary Status and Accumulation of Retirement Benefits in Descendants' Separate Trusts.** The following provisions shall be applicable to each Descendant's Separate Trust held hereunder with respect to all the Grantor's interest in any Retirement Plan from which Retirement Benefits (i) may be paid, under the terms of the plan or agreement applicable thereto, over the life expectancy of an individual beneficiary and (ii) are payable (either directly or by reason of the provisions above) to the Trustee of that Descendant's Separate Trust:

1. Each year, beginning with the year of the Grantor's death, the Trustee of such trust shall withdraw from any such Retirement Plan the Minimum Required Distribution for such Retirement Plan payable to such trust for such year, plus such additional amount or amounts as the Trustee deems advisable in its sole discretion. All amounts so withdrawn or which are otherwise paid or payable to the Trustee of that Descendant's Separate Trust, along with all income with respect thereto and all changes, increases and decreases thereof (collectively the "Descendant's Separate Trust Designated Beneficiary Portion"), shall be accounted for by Trustee, and shall be subject to the distribution and other provisions with respect to that Descendant's Separate Trust, both during the Descendant's Separate Trust Measuring Life's lifetime and at the Descendant's Separate Trust Measuring Life's death, provided that, notwithstanding anything to the contrary, none of such Descendant's Separate Trust Designated Beneficiary Portion shall ever be distributed, whether pursuant to the terms of that Descendant's Separate Trust, the terms of any trust to which property of that Descendant's Separate Trust passes following the death of any descendant of the Grantor, the exercise of any power of appointment, or any other provision (whether under this Trust Agreement or under applicable law of intestacy or otherwise), to anyone other than an individual who was born at the same time or after the Descendant's Separate Trust Measuring Life. The intent of these provisions is to cause the Descendant's Separate Trust Measuring Life to be treated as the designated beneficiary of such Retirement Plan for purposes of Code Sec. 401(a)(9) and the Regulations thereunder, so that the amount in such Retirement Plan may be paid over the life expectancy of the Descendant's Separate Trust Measuring Life, rather than being subject to the default payout rule under Code Sec. 401(a)(9)(B)(iii).

2. The following definitions shall apply in administering these provisions relating to such trust. The Minimum Required Distribution for any year shall be, for each Retirement Plan: (a) the value of the Retirement Plan determined as of the preceding year end, divided by (b) the Applicable Distribution Period; or such greater amount (if any) as the Trustee shall be required to withdraw under the laws then applicable to such Retirement Plan to avoid penalty. If the Grantor's death

² Contributed by Jonathan Blattmachr.

occurred before the Grantor's "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Descendant's Separate Trust Measuring Life. If the Grantor's death occurred on or after the Grantor's "required beginning date" with respect to such benefit, the Applicable Distribution Period means the life expectancy of the Descendant's Separate Trust Measuring Life, or if longer, the Grantor's remaining life expectancy.

3. Notwithstanding the foregoing, if the Grantor's death occurred on or after the Grantor's "required beginning date" with respect to such benefit, the Minimum Required Distribution for the year of the Grantor's death shall mean (a) the amount that was required to be distributed to the Grantor with respect to such benefit during such year, minus (b) amounts actually distributed to the Grantor with respect to such benefit during such year.

4. Life expectancy, and the meaning of "required beginning date" and other terms in this paragraph, shall be determined in accordance with Code Sec. 401(a)(9).

5. As used in this paragraph to define the person who is to be treated as the designated beneficiary whose life expectancy will be used under Code Sec. 401(a)(9)(B)(iii), the term "Descendant's Separate Trust Measuring Life" refers to the Grantor's oldest descendant who is living at the date of the Grantor's death.

D. Exclusion of Retirement Benefits from Creditors. Anything to the contrary in this Trust Agreement notwithstanding, any Retirement Benefits payable to the Trustee under this Trust Agreement shall never be or become part of the Grantor's probate or testamentary estate hereunder, and nothing in this Trust Agreement shall be deemed to subject those proceeds to payment of the Grantor's debts or expenses.

*Sample Age Restriction Accumulation See-Through Trust Clause:*³

"NO BAD PEOPLE" PLAN BENEFITS TRUST

1.1. Plan Benefits Trusts. To the extent that the Trustee is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this instrument is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer; otherwise, (B) **if there is a surviving spouse, [subject to Section ____ (allocating all income in respect of a decedent to the Marital Deduction Amount),] to or among the trusts or individuals receiving the Deceased Spouse's Remaining Property; otherwise, (C)** Plan Benefits received with respect to the death of the Deceased Spouse shall be allocated to or among the trusts or individuals receiving the Deceased Spouse's Remaining Trust Property and Plan Benefits, substituting in each case Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except that all of the following persons, if any, who would otherwise be beneficially interested in the trust (other than those whose interests are contingent solely upon the death of a prior beneficiary), are completely excluded as beneficiaries and permissible appointees of the trust: (A) individuals having a shorter life expectancy than the measuring beneficiary and (B) entities not having a life expectancy; and (v) the Trustee shall deliver a copy of this instrument or alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, the "measuring beneficiary" of a Plan Benefits Trust means (1) the oldest individual who is both living and ascertainably specified in this instrument (by name or by class) as a current permissible beneficiary of the trust as of the date for determination of the "Designated Beneficiary" under applicable statute and treasury regulations; **or, if older, (2) our oldest then living descendant, if any.** We intend that, except for persons whose interests are contingent solely upon the death of a prior beneficiary, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This instrument shall be administered and interpreted in a manner consistent with this intent. Any provision of this instrument which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

³ Contributed by Mickey Davis.

*Sample Age Restriction Accumulation See-Through Trust Clause (Separate Trusts):*⁴

If multiple trusts are desired (to hold retirement and non-retirement assets), add the following language to the provision that divides the residue into subtrusts:

Each share so created for a child or more remote descendant of the Settlor shall constitute a separate Descendant's Trust to be held and distributed for his or her benefit as provided in Section [Cross references Descendant's Trust section], except that to the extent such property consists of an interest in a Retirement Account benefit, such interest shall instead constitute a separate Descendant's Retirement Trust to be held and distributed for his or her benefit as provided in Section [Cross references Descendant's Retirement Trust section]. References in this instrument to Descendant's Trusts may be interpreted as also referring to Descendant's Retirement Trusts as the context indicates.

This is our separate Descendant's Retirement Trust section when we use multiple trusts. If multiple trusts are not desired, this language can be used in the primary trust:

1.1 Descendant's Retirement Trusts. The Descendant's Retirement Trust for each Primary Beneficiary shall commence upon the first receipt of property by the Trustee of such Descendant's Retirement Trust. Such property and any subsequent additions of property shall constitute the trust estate of such Descendant's Retirement Trust, which shall be held, administered and distributed pursuant to this Section 1.1. Each such Descendant's Retirement Trust created for the benefit of a Primary Beneficiary may be referred to as the "[Name of Primary Beneficiary] Descendant's Retirement Trust." If a Descendant's Retirement Trust is divided into separate trusts, all references in this instrument to such "Descendant's Retirement Trust" shall be deemed to refer to all such separate trusts unless otherwise indicated.

(a) Distribution of Income and Principal. The income and principal of each Descendant's Retirement Trust shall be held, administered and distributed as follows:⁵

(i) The Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Retirement Trust as the Trustee, in the Trustee's discretion, may determine to be necessary for the Primary Beneficiary's health, education and support.

(ii) Additionally, the Trustee, other than an Interested Person, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Retirement Trust as such Trustee deems advisable, in such Trustee's sole discretion.

(iii) Any Officer authorized to make distributions under this Section 1.1(a), may consider the Primary Beneficiary's other income or resources that are known to such Officer, including resources held in other trusts for the benefit of the Primary Beneficiary, the Primary Beneficiary's ability to obtain gainful employment, the obligations of others to support the Primary Beneficiary, and any benefits of income tax deferral that can be accomplished by accumulating the Primary Beneficiary's Tax-Advantaged Account assets.

(iv) Any income not so distributed shall be added to principal.

(v) [Optional when appropriate] The Settlor intends that any Officer determining whether to make distributions from a Descendant's Retirement Trust to its Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

(b) Descendant's Retirement Trust as Beneficiary of Retirement Account; Age Restrictions. The Settlor's intend that each Descendant's Retirement Trust that owns one or more Stretch-Out Retirement Accounts benefit from an extended deferral period under the Minimum Distribution Rules with respect to each Stretch-Out Retirement Account. Accordingly, each Descendant's Retirement Trust shall be administered as follows:

⁴ Contributed by Steve Trytten.

⁵ If the Primary Beneficiary's spouse or descendants are included among the current beneficiaries, be sure to draft carefully to ensure that this will not bring older life expectancies into play.

(i) The Trustee shall either account separately or maintain separate shares in order to keep track of the source and amount of any Stretch-Out Retirement Account Accumulations held by the trust. *Please refer to Section X. [cross-references our Division Into Separate Trusts provision], which grants the Trustee the power to divide a trust into two or more separate trusts having the same terms and conditions as the original trust in order to accomplish this purpose.*

(ii) A person⁶ is a "Disqualified Recipient" with respect to a Stretch-Out Retirement Account⁷ if said person is not a "Qualified Recipient." A person is a "Qualified Recipient" with respect to a Stretch-Out Retirement Account if that person would, had that person been designated as the sole death beneficiary of the Stretch-Out Retirement Account, be allowed under the Minimum Distribution Rules to calculate the minimum required distributions from said Stretch-Out Retirement Account following the year of the Participant's death using the life expectancy of an individual born no sooner than January 1 of **[specify the appropriate calendar year; e.g., the calendar year of birth of the Settlor's oldest descendant living at the time of said Participant's death]**.⁸

(iii) As a general rule, any exercise of the special power of appointment granted to the Primary Beneficiary under Section 1.1(d)(i) with respect to a Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations therefrom shall be interpreted and carried out as if each and every person who is a Disqualified Recipient with respect to said Stretch-Out Retirement Account is no longer living (if an individual) or no longer in existence (if a non-individual) at the time of the Primary Beneficiary's death. As a limited exception to the foregoing general rule, an exercise of said special power of appointment with respect to said Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations is permissible to the limited extent that an interest created thereunder for a Disqualified Recipient is of a nature that said interest is so limited that the Disqualified Recipient would have been disregarded as a "mere potential successor" under the rule of Treas. Regs. Section 1-401(a)(9)-5, A-7(c)(1) had the provision creating said interest existed at the time the Descendant's Retirement Trust qualified as a see-through trust under the Minimum Distribution Rules.⁹

(iv) The general power of appointment granted to the Primary Beneficiary under Section 1.1(d)(ii) may not be used to appoint any Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations therefrom. The "Limited Portion" referred to in said Section shall be determined only with respect to the assets of the trust other than Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations therefrom.

(v) As a general rule, any allocation or distribution of a Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations therefrom arising by reason of the Primary Beneficiary's death under Section 1.1(e) shall be interpreted and carried out as if each and every person who is a Disqualified Recipient with respect to said Stretch-Out Retirement Account is no longer living (if an individual) or no longer in existence (if a non-individual). As a limited exception to the foregoing general rule, an allocation or distribution may be made in connection with an interest for a Disqualified Recipient if said interest is so limited that the Disqualified Recipient was or should have been disregarded as a "mere potential successor" under the rule of Treas. Regs. Section 1-401(a)(9)-5, A-7(c)(1) at the time the Descendant's Retirement Trust qualified as a see-through trust under the Minimum Distribution Rules.¹⁰

(vi) As a general rule, any allocation or distribution of a Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations therefrom under Section *[Cross-references our*

⁶ The term "person" is intentionally used to include the broadest possible class of individuals, trusts, estates, charities, or other entities.

⁷ The term Stretch-Out Retirement Account is drafted in a way that excludes retirement plans that do not stretch-out over the intended life expectancy. Thus, the age restriction provisions will not be imposed if the Obama proposal to impose a five year limit on post-death distributions is enacted.

⁸ This language will vary depending on the circumstances. As a general rule, using the age of the oldest member of a class will avoid drafting complications. Although the age of each primary beneficiary could be used, this makes the drafting of successor dynasty trusts and cross-over provisions very difficult since multiple ages must be tracked.

⁹ This limited exception to the general rule is included for the reader's consideration. The regulations provide no guidance as to what should or should not be included in powers of appointment, although this exception seems a reasonable extension of the regulations. The practitioner must balance the potential benefit of including this exception against the potential cost of flunking see-through status.

¹⁰ This additional language is necessary to avoid bringing Disqualified Persons back into subsequent dynasty trusts for descendants. See prior footnote regarding trade-off of including limited exception to general rule.

Alternate Distribution provision, which directs distribution of assets if all of the intended beneficiaries are deceased] shall be interpreted and carried out as if each and every person who is a Disqualified Recipient with respect to said Stretch-Out Retirement Account is then no longer living (if an individual) or no longer in existence (if a non-individual).¹¹ As a limited exception to the foregoing general rule, an allocation or distribution may be made in connection with an interest for a Disqualified Recipient if said interest is so limited that the Disqualified Recipient was or should have been disregarded as a "mere potential successor" under the rule of Treas. Regs. Section 1-401(a)(9)-5, A-7(c)(1) at the time the Descendant's Retirement Trust qualified as a see-through trust under the Minimum Distribution Rules.

(vii) **Stretch-Out Retirement Account.** The term "Stretch-Out Retirement Account" means, with respect to a particular Descendant's Retirement Trust, an interest in a Retirement Account or portion thereof if the provisions governing said Retirement Account or portion thereof (including any death beneficiary designation in effect at the Participant's death and any other relevant circumstances) permit the Trustee of the trust to take post-death distributions over a time period based on the life expectancy of an individual, assuming said trust otherwise qualifies to do so under the Minimum Distribution Rules.¹²

(viii) **Stretch-Out Retirement Account Accumulations.** The term "Stretch-Out Retirement Account Accumulations" means, with respect to a particular Descendant's Retirement Trust, any amounts distributed from any one or more Stretch-Out Retirement Accounts to the trust that accumulate in the trust (including earnings thereon and net of any expenses or taxes allocable thereto).

(ix) **Prohibition Against Certain Amendments, Modifications, Decantings, or Terminations.** As a general rule, no power to amend, modify, decant, or terminate this trust, whether arising under this instrument or by operation of applicable law, may be exercised in such a way as to cause any portion of a Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations therefrom to pass to any recipient who is a Disqualified Recipient with respect to said Stretch-Out Retirement Account. As a limited exception to the foregoing general rule, said powers may be exercised in such a way as to create an interest for a Disqualified Recipient if said interest is so limited that the Disqualified Recipient would have been disregarded as a "mere potential successor" under the rule of Treas. Regs. Section 1-401(a)(9)-5, A-7(c)(1) at the time the Descendant's Retirement Trust qualified as a see-through trust under the Minimum Distribution Rules.

(c) **Lifetime Power to Withdraw GST Non-Exempt Retirement Assets With Consent of Trust Protector.** Each Primary Beneficiary may direct the Trustee of his or her Non-GST Exempt Descendant's Retirement Trust to distribute to the Primary Beneficiary all or any portion of said trust's Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations therefrom with the advance, written consent of the Trust Protector, which the Trust Protector may grant or not grant in its sole discretion. The Trust Protector shall have the power to modify or eliminate the Primary Beneficiary's lifetime power of withdrawal granted under this Section 1.1(c).¹³

(d) **Primary Beneficiary's Powers of Appointment.** The Primary Beneficiary shall have the following powers of appointment over his or her Descendant's Retirement Trust, each of which shall be exercisable in the manner provided in Section *[Cross-references our Provisions Regarding Powers of Appointment clause]*:

(i) **Special Power Over Descendant's Retirement Trust.** Subject to the limitations set forth in Section 1.1(b)(iii), each Primary Beneficiary who has attained 25 years of age shall have the power to appoint the principal and any undistributed income of his or her Descendant's Retirement Trust to pass upon his or her death in favor of any one or more appointees¹⁴ other

¹¹ The Alternate Distribution provision contains a cross-reference to this provision.

¹² The term "Stretch-Out Retirement Account" is important, in that it is used to limit see-through trust provisions to those plans that actually provide stretch-out. A plan might not allow stretch-out either because its own terms are more restrictive, or because the law has changed to curtail post-death stretch-out.

¹³ This clause is intended to force inclusion of non-exempt retirement interests in the Primary Beneficiary's gross estate, without including a general power of appointment that might interfere with optimal stretch-out of MRDs. This clause may not be desirable in all cases. In some cases it may be worthwhile providing a mechanism that would allow this power to be "turned off" for certain beneficiaries.

¹⁴ This clause illustrates a broad special power, but there is no reason why it could not be limited to a more select group of appointees.

than the Primary Beneficiary's creditors, estate, or the creditors of the Primary Beneficiary's estate (said power is referred to as a "Special Power"). The Primary Beneficiary's Special Power under this Section 1.1(d)(i) is intended not to cause any part of the trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes and shall not be construed as a general power of appointment within the meaning of Code Section 2041(b)(1).

(ii) **General Power over Limited Portion of GST Non-Exempt Descendant's Retirement Trust.** Subject to the limitations set forth in Section 1.1(b)(iv), each Primary Beneficiary (regardless of age) of a GST Non-Exempt Descendant's Retirement Trust shall also have the power to appoint the principal and any undistributed income of the Limited Portion (as hereinafter defined) of such trust to pass upon his or her death in favor of the creditors of his or her estate (other than any taxing authority) (said power is referred to as a "General Power"). The "Limited Portion" of such trust is that portion, if any, for which GST Tax would be payable by reason of the Primary Beneficiary's death if the Primary Beneficiary did not have the General Power under this Section 1.1(d)(ii) (after taking into account all exemptions, exclusions, deductions and credits other than any GST exemption allocated to such trust by reason of the Primary Beneficiary's death), without regard to any exercise of a Special Power by the Primary Beneficiary under Section 1.1(d)(i). The Primary Beneficiary's General Power under this Section 1.1(d)(ii) is intended to cause the Limited Portion of such trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes rather than being subject to GST Tax, and shall constitute a "general power of appointment" within the meaning of Code Section 2041(b)(1).

(iii) **Trust Protector's Power to Alter Powers of Appointment.** Please refer to Section [Cross references our provision granting the Trust Protector amendment powers over powers of appointment], which, subject to Section 1.1(b)(ix), grants the Trust Protector certain powers to alter, eliminate or reinstate the powers of appointment granted to a Primary Beneficiary under this Section 1.1(d). (The Settlor included these powers to allow tax planning flexibility.)

(e) **Death of Primary Beneficiary.** Subject to the various limitations set forth in Section 1.1(b), upon the death of a Primary Beneficiary, the Trustee shall distribute said Primary Beneficiary's Descendant's Retirement Trust (including such items of property as may pass generally to said trust by reason of said Primary Beneficiary's death) in such manner as the Primary Beneficiary shall have effectively appointed, if applicable, and shall allocate the unappointed balance of the trust into shares on the principle of representation for the then living members of the class of descendants identified earliest in the following list with at least one class member then living:

- 1st: The deceased Primary Beneficiary's descendants.
- 2nd: The descendants of the deceased Primary Beneficiary's closest lineal ancestor who was a descendant of the Settlor.
- 3rd: The descendants of the Settlor.

Subject to Section 1.1(b)(v), any share so established for an individual under this Section 1.1(e) shall be applied to create or augment a Descendant's Retirement Trust to be held and distributed for such individual as provided in this Section 1.1 (each of whom is referred to as the "Primary Beneficiary" of his or her Descendant's Retirement Trust).

If none of the individuals described above are then living, the Trustee shall distribute such property as provided in Section [Cross references our Alternate Distribution provision].

*Sample Last One Standing Accumulation See-Through Trust Clause:*¹⁵

1.1 Descendant's Retirement Trusts. The Descendant's Retirement Trust for each Primary Beneficiary shall commence upon the first receipt of property by the Trustee of such Descendant's Retirement Trust. Such property and any subsequent additions of property shall constitute the trust estate of such Descendant's Retirement Trust, which shall be held, administered and distributed pursuant to this Section ___. Each such Descendant's Retirement Trust created for the benefit of a Primary Beneficiary may be referred to as the "[Name of Primary Beneficiary] Descendant's Retirement Trust." If a Descendant's Retirement Trust is divided into separate trusts pursuant to Section [Cross references our Division Into Separate Trusts provision] or otherwise, all references in this instrument to such "Descendant's Retirement Trust" shall be deemed to refer to all such separate trusts unless otherwise indicated (please also refer to

¹⁵ Contributed by Steve Trytten. The "last one standing" approach limits a trust to a class of descendants, and then terminates if at any point there is only one descendant. Note that in many cases, using an "age restriction" trust that uses the age of the oldest descendant will be a more flexible approach in that non-descendants could be included, and the trust does not necessarily terminate at such time as there is only one descendant.

Section [Cross references our Distributions from Divided Trusts provision] if a Descendant's Retirement Trust is divided into separate trusts).

(a) **Distribution of Income and Principal.** The income and principal of each Descendant's Retirement Trust shall be held, administered and distributed as follows:

(i) The Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Retirement Trust as the Trustee, in the Trustee's discretion, may determine to be necessary for the Primary Beneficiary's health, education and support.¹⁶

(ii) Additionally, the Trustee, other than an Interested Person, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Retirement Trust as such Trustee deems advisable, in such Trustee's sole discretion.

(iii) Any Officer authorized to make distributions under this Section __, may consider the Primary Beneficiary's other income or resources that are known to such Officer, including resources held in other trusts for the benefit of the Primary Beneficiary, the Primary Beneficiary's ability to obtain gainful employment, the obligations of others to support the Primary Beneficiary, and any benefits of income tax deferral that can be accomplished by accumulating the Primary Beneficiary's Tax-Advantaged Account assets.

(iv) Any income not so distributed shall be added to principal.

(v) The Settlor intends that any Officer determining whether to make distributions from a Descendant's Retirement Trust to its Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

(vi) **Descendant's Retirement Trust as Beneficiary of Retirement Account.** The Settlor intends that each Descendant's Retirement Trust that owns an interest in a Stretch-Out Retirement Account benefit from an extended deferral period under the Minimum Distribution Rules with respect to each Stretch-Out Retirement Account of the trust. Accordingly, each Descendant's Retirement Trust shall either account separately or maintain separate shares in order to keep track of the source and amount of any Stretch-Out Retirement Account Accumulations held by such trust. *Please refer to Section [Cross references our Division Into Separate Trusts provision],* which grants the Trustee the power to divide a trust into two or more separate trusts having the same terms and conditions as the original trust in order to accomplish this purpose.¹⁷

(b) **Termination of Trust's Interest in Retirement Assets – Primary Beneficiary is Last Remaining Class Member.** At such time that the Primary Beneficiary is the only living member of the class of the Settlor's descendants (excluding any individual born prior to January 1 of the Primary Beneficiary's year of birth, as if such individual had predeceased the Primary Beneficiary)¹⁸, each of his or her Descendant's Trusts shall terminate with respect to the trust's interests in Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations, and said interests shall be distributed to the Primary Beneficiary outright and free of trust.

(c) **Lifetime Power to Withdraw GST Non-Exempt Retirement Assets With Consent of Trust Protector.**¹⁹ Each Primary Beneficiary may direct the Trustee of his or her Non-GST Exempt Descendant's Retirement Trust to distribute to the Primary Beneficiary all or any portion of said trust's Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations therefrom with the advance, written consent of the Trust Protector, which the Trust Protector may grant or not grant in its sole discretion. Notwithstanding the foregoing, subject to

¹⁶ If any other beneficiaries are included, it is essential that they are within the eligible class of descendants.

¹⁷ Compare this provision to Section 1.2 of the Age Restriction sample form – it is much shorter. The takeaway is that the last one standing approach requires less complex drafting than the age restriction approach.

¹⁸ Only include this parenthetical if each trust is to be "age restricted" to that Primary Beneficiary, which would exclude older class members. This will complicate drafting of cross-over provisions and successor trusts to track the various ages that may be in play.

¹⁹ This clause is intended to force inclusion of non-exempt retirement interests in the Primary Beneficiary's gross estate, without including a general power of appointment that might interfere with optimal stretch-out of MRDs. This clause may not be desirable in all cases. In some cases it may be worthwhile providing a mechanism that would allow this power to be "turned off" for certain beneficiaries.

the restrictions set forth in Section *[Cross references the provision of our trust that puts restrictions on the amendment powers held by the Trust Protector]* the Trust Protector shall have the power to modify or eliminate the Primary Beneficiary's lifetime power of withdrawal granted under this Section__.

(d) **Primary Beneficiary's Powers of Appointment.** The Primary Beneficiary shall have the following powers of appointment over his or her Descendant's Retirement Trust, each of which shall be exercisable in the manner provided in Section *[Cross references our Provisions Regarding Powers of Appointment clause]*:

(i) **Special Power Over Descendant's Retirement Trust.** Each Primary Beneficiary who has attained 25 years of age shall have the power to appoint the principal and any undistributed income of his or her Descendant's Retirement Trust to pass upon his or her death in favor of any one or more of the Settlor's descendants²⁰ (said power is referred to as a "Special Power"). The Primary Beneficiary's Special Power under this Section __ is intended not to cause any part of the trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes and shall not be construed as a general power of appointment within the meaning of Code Section 2041(b)(1).

(ii) **General Power over Limited Portion of GST Non-Exempt Descendant's Retirement Trust.** In no event may the Primary Beneficiary exercise his or her general power of appointment to appoint any Stretch-Out Retirement Account or Stretch-Out Retirement Account Accumulations.²¹ Otherwise, each Primary Beneficiary (regardless of age) of a GST Non-Exempt Descendant's Retirement Trust shall also have the power to appoint the principal and any undistributed income of the Limited Portion (as hereinafter defined) of such trust to pass upon his or her death in favor of the creditors of his or her estate (other than any taxing authority) (said power is referred to as a "General Power"). The "Limited Portion" of such trust is that portion, if any, for which GST Tax would be payable by reason of the Primary Beneficiary's death if the Primary Beneficiary did not have the General Power under this Section __ (after taking into account all exemptions, exclusions, deductions and credits other than any GST exemption allocated to such trust by reason of the Primary Beneficiary's death), without regard to any exercise of a Special Power by the Primary Beneficiary under Section __. The Primary Beneficiary's General Power under this Section __ is intended to cause the Limited Portion of such trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes rather than being subject to GST Tax, and shall constitute a "general power of appointment" within the meaning of Code Section 2041(b)(1).

(iii) **Trust Protector's Power to Alter Powers of Appointment.** Please refer to Section *[Cross references our provision granting the Trust Protector amendment powers over powers of appointment]*, which grants the Trust Protector certain powers to alter, eliminate or reinstate the powers of appointment granted to a Primary Beneficiary under this Section __. (The Settlor included these powers to allow tax planning flexibility.)

(e) **Death of Primary Beneficiary; Retirement Assets to Last Remaining Class Member.** Upon the death of a Primary Beneficiary (the "deceased Primary Beneficiary"), the following shall apply:

(i) In the event that the deceased Primary Beneficiary is survived by only one member of the class of the Settlor's descendants (excluding any individual born prior to January 1 of the deceased Primary Beneficiary's year of birth, as if such individual had predeceased the deceased Primary Beneficiary)²², the Descendant's Trust's interests in Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations, if any, shall pass to said surviving class member outright and free of trust, and any exercise of a power of appointment over such assets under Section __ shall be ineffective with respect to those assets, but shall not otherwise cause the exercise of such power of appointment to be deemed to be an invalid exercise.

(ii) Except as provided in subsection __, the Trustee shall distribute said Primary Beneficiary's Descendant's Retirement Trust (including such items of property as may pass generally to said trust by reason of said Primary Beneficiary's death) in such manner as the Primary Beneficiary shall have effectively appointed, if applicable, and shall divide the unappointed balance of the

²⁰ This power of appointment must be limited to descendants.

²¹ Stretch-out retirement plans must not be able to be appointed to anyone other than descendants, and thus should be excluded from this general power of appointment.

²² Only include this parenthetical if each trust is age restricted for each Primary Beneficiary.

trust into shares on the principle of representation for the then living members of the class of descendants identified earliest below with at least one class member then living:

- 1st: The deceased Primary Beneficiary's descendants.
- 2nd: The descendants of the deceased Primary Beneficiary's closest lineal ancestor who was a descendant of the Settlor.
- 3rd: The descendants of the Settlor.

Any share so established for an individual under this Section ___ shall be applied to create or augment a Descendant's Retirement Trust to be held and distributed for such individual as provided in this Section ___ (each of whom is referred to as the "Primary Beneficiary" of his or her Descendant's Retirement Trust).

If none of the individuals described in the foregoing provisions of this Section ___ are then living, the Trustee shall distribute such property as provided in Section [*Cross references our Alternate Distribution provision*].

Notwithstanding the foregoing, with respect to the Descendant's Retirement Trust's interests in Stretch-Out Retirement Accounts or Stretch-Out Retirement Account Accumulations therefrom, the determination of whether a class of descendants listed in the foregoing provisions of this Section ___ has one or more members then living, and the division among the class that is do determined to have one or more members then living, shall be made as if each individual born prior to January 1 of the deceased Primary Beneficiary's year of birth had predeceased the deceased Primary Beneficiary.²³

See Steve Trytten's sample forms in Chapter 11 for selected provisions from the administrative sections of the trust instrument.

We give the Trust Protector a broad amendment power to carry out the purposes of the trust for its intended beneficiaries, which includes as an example: "to enhance the overall after-tax valuation of any Tax-Advantaged Account in which the trust has an interest." However, we restrict the Trust Protector's broad amendment powers to protect see-through trust status:

(i) Notwithstanding any of the foregoing provisions of this Section, with respect to a Descendant's Trust created hereunder that holds an interest in a Stretch-Out Retirement Account, including Stretch-Out Retirement Account Accumulations, as to which a Primary Beneficiary is the Stretch-Out Retirement Beneficiary, permits a Disqualified Recipient (as defined in Section ___) to (a) receive any interest in any Stretch-Out Retirement Account of the trust or Stretch-Out Retirement Account Accumulations therefrom, (b) be included as a potential recipient of any interest in any Stretch-Out Retirement Account of the trust or Stretch-Out Retirement Account Accumulations therefrom by reason of the Primary Beneficiary's exercise of a power of appointment over such Descendant's Trust, or (c) otherwise possess any beneficial interest in such Descendant's Trust.

We give the Trust Protector broad amendment powers over powers of appointment, as well. But we limit these powers specifically in an Age Restriction scenario as follows:

(iii) Notwithstanding the foregoing, the Trust Protector shall not exercise any of its powers under this Section [*Cross references the provision granting the Trust Protector amendment powers over powers of appointment*] in a manner that would permit a Disqualified Recipient (as defined in Section___) to receive any interest in any Stretch-Out Retirement Account of the trust or Stretch-Out Retirement Account Accumulations therefrom.

Here are selected provisions from the administrative sections of the trust instrument:

1. Trust as Beneficiary of Retirement Account.

1.1 Trusts to Benefit from Maximum Extended Deferral. The Settlor intends that each trust hereunder that owns an interest in a Retirement Account benefit from the maximum extended deferral period under the Minimum Distribution Rules that is available based upon the terms of such trust. Accordingly, the following shall apply:

²³ Only include this paragraph if each trust is to be age restricted for each Primary Beneficiary.

- (a) The Trustee of a trust so designated shall, within the time limit prescribed under the Minimum Distribution Rules, deliver documentation required under said rules to the respective administrators and custodians of each Retirement Account.
- (b) When the Trustee makes a distribution or an allocation of an interest in a Retirement Account to or for the benefit of a beneficiary of a trust hereunder, the Trustee is to assign all of the Trustee's interests in and powers over said Retirement Account interest (e.g., to direct investments and withdrawals) to said individual or trustee, as the case may be, and nothing under this instrument shall be interpreted as requiring the Trustee to arrange for the assets held in the Retirement Account to be withdrawn from said Retirement Account. The Settlor specifically intends that any such distribution or allocation of a Retirement Account shall be handled in a manner that (i) results in zero, or the minimum possible amount of income tax payable by either the trust, said individual, or said other trust, and (ii) results in no change, or the minimum possible amount of change, to the deferral period that applies to the Retirement Account.
- (c) The administrators, custodians, or other fiduciaries of the respective Retirement Accounts shall incur no liability to the trust or to any of its beneficiaries for acting upon the written instruction of the Trustee pursuant to this Section ___.

1.1 Power to Exercise Retirement Account Options.

In addition to the powers granted to the Trustee by law or under other provisions of this instrument, the Trustee is authorized to exercise any power or right over a Retirement Account that is available to the Trustee as beneficiary or successor owner of such Retirement Account, including powers to (a) take distributions, make elections, or otherwise select payment options, (b) direct investments, and (c) direct tax-free rollovers from one Retirement Account to another (and to establish any new Retirement Account that is to receive the rollover, if applicable).

1.2 Excess Distributions.

The term "Excess Distributions" means, with respect to an interest in a Stretch-Out Retirement Account, any distribution in excess of those amounts reasonably necessary to: (a) comply with the Minimum Distribution Rules; (b) provide for the beneficiary's health, education, and support; (c) comply with the legal obligation to pay income, estate, inheritance, GST Tax, or other taxes properly chargeable to distributions received from or the balance remaining in said Stretch-Out Retirement Account; and (d) provide for payment of trust expenses properly allocable to distributions received from or the balance remaining in said Stretch-Out Retirement Account.

1.3 Retirement Related Definitions.

- (a) **Participant.** The term "Participant" means the employee, plan participant, or account owner of said Retirement Account as those terms are commonly used under the Minimum Distribution Rules.
- (b) **Retirement Account.** The term "Retirement Account" means a Tax-Advantaged Account that is subject to the Minimum Distribution Rules.
- (c) **Stretch-Out Retirement Account.** The term "Stretch-Out Retirement Account" means, with respect to a particular trust arising hereunder, an interest in a Retirement Account that satisfies the following conditions: (a) the interest in the Retirement Account (or a successor Retirement Account, e.g., an inherited IRA that receives a rollover from a qualified retirement plan) became part of the trust by reason of the death of the Participant; and (b) the provisions governing said Retirement Account (including any death beneficiary designation in effect at the Participant's death and any other relevant circumstances) permit the Trustee of the trust to take post-death distributions over a time period based on the life expectancy of an individual, assuming said trust otherwise qualifies to do so under the Minimum Distribution Rules. By way of explanation, if a trust with an interest in a Retirement Account that is a Stretch-Out Retirement Account ultimately terminates (e.g., upon the death of a beneficiary), and if as a result the remaining Retirement Account interest is then allocated to a successor trust (e.g., for a descendant of the deceased beneficiary), said remaining Retirement Account interest will not be considered a Stretch-Out Retirement Account with respect to said successor trust under this Section because said interest did not become part of said successor trust by reason of the death of the Participant.²⁴

²⁴ The term "Stretch-Out Retirement Account" is important, in that it is used to limit see-through trust provisions to those plans that actually provide stretch-out. A plan might not allow stretch-out either because its own terms are more restrictive, or because the law has changed to curtail post-death stretch-out.

(d) Stretch-Out Retirement Account Accumulations. The term "Stretch-Out Retirement Account Accumulations" means, with respect to a particular trust arising hereunder, any amounts distributed from any one or more of said Stretch-Out Retirement Accounts to the trust that accumulate in the trust (including earnings thereon and net of any expenses or taxes allocable thereto). By way of explanation, if a trust with Stretch-Out Retirement Account Accumulations ultimately terminates (e.g., upon the death of a beneficiary), and if as a result said Stretch-Out Retirement Account Accumulations are allocated to a successor trust (e.g., for the descendants of the deceased beneficiary), said accumulations will not be considered Stretch-Out Retirement Account Accumulations in the hands of said successor trust, because it was the prior trust and not the successor trust that received distributions from a Stretch-Out Retirement Account and accumulated them.²⁵

(e) Stretch-Out Retirement Beneficiary. The term "Stretch-Out Retirement Beneficiary" means, with respect to a trust hereunder that owns an interest in a "Stretch-Out Retirement Account," the trust beneficiary whose life expectancy is or will be used in determining the timing and amount of post-death distributions (or whose life expectancy would have been so used if he or she was the oldest member of the group of individuals determined under the Minimum Distribution Rules to which he or she belongs).²⁶

(f) Tax-Advantaged Account. The term "Tax-Advantaged Account" means any plan, contract, or other arrangement (other than a life insurance contract) that is allowed under the Internal Revenue Code to accumulate any part of its income in a tax-advantaged manner (e.g., income tax-deferred or income tax free) for the benefit of an owner, beneficiary, or successor, including a qualified or non-qualified annuity, a deferred compensation plan, or a retirement or individual retirement account arrangement established under Code Section 401, 403, 408, 408A, or 457. A plan account or arrangement that is otherwise a "Tax-Advantaged Account" and that owns one or more life insurance contracts among its assets is a "Tax-Advantaged Account." A plan, contract, or other arrangement that is reasonably believed to qualify for tax-advantaged treatment under the Internal Revenue Code is a "Tax-Advantaged Account" even if it is subsequently determined it did not so qualify.

We give the Trust Protector a broad amendment power to carry out the purposes of the trust for its intended beneficiaries, which includes as an example: "to enhance the overall after-tax valuation of any Tax-Advantaged Account in which the trust has an interest." However, we restrict the Trust Protector's broad amendment powers to protect see-through trust status:

(i) Notwithstanding any of the foregoing provisions of this Section, with respect to a trust created hereunder that holds an interest in a Stretch-Out Retirement Account as to which a Current Beneficiary is the Stretch-Out Retirement Beneficiary, diminishes such Current Beneficiary's interest in "conduit distributions."

In our Division Into Separate Trusts provision, we provide examples to divide related to see-through trusts:

- (a) To enable Tax-Advantaged Accounts to be segregated from other trust assets;
- (b) To avoid holding one or more Stretch-Out Retirement Accounts with other trust assets; provided, however, that Stretch-Out Retirement Account Accumulations therefrom stay with the Stretch-Out Retirement Account;

We emphasize the need to maintain the see-through trust provisions upon a combination with another trust by adding the following language to the end of our Combining Trusts provision:

If any one or more of the trusts to be combined contain specific provisions relating to Tax Advantaged Accounts (e.g., so-called "conduit provisions") and any one or more of such trusts do not contain such provisions, the Trustee of the trust hereunder may participate in a combination provided that the specific provisions relating to Tax Advantaged Accounts continue to apply after said combination to all or substantially all (measured by aggregate value of such accounts) of the Tax Advantaged Accounts to which said provisions applied prior to the combination.

²⁵ The term "Stretch-Out Retirement Account Accumulations" is not needed for a conduit trust, but is a very important addition for any accumulation trust (see next chapter).

²⁶ It is important in defining this term to allow for the possibility that stretch-out will be over the oldest member of a group, and that the trust's primary beneficiary is not necessarily the oldest member.

In our Distributions to Persons Under Age 21 or Incapacitated Persons provision, we add the following conduit provisions just in case:

(i) Notwithstanding the foregoing, to the extent the Trustee of a Simple Trust receives distributions from a Stretch-Out Retirement Account as to which the beneficiary is the Stretch-Out Retirement Beneficiary, the Trustee shall distribute to or apply for the benefit of the beneficiary all of said distributions (net of expenses, and net of income, estate, inheritance, generation-skipping transfer tax, or any other tax, to the extent said expenses and taxes are properly allocable to distributions received or to the balance remaining in said Stretch-Out Retirement Account), for as long as the beneficiary shall live or until the earlier termination of his or her Simple Trust. Notwithstanding any other provision of this instrument or any power granted to the Trustee by law, for so long as the beneficiary is the Stretch-Out Retirement Beneficiary of a Stretch-Out Retirement Account, the Trustee's power to take Excess Distributions from that Stretch-Out Retirement Account may be exercised only by the Trustee, other than: (a) any individual who made a qualified disclaimer with respect to said interest in said Stretch-Out Retirement Account; and (b) any individual who owes a legal obligation of support to the beneficiary.

11. APPORTIONMENT OF EXPENSES AND DEATH TAXES ON RETIREMENT PLANS

Background. Tax apportionment provisions are important in every estate plan. They are generally outside the scope of these materials, but a few comments and sample clauses are included to address problematic issues that may arise where retirement plans are concerned.

Absent special drafting, death taxes or expenses may be chargeable to retirement plans, resulting in retirement plan distributions that could otherwise be deferred. If these distributions are taxable, additional income taxes will also occur. In some cases this may trigger even more retirement plan distributions to fund income tax payments. These cascading distributions are sometimes referred to as a "retirement plan melt-down."

The solution may not always be as simple as directing that retirement plan assets pass free of taxes and expenses, since they might be passing to different persons than the other assets that would absorb said taxes and expenses. The following sample clauses allow for the possibility of different heirs, and provide the fiduciary with as much flexibility as possible to locate funds to pay taxes and expenses, without changing the dispositive outcome.

*Sample Clause Addressing Apportionment of Expenses and Death Taxes to Retirement Plans:*¹

1.1 Exceptions and Clarifications to Payment of Debts, Expenses and Death Taxes. The following exceptions and clarifications shall modify the rules provided in *Sections [Cross references our Payment of Debts and Expenses provision]* and *[Cross references our General Rule for Payment and Apportionment of Death Taxes provision]*:

(a) **Tax-Advantaged Accounts or Other Assets Passing Outside Trust.** If the Trustee determines that all or any portion of a debt of the Settlor, expense of administration, or Death Tax is properly chargeable, by reason of the Settlor's death, to a beneficiary's interest in property not passing under any trust hereunder (including a Tax-Advantaged Account²), the Trustee may in its sole discretion pay all or part of said amount by applying any combination the Trustee determines in its sole discretion of the following assets (and any such payment shall be credited against the amount chargeable to said interest in property not passing under any trust hereunder): (i) assets the beneficiary offers to provide for this purpose; or (ii) assets the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in the Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion. The Settlor requests, but does not require, that the Trustee apply assets other than Tax-Advantaged Account assets to pay said amount when doing so reduces the need to take a distribution from a Tax-Advantaged Account earlier than would otherwise be necessary, thus enhancing the beneficiary's ability to benefit from income tax deferred compounding. The Trustee's powers provided under this Section __ are in addition to, and not in place of, other powers provided the Trustee under this or other instruments, or under applicable law.

(b) **"Stretch-Out Retirement Accounts" Passing Under Trust Instrument.** The Trustee shall not apply Stretch-Out Retirement Account assets passing under any trust hereunder to pay any portion of a debt of the Settlor, expense of administration, or Death Tax arising by reason of the Settlor's death, except as follows:³

(i) **Payment Prior to September 30 Determination Date.** If the Trustee determines, prior to the Determination Date (as defined in Section __), that all or any portion of a debt of the Settlor, expense of administration, or Death Tax is properly chargeable by reason of the Settlor's death to a beneficiary's interest in a Stretch-Out Retirement Account passing under any trust hereunder, the Trustee shall pay said amount prior to the Determination Date by applying the following assets in any combination the Trustee determines in its sole discretion (and such payment shall

¹ Contributed by Steve Trytten.

² For the definitions of the retirement account capitalized terms used in these provisions, see any of Chapters 9 through 11.

³ Commentators have expressed concern whether the IRS might treat a trust as having the decedent's estate as a beneficiary if the trust can be burdened with the decedent's debts, expenses of administration, or death taxes. However, there is no known authority or case in which the IRS has raised this issue. If it is desired to protect against potential challenge by the IRS on these grounds, this section provides an argument that any debts, expenses, or death taxes had to have been paid prior to the end of the post-mortem planning window. It follows that even if the estate was a beneficiary, it has dropped out within the post-mortem planning window and should not be counted for purposes of determining the trust's minimum distributions.

be credited against the amount chargeable to said Stretch-Out Retirement Account interest): (a) assets from said Stretch-Out Retirement Account interest; (b) assets the beneficiary offers to provide for this purpose; or (c) assets the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in the Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion. The Settlor requests, but does not require, that the Trustee apply assets other than Stretch-Out Retirement Account assets to pay said amount when doing so reduces the need to take a distribution from the Stretch-Out Retirement Account earlier than would otherwise be necessary, thus enhancing the beneficiary's ability to benefit from income tax deferred compounding.

(ii) **Amounts Determined On or After September 30 Determination Date.** If the Trustee determines, on or after the Determination Date, that all or any portion of a debt of the Settlor, expense of administration, or any Death Tax would be properly chargeable by reason of the Settlor's death, but for the operation of this Section ___, to a beneficiary's interest in one or more Stretch-Out Retirement Account interests passing under any trust hereunder, the Trustee shall pay said amount by first applying the following assets in any combination the Trustee determines in its sole discretion: (a) assets the beneficiary offers to provide for this purpose; or (b) assets the Trustee selects for this purpose (other than Stretch-Out Retirement Account assets or assets qualifying for the charitable or marital deductions from federal estate tax in the Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion; and the Trustee shall apply assets from said Stretch-Out Retirement Account interests to pay said amount only to the extent that said other assets are insufficient to do so.

(iii) **Determination Date.** For purposes of this instrument, the term "Determination Date" means, with respect to a Stretch-Out Retirement Account as to which the Participant has died, the thirtieth day of September of the calendar year following the calendar year of the death of the Participant, or such other date as may be provided for determining post-death designated beneficiaries under the Minimum Distribution Rules (e.g., Treasury Regulations Section 1.401(a)(9)-4).

1.2 Payment and Apportionment of GST Tax. As a general rule, any GST Tax arising by reason of the Settlor's death or by reason of a distribution or termination under this instrument (which for purposes of this Section shall be interpreted as including tax payments, if any, treated as part of the distribution or termination for purposes of determining the GST Tax), shall be paid, charged to, prorated among, or recovered in the manner provided by Texas and federal law in effect at the time of such death or event (not to the exclusion of laws of other jurisdictions when applicable, and allowing appropriate deference to federal rules to the extent they supersede the rules of Texas or other jurisdictions). The following exceptions and clarifications shall modify this general rule for the payment and apportionment of GST Taxes and, since GST Tax is defined making reference to Chapter 13 of the Code, are intended to satisfy the requirements of Code Section 2603(b):

(a) **Tax-Advantaged Accounts or Other Assets Passing Outside Trust.** If the Trustee determines that all or any portion of a GST Tax is properly chargeable, by reason of the Settlor's death, to a beneficiary's interest in property not passing under any trust hereunder (including a Tax-Advantaged Account), the Trustee may in its sole discretion pay all or part of said GST Tax by applying any combination the Trustee determines in its sole discretion of the following assets (and any such payment shall be credited against the amount chargeable to said interest in property not passing under any trust hereunder): (i) assets the beneficiary offers to provide for this purpose; or (ii) assets the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in a Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion. The Settlor requests, but does not require, that the Trustee apply assets other than Tax-Advantaged Account assets to pay said amount when doing so reduces the need to take a distribution from a Tax-Advantaged Account earlier than would otherwise be necessary, thus enhancing the beneficiary's ability to benefit from income tax deferred compounding. The Trustee's powers provided under this Section ___ are in addition to, and not in place of, other powers provided the Trustee under this or other instruments, or under applicable law.

12. FLEXIBILITY TO MANAGE STATE FIDUCIARY INCOME TAX

Background. Texas estate planners frequently pay little regard to state income tax issues, but it is important to remember that state income taxes can have a significant economic impact on a trust and its beneficiaries. Flexibility

in the trust instrument to move a trust's situs can be very helpful in managing state income tax issues. A Trustee's state of residence could cause higher state income taxes at the trust level (for example if the Trustee lives in California, which apportions fiduciary income tax based on the residence of Trustees and the residence of non-contingent beneficiaries). The Trustee may be concerned whether he or she has any duty to resign, and whether he or she has any exposure for continuing to serve. Explicit exoneration may be helpful, if it is consistent with the Settlor's intent.

*Sample Clause Addressing Change of Situs:*⁴

O. Change of Situs. The situs of the property of any trust created hereunder may be maintained in any jurisdiction that is appropriate to the trust purposes and its administration, in the discretion of the Trustee (other than an Interested Trustee), and thereafter transferred at any time or times to any such jurisdiction selected by the Trustee (other than an Interested Trustee) in accordance with applicable state law, which may include court approval of the transfer or adequate notice to trust beneficiaries. Upon any such transfer of situs, the trust estate of that trust may thereafter, at the election of the Trustee (other than an Interested Trustee) of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee (other than an Interested Trustee) of any trust created hereunder elects to change the situs of any such trust, said Trustee is hereby relieved of any requirement to qualify in any other jurisdiction and of any requirement to account in any court of such other jurisdiction.

*Sample Clause Addressing Change of Situs and Governing Law:*⁵

CHANGE OF SITUS AND CHANGE OF GOVERNING LAW:

Governing Law.

(a) **Generally.** To the extent consistent with the other provisions of this instrument, (i) the Trustee shall have the powers, duties, and liabilities of trustees set forth in the [State Trust Code], as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this instrument shall be governed by Texas law.

(b) **Change Of Governing Law.** The Trustee of any trust may designate any other jurisdiction's law as the governing law with respect to the administration of that trust, on the following conditions: (i) The change of governing law must be in the best interests of the trust's beneficiaries and must not jeopardize (A) the grantor's[s] purpose in establishing the trust or (B) any otherwise allowable estate tax deduction or generation-skipping transfer tax exemption. (ii) The Trustee (or at least one Co-Trustee) of the trust must be domiciled (in the case of an individual Trustee) or have its principal place of business (in the case of a bank or other corporate trustee) in the designated jurisdiction. (iii) The designated jurisdiction may be any nation, state, district, territory, political subdivision, or similar jurisdiction. (iv) The designation must be by signed, acknowledged declaration which states the effective date of the designation and is filed among the trust records. (v) Unless waived, thirty days' advance written notice of the proposed designation must be given (A) to [each grantor] who is then living, and to the beneficiary for whom the trust is named, if any, otherwise to each adult beneficiary of the trust who is then permitted to receive distributions from the trust, if any, and (B) to the [Trustee Appointer or Trust Protector]. (vi) There is no limit on the number of successive designations of governing law for any trust. (vii) Notwithstanding any designation, [State] law shall continue to apply to the extent that the powers of the Trustee are broader under [State] law than under the designated jurisdiction's law.

*Sample Clause Addressing Change of Situs and Governing Law:*⁶

1.3 Governing Law and Change of Situs. The validity, construction and all rights under this instrument (including those respecting the exercise of a power of appointment) are governed by the internal law (and not the law of conflicts) of the State of Texas; provided, however, that all matters pertaining to the Trustee's administration of real property shall be governed by the laws of the situs of such real property, including such state's conflict of law principles. This Section ___ shall apply regardless of any change of residence of any Trustee or any beneficiary, or the appointment or substitution of a Trustee residing in another state. The Trustee of a trust

⁴ See Article XXX, Section O. of sample trust contributed by Jonathan Blattmachr.

⁵ Contributed by Mickey Davis.

⁶ Contributed by Steve Trytten.

hereunder may, with the consent of a majority of the Current Beneficiaries of such trust, change the situs of such trust and elect to have such trust be governed by the laws of another jurisdiction.

*Sample Clause Addressing Exoneration of Fiduciary (including State Income Tax Arising from Fiduciary's Residence):*⁷

1.1 Advancement of Expenses; Exoneration of Trustees.

(a) **Indemnification of Individual Trustees.** Each Trustee who is an individual, other than an individual who is a Professional Trustee (as defined in Section ___), shall not be held liable and shall be held harmless and indemnified against any and all claims (including any error of judgment, exercise or non-exercise of any power or discretion, mistake of law, or action or inaction of any kind), except for (i) a breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary bringing the claim, or (ii) any profit that the Trustee derives from such a breach of trust. Said indemnification shall extend to any expenses incurred by the Trustee in connection with said claims to the fullest extent not prohibited by applicable law.

(b) **Increased Tax Arising by Reason of Trustee's Residence.** The claims that qualify for indemnification for certain Trustees under Subsection 1.1(a) include any increased taxes that apply to the trust by reason of such Trustee's residence in the State of California. Further, such Trustee shall owe no duty to resign notwithstanding increased taxes apply to the trust by reason of such Trustee's residence in the State of California.

(c) **Advancement of Expenses.** Expenses incurred by any Trustee in defending any claim or demand against the Trustee or the trust shall be paid by the trust estate in advance of the final disposition of such claim or demand (and the Trustee shall, for this purpose, be entitled to a presumption that the Trustee is not liable under such claim or demand); provided, however, that the Trustee shall repay any such advanced amount if it is ultimately determined that such Trustee is liable for such claim or demand.

(d) **Definitions.** For purposes of this Section ___, the following terms shall have the following meanings:

(i) The term "expenses" shall be broadly construed and shall include, without limitation, court costs, attorneys' fees, witness fees, fines, reduction in compensation for service as a Trustee, amounts paid in settlement or judgment and any other costs and expenses of any nature or kind incurred in connection with any proceeding.

(ii) The term "proceeding" shall be broadly construed and shall include, without limitation, the investigation, preparation, prosecution, defense, settlement, arbitration and appeal of, and giving of testimony in, any threatened, pending or completed action or lawsuit.

(iii) The term "Professional Trustee" shall mean any individual who regularly engages in the business of serving as a trustee or regularly holds himself or herself out to the public as offering such service for a fee; provided, however, that in no event shall the term "Professional Trustee" be deemed to include an attorney or C.P.A. serving as a Trustee as a result of the nomination, designation or appointment to such office by a client (or an employee or affiliate of a client) or if such nomination, designation or appointment is otherwise related, directly or indirectly, to the relationship between a client or former client and his or her attorney or C.P.A.

⁷Contributed by Steve Trytten.

13. MANAGING WHETHER DYNASTY TRUST IS SUBJECT TO ESTATE VS. GST TAX AT BENEFICIARY'S DEATH

Background. The assets in a non-exempt dynasty trust may be subject to transfer tax at the primary beneficiary's death. The terms of the trust and the actions of the primary beneficiary may allow a choice as to whether the assets are included in the primary beneficiary's estate for estate tax. If not, generation skipping transfer tax ("GST Tax") may apply if the primary beneficiary's death is a GST taxable event.

It is difficult to predict in advance whether it is better for non-exempt assets to be subjected to estate tax or to GST tax. A number of variables are involved, and that analysis will be a moving target over time as circumstances and tax laws evolve. An in-depth treatment of this issue also is outside the scope of these materials, but a few key variables to consider include:

- The other assets that may be subject to transfer tax, and the amounts of transfer tax credits, exemptions, graduated rate brackets, *etc.* available to the primary beneficiary, spouse, or other family members;
- Whether it may be possible to pay transfer tax on a "tax exclusive" basis, such as the gift tax calculated on lifetime gifts (or the generation skipping transfer tax calculated on direct skips);
- The potential credit for taxes paid on prior transfers that is available under Code Section 2013 with respect to estate tax payments, but not generation skipping transfer tax;
- The likelihood that the non-exempt assets will pass to persons or trusts who are skip persons, as generation skipping transfer tax would not apply if the assets pass to non-skip persons (*e.g.*, are assets likely to pass to or for the benefit of the primary beneficiary's other siblings, descendants, or perhaps even a "double skip" to or for the benefit of his or her grandchildren or more remote descendants);
- The potential for a new cost basis under Code Section 1014 if the assets are included in the primary beneficiary's estate (assets that are not included in an estate but are subject to generation skipping transfer tax do not receive a new cost basis, except in the case of a taxable termination occurring at the same time as and by reason of the death of a decedent);¹
- The deduction in respect of a decedent allowed under Code Section 691(c) is available for estate tax, and for certain scenarios involving GST Tax;² and
- State transfer tax implications.

*Sample Disposition of Non-Exempt Trust Clause:*³

A. Special Provisions for GST Non-Exempt Trust.

1. Death of Beneficiary Whose Death Would Cause Generation-Skipping Transfer Tax.

Upon the death of the Beneficiary (referred to in this paragraph as the "Deceased Beneficiary"), if the death of such Deceased Beneficiary would cause the imposition of a generation-skipping transfer tax if the GST Non-Exempt Trust were distributable in the same manner as that provided herein for distribution of the GST Exempt Trust, then the GST Non-Exempt Trust shall be distributed as follows:

a) If any Grandchild or more Remote Descendant of the Deceased Beneficiary is Living.

If upon the death of the Deceased Beneficiary any descendant of the Deceased Beneficiary other than a child of the Deceased Beneficiary is then living, the GST Non-Exempt Trust, to the extent, if any, not effectively appointed by the Deceased Beneficiary, shall, upon his or her death, continue in trust until the fifth (5th) anniversary of the death of the Deceased Beneficiary and, until

¹ IRC § 2654(a)(2).

² See Harrington, Carol A., Tax Management Portfolio 850-2nd, "Generation-Skipping Transfer Tax," Section B.2. for a short discussion of certain limitations and interpretive issues arising under IRC § 691(c)(3).

³ See Article V, Section C. of sample trust contributed by Jonathan Blattmachr.

such fifth (5th) anniversary, shall be held in a separate trust for the benefit of those descendants of the Deceased Beneficiary living upon the death of the Deceased Beneficiary who are then assigned to the youngest generation from the Grantor for generation-skipping transfer tax purposes of the Code (hereinafter collectively the "Deceased Beneficiary's Youngest Descendants"). During the term of such trust, The Distributions Trustee shall distribute to one or more of the Deceased Beneficiary's Youngest Descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose. Any net income not so distributed shall be accumulated and annually added to principal.

Upon the fifth (5th) anniversary of the death of the Deceased Beneficiary, the trust principal then held for the benefit of the Deceased Beneficiary's Youngest Descendants hereunder, as it is then constituted, together with any accrued, accumulated and undistributed income, shall be set aside and divided into per stirpital shares for the Deceased Beneficiary's descendants then living or, if there is no descendant of the Deceased Beneficiary then living and if the Deceased Beneficiary was a grandchild or more remote descendant of the Grantor, for the descendants then living of the Deceased Beneficiary's nearest ancestor who was a descendant of the Grantor with descendants then living or, if there is no such descendant then living or if the Deceased Beneficiary was a child of the Grantor, for the Grantor's descendants then living, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts, to be held as a separate trust to be disposed of under the terms of this Article, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

b) If no Grandchild nor any more Remote Descendant of the Deceased Beneficiary is Living. If upon the death of the Deceased Beneficiary either (i) no descendant of the Deceased Beneficiary other than a child of the Deceased Beneficiary is then living or (ii) no descendant of the Deceased Beneficiary is then living, but a descendant of the Grantor who is assigned to a generation for generation-skipping transfer tax purposes at least two generations younger than that of the Deceased Beneficiary is then living, the GST Non-Exempt Trust, to the extent, if any, not effectively appointed by the Deceased Beneficiary, shall, upon his or her death, continue in trust until the fifth (5th) anniversary of the death of the Deceased Beneficiary and until such fifth (5th) anniversary, shall be held in a separate trust for the benefit of those then living descendants who are then assigned to the youngest generation from the Grantor for generation-skipping transfer tax purposes of the Code of the ancestor of the Deceased Beneficiary of the closest degree of consanguinity to the Deceased Beneficiary which ancestor has descendants who are then living and which ancestor is (or was) a descendant of the Grantor or which ancestor is (or was) the Grantor (hereinafter collectively the "Youngest Collateral Relatives"). During the term of such trust, The Distributions Trustee shall distribute to one or more of the Youngest Collateral Relatives as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose. Any net income not so distributed shall be accumulated and annually added to principal.

Upon the fifth (5th) anniversary of the death of the Deceased Beneficiary, the trust principal then held for the benefit of the Youngest Collateral Relatives hereunder, as it is then constituted, together with any accrued, accumulated and undistributed income, shall be set aside and divided into per stirpital shares for the Deceased Beneficiary's descendants then living or, if there is no descendant of the Deceased Beneficiary then living and if the Deceased Beneficiary was a grandchild or more remote descendant of the Grantor, for the descendants then living of the Deceased Beneficiary's nearest ancestor who was a descendant of the Grantor with descendants then living or, if there is no such descendant then living or if the Deceased Beneficiary was a child of the Grantor, for the Grantor's descendants then living, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts, to be held as a separate trust to be disposed of under the terms of this Article, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

2. Death of Beneficiary Whose Death Would Not Cause Generation-Skipping Transfer Tax. Upon the death of the Deceased Beneficiary, and if the death of such Deceased Beneficiary would not cause the imposition of a generation-skipping transfer tax if the GST Non-Exempt Trust were distributable in the same manner as that provided herein for distribution of the GST Exempt Trust, then the GST Non-Exempt Trust shall be distributed in the same manner as that provided herein for distribution of the GST Exempt Trust.

B. Disinterested Trustee May Confer Power. The Trustee (excluding, however, any Interested Trustee)⁴ may at any time, prior to the death of the Beneficiary, by an instrument in writing (1) confer upon the Beneficiary a power exercisable only by Will to appoint all or part of the Trust to the creditors of the Beneficiary's estate (other than any taxing authority), and the instrument conferring such power upon the Beneficiary may require the consent of the Trustee (other than any Interested Trustee) to exercise the power, (2) revoke any such instrument previously executed, with or without executing a replacement instrument and/or (3) irrevocably relinquish the powers conferred under (1) and/or (2). Without limiting the Trustee's discretion, the Trustee may use the authority conferred by this paragraph to subject the trust property to estate tax instead of the generation-skipping transfer tax when it appears that it may reduce overall taxes to do so. If a power is conferred upon a Beneficiary by the Trustee in accordance with this paragraph, such power shall not be exercisable in any manner so as to postpone the vesting of any estate or interest in the appointed property or to suspend the absolute ownership or power of alienation of the appointed property for a period ascertainable without regard to the date of this Agreement, and the validity of any exercise shall be measured with respect to that date.

Using the Delaware Tax Trap

A power of appointment that the power holder cannot exercise in favor of him- or herself, his or her creditors, his or her estate, or the creditors of his or her estate, is known as a "special" or "limited" power of appointment. Normally, holding or exercising a limited testamentary power of appointment over property does not cause that property to be included in the power holder's estate for federal estate tax purposes. IRC § 2041(b)(1)(A). However, estate tax inclusion does result if the power is exercised

by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

IRC § 2041(a)(3).⁵

Exercising a limited power of appointment in this manner triggers the so-called "Delaware Tax Trap" ("DTT"). If a child exercises the power in this fashion, the property so appointed is includable in the child's estate for federal estate tax purposes, and therefore avoids application of the generation-skipping transfer tax.

⁴ It is important that this power can only be exercised by a dis-interested Trustee to ensure against any risk of causing inclusion of trust assets in the grantor's estate.

⁵ See also Treas. Reg. § 20.2041-3(e). There is a gift tax analog, IRC § 2514(e), but triggering gift tax typically only increases basis to the extent of gift tax actually paid, so its application is extremely limited.

14. STATE-SPECIFIC DRAFTING CHALLENGES: CALIFORNIA PROP. 13 AND TEXAS TAX CODE SECTION 11.13

Background. State-specific issues may require additional attention in drafting a dynastic trust. For example, California has a unique system for property tax assessment that began with Proposition 13 in 1978. Under this system, annual increases to property tax assessments may not exceed 2% even if fair market value has increased by more. However, the property will be fully reassessed upon a change in ownership. Certain transfers from parents to children (or vice versa) may qualify for an exclusion from reassessment. A transfer in trust may also qualify, but only if there are no current beneficiaries other than children (or parents, as the case may be). Thus, a trust must be drafted carefully to ensure that no other current beneficiaries will interfere with the parent-child exclusion.

The Texas Tax Code also has a unique feature which provides property tax exemptions for a "residence homestead" for county and school taxes. To be eligible for the exemption, the residence homestead must be owned by one or more individuals or by a "qualifying trust."¹ In general, to constitute a qualifying trust, the agreement, will, or court order creating the trust (or an instrument transferring property to the trust or another agreement that is binding on the trustee) must provide that the trustor of the trust or a beneficiary of the trust has the right to use and occupy as the trustor's or beneficiary's principal residence residential property rent free and without charge except for taxes and other costs and expenses specified in the instrument or court order for life, for the lesser of life or a term of years, or until the trust is revoked or terminated. Section 113.022 of the Texas Trust Code provides that the trustee of a trust (other than a charitable trust) may permit real estate held in trust to be occupied by a beneficiary who is currently entitled to receive distributions from the trust, "upon a finding that the trustee's action would be consistent" with the probable intention of the testator. Many taxing authorities in Texas had determined that these provisions of the Texas Trust Code fall short of granting trust beneficiaries the rights required to make the trust a qualifying trust under the Texas Trust Code. Therefore, language in the trust agreement that grants more express rights may be appropriate.

*Sample Trust Provisions to Qualify for Parent-Child Exclusion:*²

If a trust may seek qualification for the parent-child exclusion, it is best not to include the common dynastic trust provision allowing direct payments of health and tuition for the benefit of the child's descendants. Instead, we address these issues as part of the Trust Protector's amendment powers. The Trust Protector is authorized to amend the trust to add this provision, but only as to assets other than California real property that carries a reduced property tax assessment resulting from parent-child exclusion. The clause also prohibits the Trust Protector from making any other amendment or modification that would interfere with qualification for parent-child exclusion.

(a) The Trust Protector shall have the power to amend the terms of any Descendant's Trust created hereunder for a Primary Beneficiary to provide that the Trustee, other than an Interested Person, may make distributions for the benefit of any descendant of the Primary Beneficiary for tuition or medical care paid directly to the applicable educational institution, medical provider, or medical insurance carrier, taking into account the tax benefits to be achieved by making such payments from GST Non-Exempt assets. However, under no circumstances may a distribution be made to a descendant of a Primary Beneficiary from California real property (or income from such real property) that carries a reduced property tax assessment due to the allowance of an exclusion under California Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers).

(b) Notwithstanding the foregoing, the Trust Protector may not amend, modify, or terminate any trust hereunder in any manner that adds an "impermissible beneficiary" to receive distributions from any California real property (or net income thereon) that carries a reduced property tax assessment due to the allowance of an exclusion under Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers), and in that regard an "impermissible beneficiary" refers to any person who, if that person had been a beneficiary of the trust (or predecessor trust, if applicable) that received the property in connection with the transfer that qualified for Section 63.1 exclusion at the time of the transfer, would have caused that trust to fail to qualify for that exclusion.

If the trust will be containing a decanting power (or if a decanting power applies under applicable State law), we restrict the decanting power as follows:

¹ Tex. Tax Code § 11.13(j)(1).

² Contributed by Steve Trytten.

(a) The Appointing Fiduciary may not exercise the Appointing Power in any manner that would add an "impermissible beneficiary" to receive distributions from any California real property (or net income thereon) that carries a reduced property tax assessment due to the allowance of an exclusion under Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers), and in that regard an "impermissible beneficiary" refers to any person who, if that person had been a beneficiary of the trust (or predecessor trust, if applicable) that received the property in connection with the transfer that qualified for Section 63.1 exclusion at the time of the transfer, would have caused that trust to fail to qualify for that exclusion.

*Sample Trust Provisions to Qualify for Texas Trust Code Exemptions:*³

A. Homestead Occupancy Right. Each beneficiary for whom a trust is named shall have a Homestead Occupancy Right as to his or her trust. For this purpose, a "Homestead Occupancy Right" as to a trust means the right to use and occupy as a principal residence (rent free and without charge except for taxes and other costs and expenses as may be specified elsewhere in this instrument) any residential property held in the trust. The right lasts for life or until the trust terminates or is revoked (as to the property) in compliance with Section 11.13 of the Texas Tax Code.

B. Homestead Maintenance And Expenses. At any time that a beneficiary occupies residential property held in a trust as his or her principal residence he or she shall be responsible for maintaining the property at his or her expense; however, in making discretionary distributions to the beneficiary from that (or any other) trust, the Trustee may consider those expenses and shall provide for them to the same extent, if any, as would be proper if the property were not held in the trust. For this purpose, "maintaining the property" means: (i) keeping the property in good repair and in compliance with all applicable ordinances, deed restrictions and other applicable rules, if any; (ii) paying the interest on any "mortgage" (meaning any purchase money or home improvement debt secured by a lien on the property); (iii) keeping the property properly insured; and (iv) paying all utilities and other ordinary expenses of maintaining and preserving the property. All other costs of the property shall be paid by the owners of the residence in proportion to their respective ownership interests. This includes, for example, all principal payments on any mortgage and the cost of all improvements and extraordinary repairs (those necessitated by fire, flood or other casualty) in excess of any available insurance proceeds.

³ Contributed by Mickey Davis.

15. DECANTING AND TRUST PROTECTOR POWERS TO MODIFY

Background. The three most important qualities of a good dynasty trust are: flexibility, flexibility, and flexibility. Modern concepts such as Trust Protectors and decanting authority have greatly expanded the potential flexibility of an irrevocable trust to respond to changes in law or circumstance.

Savings language may be valuable in clarifying limits to these powers as necessary to preserve favorable tax benefits such as the marital deduction for gift and estate tax, see-through trust status for purposes of minimum required distributions from retirement plans, and so forth.¹

Some clients may not want others to make changes to what they have set up, and explicit language may be necessary to set the limit as to what modifications or decantings, if any, are permitted.²

The potential income and transfer taxes of a decanting are not clear.³ The potential for negative tax consequences may be reduced if the adjustments to the trust can be accomplished as a modification of the same trust, rather than a transfer of assets out of the existing trust and into a new trust. The Uniform Trust Decanting Act specifically authorizes the exercise of a decanting power to modify the existing trust.⁴

*Sample Disposition of Non-Exempt Trust Clause:*⁵

See Section A.8. for savings language that is intended to avoid negative tax consequences arising from the very existence of the decanting clause.

A. Trustees Can Create Trusts. The authorized Trustee (as defined in this paragraph) may, subject to the provisions set forth in this paragraph, exercise any power to invade the principal of the invaded trust by appointing (whether or not there is a current need to invade principal under any standard for invasion of principal set forth in the invaded trust) part or all of the principal of the invaded trust in favor of a trustee of another trust (referred to as the "appointed trust," and defined further below) for the benefit of one, or more or all of those beneficiaries for whom the principal of the invaded trust may be currently paid to the exclusion of any one or more of such beneficiaries. The exercise of the power to invade the principal of a trust under this paragraph shall be subject to the following additional provisions:

1. If all of the assets of the invaded trust are to be paid to the appointed trust under the applicable appointment, then the exercise of the power by the authorized Trustee under this paragraph shall apply both to (1) all of the assets currently comprising the principal of the invaded trust, including undistributed accumulated income, and (2) to all assets subsequently paid to or acquired by the invaded trust after the payment to the appointed trust, unless the authorized Trustee who so appoints the principal of the invaded trust provides otherwise in writing at the time of appointment. If only a portion of the trust assets of the invaded trust are to be paid over to the appointed trust under the applicable appointment, then subsequently discovered assets of the invaded trust or assets subsequently paid to or acquired by the invaded trust shall remain assets of the invaded trust, unless the authorized Trustee who so appoints the principal of the invaded trust provides otherwise in writing at the time of appointment.

2. The exercise of the power to invade the principal of a trust under this paragraph shall be by an instrument in writing, signed, and acknowledged by the authorized Trustee. The instrument exercising the power shall be maintained with the records of the invaded trust and may be filed in any court having jurisdiction over the invaded trust.

¹ The Uniform Trust Decanting Act promulgated in July, 2015 has excellent savings language. See Sections 19 and 22. The Uniform Law Commission comments that accompanied the Act are particularly helpful.

² Explicit language limiting or forbidding decanting will be respected under the Uniform Trust Decanting Act, Section 15.

³ For a thorough discussion of the tax and other issues that are associated with decanting, see Willms, *Decanting Trusts: Irrevocable, Not Unchangeable*, 6 EST. PLAN. & COMMUNITY PROP. L. J. 35 (2013); for a more recent version of the article, see Willms, *Decanting Trusts: Irrevocable, Not Unchangeable*, presented to the Corpus Christi Estate Planning Council (Mar. 2015), available at <http://tinyurl.com/o7rnh7w>. ACTEC has submitted comments in response to Notice 2011-101, which can be found online at: <http://www.actec.org/resources/comments-on-transfers-by-a-trustee/>

⁴ Section 2(10) of the Uniform Trust Decanting Act.

⁵ See Article XVI, Section D. of sample trust contributed by Jonathan Blattmachr.

3. The exercise of the power to invade the principal of a trust under this paragraph shall not be treated as being prohibited by any provision in the invaded trust instrument that prohibits amendment or revocation of the trust or that constitutes a spendthrift clause.
4. The provisions of this paragraph shall not be construed to abridge the right of any Trustee to appoint property in further trust that arises under any statutory law or under common law, or as directed by any court having jurisdiction over the invaded trust.
5. Nothing in this paragraph shall be construed as creating or implying a duty on any Trustee acting hereunder to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a Trustee not exercising the power conferred under this paragraph.
6. The authorized Trustee, acting pursuant to the authority granted by this paragraph, may not exercise a power to decrease or indemnify against a Trustee's liability or exonerate a Trustee from liability for failure to exercise the duty of care, diligence and prudence otherwise applicable to the Trustee or to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.
7. The authorized Trustee, acting pursuant to the authority granted by this paragraph, may not exercise a power to increase the total compensation of any Trustee of the appointed trust, other than by reason of extending the period, as may be permitted hereunder, during which such Trustee will serve. No Trustee shall receive any paying commission with respect to property transferred pursuant to this paragraph.
8. If any contribution to the invaded trust qualified for the annual exclusion under Code Sec. 2503(b), the marital deduction under Code Sec. 2056(a) or 2523(a), or the charitable deduction under Code Sec. 170(a), 642(c), 2055(a) or 2522(a), is a direct skip whether or not a nontaxable gift under Code Sec. 2642(c), or qualified for any other specific tax benefit that would be lost by the existence of the authorized Trustee's authority under this paragraph for income, gift, estate, or generation-skipping transfer tax purposes under the Code, then the authorized Trustee shall not (1) have the power to invade the principal of a trust pursuant to this paragraph in a manner that would prevent the invaded trust from qualifying for or would reduce the exclusion, deduction, nontaxable gift or other tax benefit which was originally claimed with respect to that contribution, (2) have the power to make a change, including the grant of a power of appointment, that will result in (a) a change or modification of any standard of payment to or for one or more of the beneficiaries of the invaded trust or (b) a reduction, limitation or other change in any beneficiary's right to a mandatory distribution of income, a mandatory annuity or unitrust interest, a right annually to withdraw a percentage of the value of the trust or a right annually to withdraw a specified dollar amount provided that such mandatory or annual right has already come into effect with respect to the beneficiary. Notwithstanding the foregoing (2) but subject to (1), the authorized Trustee may pay to an appointed trust that is a supplemental needs trust.
9. The authorized Trustee exercising the authority granted by this paragraph may not make a change that will violate any rule against perpetuities or similar rule limiting the duration of trusts applicable to the invaded trust and may not make a change that will disqualify a trust which owns S corporation stock and is a permitted shareholder under Code Sec. 1361(c)(2) from being a permitted shareholder.
10. The current beneficiaries of the appointed trust shall be one, more than one or all of the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be one, more than one or all of the successor or remainder beneficiaries of the invaded trust. If a beneficiary includes a class of persons, such class shall include any person who falls within the class of persons after the payment to the appointed trust. The appointed trust may grant to one or more of the beneficiaries of the appointed trust a power of appointment.
11. The term "appointed trust" shall mean an irrevocable trust other than the invaded trust to which principal is appointed under this paragraph including, but not limited to, a new trust created by the authorized Trustee.
12. The standard for invasion in the appointed trust may be no greater than the standard for invasion of the invaded trust.
13. As used in this paragraph, the term "authorized Trustee" shall refer to the Trustee of any trust hereunder, provided, however, that with respect to any trust which provides that principal may be invaded for any reason other than support, maintenance, health and education within the meaning of Code Sec. 2041(b), the authorized Trustee of that trust shall exclude any Interested Trustee.

*Sample Trust Protector Clause, Including Power to Modify:*⁶

SECTION ___ TRUST PROTECTOR.

For all purposes of this Agreement:

(a) Definition and Requirements. "Trust Protector" means a person who has been appointed in writing by the then acting trustee, and such appointment has been accepted in writing by the person appointed to act as Trust Protector. The trustee then acting shall designate the initial Trust Protector at such time as the trustee deems appropriate, in the trustee's sole and absolute discretion. However, in no event may any beneficiary of a trust or any related or subordinate party (as defined by Code section 672(c)) with respect to any such beneficiary be appointed as Trust Protector of that trust.

(b) Designation of Successor Trust Protector. Subject to the preceding provisions of this Section, the trustee then acting may appoint a successor Trust Protector.

(c) Majority Rule. During such time when two or more persons are serving as Trust Protectors, any decision of the Trust Protectors shall require the affirmative consent of a majority of them.

(d) Powers of Trust Protector. The Trust Protector may, from time to time, notwithstanding any other provision of this Agreement, modify this Agreement, including the dispositive, management, administrative and other provisions of all kinds with respect to any or all trusts created under this Agreement. Without limiting the generality of the foregoing, the Trust Protector shall have the following powers which may be exercised in the sole and absolute discretion of the Trust Protector:

(1) To modify the distributive provisions with respect to any one or more beneficiaries or to terminate a trust in order to address changes in tax or other laws or circumstantial changes that may affect the trust and/or trust beneficiaries, including any changes a court may approve under RSMo sections 456.4-415 (reformation to correct mistakes), 456.4-416 (modification to achieve settlor's tax objectives, or both);

(2) To exercise the powers described in Section ___;

(3) To modify the management or administrative provisions of a trust;

(4) To modify any power of appointment by increasing or decreasing the class of appointees and by converting any limited power of appointment to a general power of appointment, the exercise of which takes effect at the death of the person holding the power, or to similarly change such a general power of appointment to a limited power of appointment; and

(5) To distribute the principal of any trust created under this Agreement in further trust under RSMo section 456.4-419 or any successor statute.

(e) Exercise of Powers. All powers granted herein: (1) shall be exercised only by an instrument that is signed by the Trust Protector and delivered to the trustee; (2) may be exercised any number of times without exhausting the power; (3) are personal to the Trust Protector, and no individual is authorized to execute the power on behalf of the Trust Protector; and (4) may not be exercised in a manner that directly or indirectly authorizes distributions to the Trust Protector, the Trust Protector's estate or the creditors of either or to the natural objects of the Trust Protector's bounty who are not descendants of mine.

(f) Release of Powers. The Trust Protector, acting on the Trust Protector's own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, reduce or modify to a lesser extent any or all powers and discretions conferred under this Section.

(g) No Requirement to Act. The Trust Protector need not consider the advisability of exercising a power under this Section until the trustee requests by written instrument delivered to the Trust Protector that the Trust Protector consider exercising the powers under this Section. The Trust Protector shall not be liable to any person for any action taken or omitted under this Section unless and except to the extent that the person asserting liability proves, by clear and convincing evidence, that the Trust Protector acted in bad faith.

⁶ Contributed by Steve Gorin.

(h) **Liability.** A Trust Protector exercising the powers under this Section is not a trustee or any other fiduciary with respect to those powers and shall not have the same legal responsibilities as a trustee or any other fiduciary in the exercise of the powers under this Section.

(i) **Miscellaneous.** Sections [references to various trustee provisions that make sense to apply to a trustee, such as providing for reasonable compensation and expense reimbursement] shall apply to the Trust Protector by substituting the words "Trust Protector" for the word "trustee."

*Sample Virtual Representation Clause:*⁷

A virtual representation clause can be very helpful when carrying out a modification of decanting.

Section ____ Virtual Representation of Trust Beneficiaries.

Where an adult competent party to a proceeding relating to a trust has the same interest as a person who is a minor or is incapacitated (such person referred to in this Section as "disabled"), it is unnecessary to serve process upon the disabled person, and the disabled person is bound by the judgment rendered in such proceeding. Similarly, where an adult competent party to a non-judicial settlement of the account of any fiduciary has the same interest as a disabled person, it is unnecessary to have the interest of the disabled person further represented, and the disabled person is bound by the settlement. Subject to the foregoing limitations, the parents, custodian, conservator or guardian of any disabled beneficiary may, in carrying out the provisions of this Section, act and receive notice or accounting for the disabled beneficiary and execute any instrument for such beneficiary and on such beneficiary's behalf.

*Sample Trust Protector Clause, Including Power to Modify:*⁸

We grant both specific and broad amendment powers to the Trust Protector to provide flexibility throughout the life of the trust. Section 1.1(c) contains several limitations and savings provisions.

1.1 Powers and Duties of Trust Protector.

In addition to other powers specifically granted to the Trust Protector elsewhere in this instrument, the Trust Protector shall have the following powers, each of which may be exercised in the Trust Protector's sole discretion:

(a) **Powers Regarding Officers and Officer Powers.** The Trust Protector shall have the power:

(i) With respect to the Removal and Replacement Powers under Section [*Cross references the provision in our trust that provides Trustee removal, replacement, and designation powers to various individuals*]:

(A) While the Settlor is holding Removal and Replacement Powers, to exercise Removal and Replacement Powers without the consent of the Settlor.

(B) At any time after the Settlor becomes unable or unwilling to hold Removal and Replacement Powers, to revest the Settlor with the Removal and Replacement Powers that the Settlor may have previously relinquished.

(ii) With respect to a Primary Beneficiary's powers over his or her Descendant's Trust, to postpone or accelerate the age at which a Primary Beneficiary may:

(A) serve as Co-Trustee of his or her Descendant's Trust; or

(B) exercise the Removal and Replacement Powers over his or her Descendant's Trust.

In exercising its discretion under this Section ____, the Trust Protector shall take into consideration the facts and circumstances at that time, including issues relating to (a) the Primary Beneficiary's ability to handle money and make decisions wisely; (b) the Primary Beneficiary's health, marriage and need for asset protection; and (c) tax planning implications.

(iii) To modify or eliminate any existing restrictions set forth in Section [*Cross references our provision providing restrictions on Removal and Replacement Powers*] or create additional restrictions on the exercise of Removal and Replacement Powers, as may be applicable to any provision of this instrument.

⁷ Contributed by Steve Gorin.

⁸ Contributed by Steve Trytten.

(iv) To modify any trust arising hereunder to direct whether Co-Trustees are to act by unanimous agreement or by majority vote or whether any one Co-Trustee shall have the power to act alone in carrying out any or all powers of the Trustee.

(v) To direct or modify a procedure for resolving deadlock among current or future Co-Trustees (including the designation of a tiebreaker and a mechanism for designating successor tiebreakers).

(vi) To revest in the office of Trustee any right or power to the extent it has been previously relinquished or restricted in scope by the Trustee.

(b) **Amendment Powers.** The Trust Protector shall have the power:

(i) To amend the terms of any Descendant's Trust created hereunder for a Primary Beneficiary to provide that the Trustee, other than an Interested Person, may make distributions for the benefit of any descendant of the Primary Beneficiary for tuition or medical care paid directly to the applicable educational institution, medical provider, or medical insurance carrier, taking into account the tax benefits to be achieved by making such payments from GST Non-Exempt assets. However, under no circumstances may a distribution be made to a descendant of a Primary Beneficiary from California real property (or income from such real property) that carries a reduced property tax assessment due to the allowance of an exclusion under California Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers).⁹

(ii) To amend the terms of any trust arising hereunder to create, modify, or eliminate various offices thereunder (such as offices to hold incidents of ownership of life insurance policies, certain investments or voting rights in entity interests, or distribution powers) for any purpose, including to bifurcate or consolidate the Trustee's powers, or to add or eliminate a directed trust arrangement. Unless the Trust Protector specifically directs otherwise, each new office so created shall provide that expenses incurred by any person acting in the capacity of such new office shall be advanced, and any individual acting in the capacity of such new office who is an individual, other than an individual who is a Professional Trustee (as defined in Section *[Cross references the provision defining this term in our Exoneration provision]*), shall be held harmless and indemnified, in the same manner as if said officer were a "Trustee" within the meaning of Section *[Cross references our Exoneration provision]*, subject to the limitations contained therein.

(iii) Subject to Section *[Cross references our provision relating to Controlled Corporation Stock]* regarding Controlled Corporation Stock, to amend, modify or terminate all or any part of a trust arising hereunder in any manner that the Trust Protector determines is appropriate to carry out the purposes of the trust for its intended beneficiaries, including (a) to protect a beneficiary, (b) to limit taxation, (c) to avoid jeopardizing S corporation status for any corporation seeking to maintain S corporation status as to which the trust is a shareholder, (d) to respond to a change in laws, economic condition or other circumstances, (e) to enhance the overall after-tax valuation of any Tax-Advantaged Account in which the trust has an interest, (f) to enable the trust to be an owner or permitted transferee of ownership interests in closely held business or other business entities pursuant to the terms of any applicable contractual agreement governing such business entities, or (g) from and after such time as the Substitution Power, the Power to Vest Borrowing Power, and the Power to Add Charitable Beneficiaries are no longer in effect with respect to such trust, to eliminate or restrict any power that would cause such trust to be a grantor trust.

(c) **Restrictions on Trust Protector Powers.** Notwithstanding the foregoing, the Trust Protector may not amend, modify, or terminate any trust hereunder in any manner that:

(i) Reduces the amount of trust assets in which a beneficiary (other than a beneficiary whose beneficial interest in the trust, taking actuarial considerations into account, is worth less than 5% of the trust) has a beneficial interest. By way of example and not limitation, an amendment that purports to change the respective shares of two beneficiaries from 50/50 to 40/60 would not be allowable hereunder. However, any amendment that purports to do any of the following would be allowable hereunder if such amendment otherwise serves one or more of the purposes enumerated above: (a) change the age at which a beneficiary receives a distribution or right under a trust from one age to an older age, (b) change a trust that terminates at a certain age to a trust that does not terminate at a certain age, (c) change a trust that requires distribution of all income to the sole Current Beneficiary to a trust that provides that the Trustee may accumulate or distribute income on a discretionary basis to the sole Current Beneficiary but to no one else, or vice versa (for example, to allow a trust that is a Qualifying Subchapter S Trust to an Electing

⁹ This last part of the provision is for California parent-child property tax exclusion purposes.

Small Business Trust, or vice versa), or (d) change a trust as to which the beneficiary is the sole Current Beneficiary into a Special Needs Trust as to which the beneficiary continues to be the sole Current Beneficiary.

(ii) Adds an "impermissible beneficiary" to receive distributions from any California real property (or net income thereon) that carries a reduced property tax assessment due to the allowance of an exclusion under Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers), and in that regard an "impermissible beneficiary" refers to any person who, if that person had been a beneficiary of the trust (or predecessor trust, if applicable) that received the property in connection with the transfer that qualified for Section 63.1 exclusion at the time of the transfer, would have caused that trust to fail to qualify for that exclusion.¹⁰

(iii) Permits the Settlor to serve as Trustee, Co-Trustee, or in any other fiduciary capacity with respect to the trust in any manner.

(iv) Vests the Settlor with any interest in the trust estate of any trust hereunder, any right to income or principal of any such trust estate, or any power to vary the interest of any trust beneficiary or otherwise designate the persons who shall possess or enjoy any such trust estate or the income therefrom.

(v) Causes the Settlor's Substitution Power under Section *[Cross references the provision granting the Settlor's Substitution Power]* to be deemed to be a power to shift benefits among trust beneficiaries within the meaning of Revenue Rulings 2008-22 or 2011-28 (for example, an amendment that purports to change the terms of a trust in a way that would cause the nature of the trust's investments, the level of income produced by any or all of the trust's investments, or the provisions of Section *[Cross references our Diversification provision]* to have an impact on the respective interests of the beneficiaries of such trust).

(vi) Vests the Settlor with any incidents of ownership in any life insurance policy on the life of the Settlor owned by any trust hereunder.

(vii) Causes inclusion of all or any portion of the trust estate in the gross estate of the Settlor for federal estate tax purposes.

(viii) Jeopardizes the status of any trust created under this instrument as an eligible S corporation shareholder if such trust owns or is expected to own stock in a corporation seeking to maintain S corporation status. See Section *[Cross references our S Corporation provision]*.

(ix) Notwithstanding any of the foregoing provisions of this Section, alters the terms of this instrument in a way that adversely affects a federal estate tax marital or charitable deduction that would, absent such alteration, be available to the estate of the Settlor, if applicable, or any beneficiary or adversely affects the status of any trust as GST Exempt.

*Sample Decanting Clause:*¹¹

Our decanting clause defers to the decanting statute of the trust's situs, if applicable. If there is no decanting statute, then the clause provides decanting authority as part of the trust instrument. In the latter case, limitations and savings provisions can be found in Subsections 1.1(e) and (f).

1.1 Appointing to Another Trust.

This Section explains when and how a Fiduciary holding a power to invade principal of a trust created hereunder after the death of the Settlor ("Invasion Power"), other than a Fiduciary who is a Current Beneficiary or Successor Beneficiary of such trust, may exercise said power by appointing all or part of said principal in favor of the Trustee of one or more other trusts. Said Fiduciary is referred to as the "Appointing Fiduciary."

If the situs of any such trust created hereunder after the death of the Settlor is a jurisdiction that expressly permits the Appointing Fiduciary to exercise its Invasion Power by appointing the property subject to the Invasion Power in favor of the Trustee of one or more other trusts, then the Appointing Fiduciary may so exercise such Invasion Power in accordance with and subject to the applicable law of said jurisdiction, and with the exception of Section __, the remaining provisions of this Section __ shall not apply.

¹⁰ This provision is for California parent-child property tax exclusion purposes.

¹¹ Contributed by Steve Trytten.

If the situs of any such trust created hereunder after the death of the Settlor is any jurisdiction other than a jurisdiction that expressly permits the Appointing Fiduciary to exercise its Invasion Power by appointing the property subject to such Invasion Power in favor of the Trustee of one or more other trusts, then the Appointing Fiduciary may so exercise such Invasion Power in accordance with and subject to the remaining provisions of this Section __.

(a) **Appointing Power.** An Appointing Fiduciary may exercise its Invasion Power with respect to such trust (the "Original Trust") by appointing all or any part of the property subject to such Invasion Power in favor of the trustee of any one or more trusts that each qualify as an "Appointed Trust" with respect to the Original Trust (as provided in Section __). Such power is hereinafter referred to as the "Appointing Power."

The Appointing Power may be exercised regardless of whether there is a current need to distribute any of such property that is governed by such Invasion Power pursuant to any standard set forth in the Original Trust. The Appointing Power may be exercised without the consent of any beneficiary of the Original Trust. The exercise of the Appointing Power shall not be treated as being prohibited by any provision in the Original Trust that prohibits amendment or revocation of the trust or that constitutes a spendthrift clause. Nothing in this Section __ or the remaining provisions of Section __ shall be construed as creating or implying a duty on any Appointing Fiduciary to exercise the Appointing Power, and no inference of impropriety shall be made as a result of an Appointing Fiduciary not exercising the Appointing Power.

(b) **Appointed Trust.** A trust qualifies as an Appointed Trust with respect to an Original Trust if:

(i) The current beneficiaries of the trust consist of one, more than one, or all of the Current Beneficiaries of the Original Trust and no one else.

(ii) The successor and remainder beneficiaries of the trust consist of one, more than one, or all of the current, successor, or remainder beneficiaries of the Original Trust and no one else.

(iii) The trust is an irrevocable trust.

(iv) A trust qualifies as an Appointed Trust regardless of whether the trust grants (or does not grant) a power of appointment to one or more of the beneficiaries of the trust.

The Appointed Trust may have dispositive and/or administrative provisions that differ from the Original Trust. If the beneficiaries of the Original Trust are identified as an open class (e.g., comprised of descendants of a person who is living or who has living descendants), the Appointed Trust will not fail the requirements of Sections __ and __ solely because it creates interests for others who may fall within said open class after the exercise of the Appointing Power.

(c) **Treatment of Trust Assets Acquired After Appointment.** Unless provided otherwise in a written instrument by the Appointing Fiduciary:

(i) If the Appointing Power is exercised with respect to all of the principal of the Original Trust as constituted at the time of exercise, it shall apply to all of the assets comprising the net income and principal of the Original Trust (other than income for periods prior to said exercise of the Appointing Power that is currently required to be distributed under the Original Trust), including any and all income or principal discovered, paid to, or acquired by the Original Trust subsequent to said exercise.

(ii) If the Appointing Power is exercised with respect to less than all of the principal of the Original Trust as constituted at the time of exercise, it shall not apply to any income for periods prior to said exercise of the Appointing Power that is currently required to be distributed under the Original Trust, and it shall not apply to income or principal discovered, paid to, or acquired by the Original Trust subsequent to such exercise.

(d) **Manner of Exercise.** The exercise of the Appointing Power shall be by written instrument, signed and acknowledged by the Appointing Fiduciary. Such written instrument shall be maintained with the records of the Original Trust and may be filed in any court having jurisdiction over the Original Trust.

(e) **Restrictions on Power.** The Appointing Fiduciary may not exercise the Appointing Power in any manner that would:

(i) decrease or indemnify against any Trustee's liability or exonerate any Trustee from liability for failure to exercise the duty of care, diligence and prudence otherwise applicable to the Trustee or to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; provided, however, that this Section shall not be constructed to prevent

the Appointing Fiduciary from exercising its Appointing Power to appoint to a trust that has a directed Trustee and that exonerates the Trustee from liability for following the directions of the directed Trustee;

(ii) result in any Trustee receiving compensation that is greater than any compensation they would have received as Trustee under the Original Trust;

(iii) violate any rule against perpetuities or similar rule limiting the duration of trusts applicable to the Original Trust;

(iv) jeopardize the S corporation status of the Original Trust or any Appointed Trust as an eligible S corporation shareholder if any such trust owns or is expected to own stock in an S corporation;

(v) add an "impermissible beneficiary" to receive distributions from any California real property (or net income thereon) that carries a reduced property tax assessment due to the allowance of an exclusion under Revenue and Taxation Code Section 63.1 (relating to certain "parent-child" and "grandparent-grandchild" transfers), and in that regard an "impermissible beneficiary" refers to any person who, if that person had been a beneficiary of the trust (or predecessor trust, if applicable) that received the property in connection with the transfer that qualified for Section 63.1 exclusion at the time of the transfer, would have caused that trust to fail to qualify for that exclusion; or

(vi) jeopardize such trust's ability to hold an interest in a retirement account in a manner that would qualify for the longest possible deferral period with respect to such account under the minimum distribution rules.

(f) **Special Considerations Regarding Tax Treatment (Savings Clause).** The Settlor intends that the existence of the Appointing Power shall not interfere with the trust's ability to qualify for and benefit from any benefits for income, gift, estate, or generation-skipping transfer tax purposes under the Code relating to the trust or contributions to the trust, including the annual exclusion under Code Section 2503(b), the marital deduction under Code Section 2056(a) or 2523(a), or the charitable deduction under Code Sections 170(a), 642(c), 2055(a) or 2522(a), and this Section shall be interpreted accordingly. In particular, to the extent that any tax benefit would be lost by the existence of the Appointing Power, the Appointing Fiduciary shall not have the power to:

(i) distribute the net income or principal of an Original Trust pursuant to this Section in a manner that would reduce or prevent the Original Trust from qualifying for the exclusion, deduction, nontaxable gift or other tax benefit that was originally claimed with respect to that contribution; or

(ii) make a change, including the grant of a power of appointment, that will result in (a) a change or modification of any standard of distribution to or for one or more of the beneficiaries of the Original Trust or (b) a reduction, limitation or other change in any beneficiary's right to a mandatory distribution of income, a mandatory annuity or unitrust interest, a right annually to withdraw a percentage of the value of the trust or a right annually to withdraw a specified dollar amount provided that such mandatory or annual right has come into effect with respect to the beneficiary.

Notwithstanding the foregoing Section 1.1(f)(ii), but subject to Section __, the Appointing Fiduciary may distribute to an Appointed Trust that is a supplemental needs trust.

16. UNITRUST DISTRIBUTIONS TO INDIVIDUAL BENEFICIARIES

Background. Unitrust distributions are a modern alternative to an income interest. The unitrust approach strikes a fair balance between the interests of current and remainder beneficiaries without interfering with optimal investment strategy for the trust.

Although the unitrust concept is straight-forward, the drafting and implementation requires addressing a number of details, as illustrated in the sample clauses below.

*Sample Unitrust Clause:*¹

1.3. Unitrust Amount.

A. Generally. For each calendar year of a trust, the Unitrust Amount of that trust is the product of:

1. the specified percentage amount, and
2. the average of the net fair market value of the assets of the trust (i) valued as of the close of the last business day of the preceding three calendar years, or, (ii) in the first three calendar years of the trust, valued as of the date of my death and as of the close of the last business day of each calendar year thereafter.

B. Source Of Payment. The Unitrust Amount shall be paid first from available income, then from capital gains, then from principal.

C. Prorations And Adjustments. The Trustee shall prorate the Unitrust Amount for any short year (including the initial year and the final year of the trust) on a daily basis. If an incorrect valuation of trust assets for any year results in an incorrect distribution, the Trustee shall pay to the recipient--in the case of an undervaluation--or receive from or charge against a subsequent Unitrust payment to the recipient--in the case of an overvaluation--an amount equal to the difference between the amount distributed and the proper Unitrust Amount, in either case without interest. This adjustment shall be made within a reasonable time after the proper Unitrust Amount is finally determined.

D. Valuation. For purposes of computing the Unitrust Amount, assets shall be valued at their net fair market value, with no accrual of interest or other periodic payments, and considering the debts and any accrued estate tax (but not income tax or property tax) liability of the trust. In determining the fair market value of a non-marketable asset, the Trustee may (but need not) have the non-marketable asset appraised by a valuation professional. The cost of the appraisal shall be paid from the principal of the trust estate. The Trustee need not revalue a non-marketable asset each year, but may use the prior year's value or a reasonable estimate of the current value. I suggest, but do not require, that if a non-marketable asset was last valued at more than \$100,000, it be revalued (by the Trustee or via appraisal) within three years. The Trustee's assignment of a value to a non-marketable asset, done in good faith, shall be binding on all current and future beneficiaries of the trust or share and shall not be subject to question. "Marketable assets" are (i) cash, and moneys held at financial institutions, (ii) securities (including mutual fund shares) for which market quotations are readily available, and (iii) interests in common trust funds. "Non-marketable assets" are all assets which are not marketable assets. Examples of non-marketable assets include (but are not limited to) real estate, partnership interests, closely held stock and loans.

E. Residential Property. If the trust holds a residence, including a seasonal or vacation home, the trustee in its discretion may allow the recipient of the Unitrust Amount to occupy the residence. In such case: (i) the value of the residence shall be excluded in determining the Unitrust Amount payable; (ii) neither the expenses of the residence nor the value of its use shall be charged against the Unitrust Amount payable to the recipient; and (iii) Section ___ shall govern the recipient's occupancy rights.

*Sample Unitrust Clauses for Trust with Retirement and Non-Retirement Assets:*²

¹ Contributed by Mickey Davis, adapted from language suggested by Eric Viehman.

² Contributed by Steve Trytten.

Trusts that are "see-through trusts" with respect to retirement plans and that also hold non-retirement assets require particular attention in coordinating the distribution provisions that support see-through trust status with the unitrust provision.

"Wrap-around Unitrust Clause." The first clause below illustrates one of two possible approaches for a see-through trust that is a conduit trust. Under this first approach, the conduit distribution is a given, and the unitrust distribution is "wrapped around" the conduit distribution. The clause does this by directing an additional distribution amount if necessary to produce combined distributions equal to the unitrust percentage of all trust assets including retirement plan assets. Note that the value of any residential property is excluded from the asset base if the beneficiary has the right to occupy the property. Subsection (b) of the clause also permits additional distributions for support, health, or education at the Trustee's discretion.

(a) In each year of the Descendant's Trust (a "trust year"), the Trustee shall distribute to or for the benefit of the Primary Beneficiary, in no less frequent than quarterly installments, the Unitrust Amount corresponding to that trust year (defined next).

(i) The Unitrust Amount for any given calendar year shall be an amount equal to 3% (the "Unitrust Percentage") multiplied by the Asset Base (defined next) and then reduced by the value of all distributions from Stretch-Out Retirement Accounts made during said year to the Primary Beneficiary pursuant to Section __. The Unitrust Amount shall not be reduced by trust expenses that might otherwise be charged to income if the trust were not a unitrust. The Asset Base for a given calendar year is the average of the fair market value of the trust estate of the Descendant's Trust (including Stretch-Out Retirement Accounts) at the beginning of the current and two prior calendar years (or such lesser number of calendar years as have occurred since inception of the Descendant's Trust). However, the Asset Base shall be determined by excluding the value of any residential property (and any Tangible Personal Property contained therein) that, as of the first day of the current valuation year, the Primary Beneficiary had the right to occupy. Notwithstanding the foregoing:

(A) For a short trust year, including the year of the Primary Beneficiary's death, the Unitrust Amount shall be prorated to reflect the number of days in the short trust year.

(B) For a trust year in which assets are added to the Descendant's Trust (other than the first funding of the trust) or distributed from the Descendant's Trust (other than the distribution of the Unitrust Amount) (hereinafter "adjustment year"), the Unitrust Amount shall be increased (in the case of a contribution) or decreased (in the case of a distribution) by an amount equal to the Unitrust Percentage times the fair market value of the assets contributed or distributed (valued as of the date or dates of contribution or distribution), multiplied by a fraction, the numerator of which is the number of days from the contribution or distribution to the end of the calendar year, and the denominator of which is the days in the calendar year. Further, the beginning year values for the adjustment year and the trust year immediately preceding the adjustment year (unless the adjustment year is the first year of the trust) shall be increased by the amount of such addition, or decreased by the amount of such distribution, for purposes of determining the Unitrust Amount for the year following the adjustment year.

(ii) The Trustee shall value assets consisting of cash and marketable securities, or any other liquid assets for which there is a clear, public market indication of value ("Liquid Assets"). The Trustee, other than an Interested Person, shall value all assets other than Liquid Assets using such method of valuation as the Trustee, other than an Interested Person, deems reasonable in its sole discretion under the circumstances. The Trustee shall value assets held in Stretch-Out Retirement Accounts without any downward adjustment for income tax that may be payable and without any upward adjustment for the potential benefit of tax deferred compounding that may occur. The Trustee, other than an Interested Person, may engage appraisers at the trust's expense to determine such fair market values but is not required to do so. Any determination of fair market value shall be binding on all parties, including the Primary Beneficiary and any remainder beneficiaries of the Descendant's Trust and not subject to appeal absent manifest error or bad faith on the part of the Trustee. For administrative convenience when determining the "Asset Base" the Trustee may assume that the value of any asset at the close of a calendar year equals the value of that asset at the beginning of the next calendar year. No computation of the fair market value of the trust estate of the Trust shall require accruals, other than accruals for distributions that are payable but not paid as of the date for the determination of such fair market value.

(iii) The Unitrust Amount shall be paid (a) first from net accounting income and then from any other ordinary income (as such term would be determined if the Descendant's Trust were not a unitrust), and to the extent said net accounting income and other ordinary income is insufficient, (b) next from net realized short term capital gains, and if such short term capital gains are insufficient, (c) next, from net realized long-term capital gains, and if such long-term capital gains are insufficient, then (d) last, from corpus. The preceding sentence shall be interpreted as excluding those items of income or gain arising from distributions (either Minimum Required Distributions or Excess Distributions) from a Stretch-Out Retirement Account as to which the Primary Beneficiary is the Stretch-Out Retirement Beneficiary, since said amounts are the subject of specific distributions under Section ____.

(iv) The goal of the unitrust structure is to provide a relatively smooth flow of guaranteed distributions to the Primary Beneficiary.

(b) If the Primary Beneficiary needs additional funds for his or her support, health or education, upon receipt of satisfactory evidence of such need and after considering all other resources available to the Primary Beneficiary that are known to the Trustee (including the Unitrust Amount payable to the Primary Beneficiary, but excluding the Primary Beneficiary's primary residence and Tax-Advantaged Account assets that if accumulated may have benefits of income tax deferral), the Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary so much of the Descendant's Trust, up to the whole thereof, as the Trustee may deem necessary to meet said need.

(c) Any income not so distributed shall be added to principal.

(d) The Settlor intends that any Officer determining whether to make distributions from a Descendant's Trust to its Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

Non-Retirement Only Unitrust Clause. The next clause below illustrates the alternate approach for a see-through trust that is a conduit trust. The conduit distribution is a given, and the unitrust clause directs a unitrust distribution based only on the value of non-retirement plan assets. Note that the value of any residential property is excluded from the asset base if the beneficiary has the right to occupy the property. Subsection (b) of the clause also permits additional distributions for support, health, or education at the Trustee's discretion.

(a) In each year of the Descendant's Trust (a "trust year"), the Trustee shall distribute to or for the benefit of the Primary Beneficiary, in no less frequent than quarterly installments, the Unitrust Amount corresponding to that trust year (defined next).

(i) The Unitrust Amount for any given calendar year shall be an amount equal to 3% (the "Unitrust Percentage") multiplied by the Asset Base (defined next). The Unitrust Amount shall not be reduced by trust expenses that might otherwise be charged to income if the trust were not a unitrust. The Asset Base for a given calendar year is the average of the fair market value of the trust estate of the Descendant's Trust at the beginning of the current and two prior calendar years (or such lesser number of calendar years as have occurred since inception of the Descendant's Trust). However, the Asset Base shall be determined by excluding (a) the value of the Descendant's Trust's interest in any Stretch-Out Retirement Account, and (b) the value of any residential property (and any Tangible Personal Property contained therein) that, as of the first day of the current valuation year, the Primary Beneficiary had the right to occupy. Notwithstanding the foregoing:

(A) For a short trust year, including the year of the Primary Beneficiary's death, the Unitrust Amount shall be prorated to reflect the number of days in the short trust year.

(B) For a trust year in which assets are added to the Descendant's Trust (other than the first funding of the trust) or distributed from the Descendant's Trust (other than the distribution of the Unitrust Amount) (hereinafter "adjustment year"), the Unitrust Amount shall be increased (in the case of a contribution) or decreased (in the case of a distribution) by an amount equal to the Unitrust Percentage times the fair market value of the assets contributed or distributed (valued as of the date or dates of contribution or distribution), multiplied by a fraction, the numerator of which is the number of days from the contribution or distribution to the end of the calendar year, and the denominator of which is the days in the calendar year. Further, the beginning year values for the adjustment year and the trust year immediately preceding the adjustment year (unless the adjustment year is the first year of the trust) shall be increased by the amount of such addition, or decreased by the amount of such distribution, for purposes of determining the Unitrust Amount for the year following the adjustment year.

(ii) The Trustee shall value assets consisting of cash and marketable securities, or any other liquid assets for which there is a clear, public market indication of value ("Liquid Assets"). The Trustee, other than an Interested Person, shall value all assets other than Liquid Assets using such method of valuation as the Trustee, other than an Interested Person, deems reasonable in the its sole discretion under the circumstances. The Trustee, other than an Interested Person, may engage appraisers at the trust's expense to determine such fair market values but is not required to do so. Any determination of fair market value shall be binding on all parties, including the Primary Beneficiary and any remainder beneficiaries of the Descendant's Trust and not subject to appeal absent manifest error or bad faith on the part of the Trustee. For administrative convenience when determining the "Asset Base" the Trustee may assume that the value of any asset at the close of a calendar year equals the value of that asset at the beginning of the next calendar year. No computation of the fair market value of the trust estate of the Trust shall require accruals, other than accruals for distributions that are payable but not paid as of the date for the determination of such fair market value.

(iii) The Unitrust Amount shall be paid (a) first from net accounting income and then from any other ordinary income (as such term would be determined if the Descendant's Trust were not a unitrust), and to the extent said net accounting income and other ordinary income is insufficient, (b) next from net realized short term capital gains, and if such short term capital gains are insufficient, (c) next, from net realized long-term capital gains, and if such long-term capital gains are insufficient, then (d) last, from corpus.

(iv) The goal of the unitrust structure is to provide a relatively smooth flow of guaranteed distributions to the Primary Beneficiary.

(b) If the Primary Beneficiary needs additional funds for his or her support, health or education, upon receipt of satisfactory evidence of such need and after considering all other resources available to the Primary Beneficiary that are known to the Trustee (including the Unitrust Amount payable to the Primary Beneficiary, but excluding the Primary Beneficiary's primary residence and Tax-Advantaged Account assets that if accumulated may have benefits of income tax deferral), the Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary so much of the Descendant's Trust, up to the whole thereof, as the Trustee may deem necessary to meet said need.

(c) Any income not so distributed shall be added to principal.

(d) The Settlor intends that any Officer determining whether to make distributions from a Descendant's Trust to its Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

17. SAMPLE INTER VIVOS DYNASTY TRUST IRREVOCABLE TRUST

THIS IS A TRUST AGREEMENT dated June _____, 2017, between Howard M. Zaritsky of Fairfield, Virginia (the "Grantor") and Steve Gorin as General Trustee, Big Trust Company of Alaska as Administrative Trustee, Mickey Davis as Distributions Trustee, and Steven Trytten as Investment Trustee (collectively, the "Trustee").

WHEREAS, the Grantor desires to create a trust; and

WHEREAS, the Trustee is willing to accept the trust hereby created and covenants to discharge faithfully the duties of a Trustee hereunder;

NOW, THEREFORE, the Grantor intends to transfer the property described in Exhibit A, attached hereto and made a part hereof, to the Trustee, IN TRUST, and the Trustee agrees to accept the property and to hold, manage and distribute the property under the terms of this Agreement.

ARTICLE I Trust Name

This Agreement and the trust hereunder may be referred to as Irrevocable Trust.

ARTICLE II Lifetime Trust

A. During The Grantor's Life. During the Grantor's life, the Trustee shall administer the trust (the "Lifetime Trust") pursuant to this paragraph:

1. The Distributions Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee (excluding, however, any Disqualified Trustee) may at any time and from time to time determine to such one or more of the Grantor's Wife, Martha Washington Zaritsky, and the Grantor's descendants in such amounts or proportions as the Trustee (excluding, however, any Disqualified Trustee) may from time to time select for the recipient's health, education, maintenance or support in his or her accustomed manner of living.
2. The Distributions Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine to the Grantor's Wife and the Grantor's descendants in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose.
3. Any net income not so distributed shall be accumulated and annually added to principal.
4. The Lifetime Trust shall also be subject to the withdrawal rights set forth below.

B. Separate Trusts for GST Purposes. Although this Article speaks in terms of a single Lifetime Trust, the Lifetime Trust may instead be held as two trusts under the circumstances outlined in this paragraph if the Trustee (excluding, however, any Interested Trustee) in the Trustee's absolute discretion determines to do so.

1. The Trustee may hold as much of the property of the Lifetime Trust as the Trustee may determine in the exercise of discretion as a separate trust ("the GST Exempt Trust") and hold the balance of the trust property in another separate trust ("the GST Non-Exempt Trust"). The GST Exempt Trust and the GST Non-Exempt Trust shall have identical terms but shall be accounted for as separate trusts for which investments and distributions need not be the same. The Grantor anticipates this will be done in such manner that the GST Exempt Trust will have a zero inclusion ratio with respect to the Grantor and the Grantor's Wife as transferors for Federal generation-skipping transfer tax purposes (to the extent either or both of them may be considered a transferor of property held under this Article for such purposes).
2. The GST Exempt Trust and the GST Non-Exempt Trust may be held and administered as if they were a single trust, *in solido*, and shall be treated as a single trust in applying the Crummey withdrawal rights defined below.
3. When additions are made to the Lifetime Trust, the Trustee may wait until there is sufficient information concerning what GST exemption has been allocated to the addition before allocating the added property to the GST Exempt Trust or the GST Non-Exempt Trust.
4. The Trustee (excluding, however, any Interested Trustee) is also authorized in the Trustee's absolute discretion to transfer property from the GST Non-Exempt Trust to the GST Exempt Trust. Without limiting the Trustee's discretion, the Grantor anticipates this will be done in conjunction with the allocation of additional GST exemption to the property. If the GST Non-Exempt Trust has more than one GST transferor and is therefore treated as separate trusts for GST purposes, then a transfer from the GST Non-Exempt Trust shall be deemed to come pro rata from such separate trusts comprised in the GST Non-Exempt Trust, unless the Trustee shall identify it in some other fashion. If the GST Exempt Trust also has more than one GST transferor, the transferred property shall be added to the separate trust for GST purposes having the same transferor.

5. The authority conferred by this Article to create separate GST Exempt and GST Non-Exempt Trusts may be exercised without any special notation on the trust records.

6. If no Trustee (other than an Interested Trustee) serves, or if it is established that no such division has ever been accomplished, all property contributed hereto shall be deemed to be GST Exempt, whether or not GST exemption is actually allocated to the property contributed hereunder.

C. End of Lifetime Trust. Upon the Grantor's death, if the Grantor is survived by the Grantor's Wife, any property of the Lifetime Trust that is included in the Grantor's gross estate shall be distributed to the Trustee of the Marital Trust hereunder, to be disposed of under the terms of that trust, and any property of the Lifetime Trust that is not included in the Grantor's gross estate shall be distributed to the Trustee of the Family Trust hereunder, to be disposed of under the terms of that trust. Upon the Grantor's death, if the Grantor is not survived by the Grantor's Wife, the property of the Lifetime Trust shall be set aside and divided, separately as to any GST Non-Exempt Trust and as to any GST Exempt Trust, into per stirpital shares for the Grantor's then-living descendants, and each share so set aside for a descendant shall be distributed to the Trustee of a Descendant's Separate Trust to be held as a separate trust and to be disposed of under the terms of the Descendants' Separate Trusts under this Agreement, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

ARTICLE III Crummey Rights of Withdrawal

Immediately following each contribution (as defined below) to the trust, the Grantor's Wife and each of the Grantor's children (unless excluded as provided below) may withdraw from the trust a portion of the value of each contribution, the amount of which, and the limitations, rules and procedures applicable to which shall be set forth later in this Agreement.

ARTICLE IV Family Trust

Property that is to be held as the Family Trust shall be held under this Article and all references to "Family Trust" shall be to the trusts held under this Article.

A. Separate Trusts for GST Purposes. If property passes to the Family Trust from separate GST Exempt and GST Non-Exempt Trusts of the Lifetime Trust, then the Family Trust shall likewise be held in separate GST Exempt and GST Non-Exempt Trusts. In that event, without limiting the Trustee's discretion, the Grantor suggests that no distributions be made from the GST Exempt Trust until the GST Non-Exempt Trust is exhausted, unless there is a compelling reason to do so.

B. During Wife's Life. The following provisions shall apply during the Grantor's Wife's life:

1. The Distributions Trustee may, but shall not be required to, distribute to one or more of the Grantor's Wife and the Grantor's descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose; provided, however, that distributions to any descendant of the Grantor of such income and principal shall only be made in accordance with the provisions of the Supplemental Needs Trust below, and the descendant for whom such distribution would be made shall be treated as the Beneficiary of a Supplemental Needs Trust hereunder.

2. Any net income not so distributed shall be accumulated and annually added to principal.

3. Without limiting the Trustee's discretion, the Grantor suggests that no distribution of income or principal be made to the Grantor's Wife until the principal of the Marital Trust is exhausted, unless there is a compelling reason to do so.

4. Without limiting the Trustee's discretion, the Trustee may consider the needs of the Grantor's Wife as more important than the needs of the Grantor's descendants or any other beneficiary.

C. Upon Wife's Death. Upon the death of the Grantor's Wife, the property then held in the Family Trust shall be:

1. distributed to one or more persons out of a class composed of the Grantor's descendants on such terms as the Grantor's Wife may appoint by a Will or other signed writing that is acknowledged before a notary public specifically referring to this power of appointment; or, in default of appointment or insofar as an appointment is not effective;

2. set aside and divided, separately as to any GST Non-Exempt Trust and as to any GST Exempt Trust, into per stirpital shares for the Grantor's then-living descendants, and each share so set aside for a descendant shall be distributed to the Trustee of a Descendant's Separate Trust to be held as a separate trust and to be disposed of under the terms of the Descendants' Separate Trusts under this Agreement, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

ARTICLE V
Descendants' Separate Trusts

Property that is to be held in a Descendant's Separate Trust or the Descendants' Separate Trusts shall be held under this Article and all references to the "Descendant's Separate Trust" or the "Descendants' Separate Trusts" shall be to the trusts held under this Article.

A. During The Beneficiary's Life. The following provisions shall apply during the Beneficiary's life:

1. The Distributions Trustee may, but shall not be required to, distribute to any one or more of the Beneficiary and the Beneficiary's descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Disqualified Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Disqualified Trustee) may from time to time select for the recipient's health, education, maintenance or support in his or her accustomed manner of living.
2. The Distributions Trustee may, but shall not be required to, distribute to any one or more of the Beneficiary and the Beneficiary's descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose.
3. Any net income not so distributed shall be accumulated and annually added to principal.
4. Without limiting the Trustee's discretion, the Trustee may consider the needs of the Beneficiary as more important than the needs of the Beneficiary's descendants or of any other beneficiary.
5. Without limiting the Trustee's discretion, the Grantor suggests that no distribution of principal be made from any trust for a Beneficiary that is exempt from Federal generation-skipping transfer tax ("GST Exempt Trust") until the principal of any trust that is not exempt from Federal generation-skipping transfer tax ("GST Non-Exempt Trust") for that Beneficiary is exhausted, unless there is a compelling reason to do so.

B. Upon Beneficiary's Death. Upon the Beneficiary's death, the property then held in his or her Descendant's Separate Trust shall be distributed as follows:

1. distributed to such one or more persons out of a class composed of the Beneficiary's descendants and surviving spouses of the Beneficiary's descendants on such terms as the Beneficiary may appoint by a Will or other signed writing that is acknowledged before a notary public specifically referring to this power of appointment; or, in default of appointment or insofar as an appointment is not effective;
2. With respect to the GST-Non-Exempt Trust, distributed pursuant to the Paragraph of this article titled "Special Provisions for GST Non-Exempt Trust;" and
3. With respect to the GST Exempt Trust, set aside and divided into per stirpital shares for the Beneficiary's descendants then living or, if there is no descendant of the Beneficiary then living and if the Beneficiary was a grandchild or more remote descendant of the Grantor, for the descendants then living of the Beneficiary's nearest ancestor who was a descendant of the Grantor, with descendants then living or, if there is no such descendant then living or if the Beneficiary was a child of the Grantor, for the Grantor's descendants then living, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts, to be held as a separate trust to be disposed of under the terms of this Article, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

C. Special Provisions for GST Non-Exempt Trust.

1. **Death of Beneficiary Whose Death Would Cause Generation-Skipping Transfer Tax.** Upon the death of the Beneficiary (referred to in this paragraph as the "Deceased Beneficiary"), if the death of such Deceased Beneficiary would cause the imposition of a generation-skipping transfer tax if the GST Non-Exempt Trust were distributable in the same manner as that provided herein for distribution of the GST Exempt Trust, then the GST Non-Exempt Trust shall be distributed as follows:

- a) **If any Grandchild or more Remote Descendant of the Deceased Beneficiary is Living.** If upon the death of the Deceased Beneficiary any descendant of the Deceased Beneficiary other than a child of the Deceased Beneficiary is then living, the GST Non-Exempt Trust, to the extent, if any, not effectively appointed by the Deceased Beneficiary, shall, upon his or her death, continue in trust until the fifth (5th) anniversary of the death of the Deceased Beneficiary and, until such fifth (5th) anniversary, shall be held in a separate trust for the benefit of those descendants of the Deceased Beneficiary living upon the death of the Deceased Beneficiary who are then assigned to the youngest generation from the Grantor for generation-skipping transfer tax purposes of the Code (hereinafter collectively the "Deceased Beneficiary's Youngest Descendants"). During the term of such trust, The Distributions Trustee shall distribute to one or more of the Deceased Beneficiary's Youngest Descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any

Interested Trustee) may from time to time select, for any purpose. Any net income not so distributed shall be accumulated and annually added to principal.

Upon the fifth (5th) anniversary of the death of the Deceased Beneficiary, the trust principal then held for the benefit of the Deceased Beneficiary's Youngest Descendants hereunder, as it is then constituted, together with any accrued, accumulated and undistributed income, shall be set aside and divided into per stirpital shares for the Deceased Beneficiary's descendants then living or, if there is no descendant of the Deceased Beneficiary then living and if the Deceased Beneficiary was a grandchild or more remote descendant of the Grantor, for the descendants then living of the Deceased Beneficiary's nearest ancestor who was a descendant of the Grantor with descendants then living or, if there is no such descendant then living or if the Deceased Beneficiary was a child of the Grantor, for the Grantor's descendants then living, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts, to be held as a separate trust to be disposed of under the terms of this Article, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

b) **If no Grandchild nor any more Remote Descendant of the Deceased Beneficiary is Living.** If upon the death of the Deceased Beneficiary either (i) no descendant of the Deceased Beneficiary other than a child of the Deceased Beneficiary is then living or (ii) no descendant of the Deceased Beneficiary is then living, but a descendant of the Grantor who is assigned to a generation for generation-skipping transfer tax purposes at least two generations younger than that of the Deceased Beneficiary is then living, the GST Non-Exempt Trust, to the extent, if any, not effectively appointed by the Deceased Beneficiary, shall, upon his or her death, continue in trust until the fifth (5th) anniversary of the death of the Deceased Beneficiary and until such fifth (5th) anniversary, shall be held in a separate trust for the benefit of those then living descendants who are then assigned to the youngest generation from the Grantor for generation-skipping transfer tax purposes of the Code of the ancestor of the Deceased Beneficiary of the closest degree of consanguinity to the Deceased Beneficiary which ancestor has descendants who are then living and which ancestor is (or was) a descendant of the Grantor or which ancestor is (or was) the Grantor (hereinafter collectively the "Youngest Collateral Relatives"). During the term of such trust, The Distributions Trustee shall distribute to one or more of the Youngest Collateral Relatives as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose. Any net income not so distributed shall be accumulated and annually added to principal.

Upon the fifth (5th) anniversary of the death of the Deceased Beneficiary, the trust principal then held for the benefit of the Youngest Collateral Relatives hereunder, as it is then constituted, together with any accrued, accumulated and undistributed income, shall be set aside and divided into per stirpital shares for the Deceased Beneficiary's descendants then living or, if there is no descendant of the Deceased Beneficiary then living and if the Deceased Beneficiary was a grandchild or more remote descendant of the Grantor, for the descendants then living of the Deceased Beneficiary's nearest ancestor who was a descendant of the Grantor with descendants then living or, if there is no such descendant then living or if the Deceased Beneficiary was a child of the Grantor, for the Grantor's descendants then living, the share so set aside for a descendant to be distributed to the Trustee of the Descendants' Separate Trusts, to be held as a separate trust to be disposed of under the terms of this Article, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

2. **Death of Beneficiary Whose Death Would Not Cause Generation-Skipping Transfer Tax.** Upon the death of the Deceased Beneficiary, and if the death of such Deceased Beneficiary would not cause the imposition of a generation-skipping transfer tax if the GST Non-Exempt Trust were distributable in the same manner as that provided herein for distribution of the GST Exempt Trust, then the GST Non-Exempt Trust shall be distributed in the same manner as that provided herein for distribution of the GST Exempt Trust.

D. **Disinterested Trustee May Confer Power.** The Trustee (excluding, however, any Interested Trustee) may at any time, prior to the death of the Beneficiary, by an instrument in writing (1) confer upon the Beneficiary a power exercisable only by Will to appoint all or part of the Trust to the creditors of the Beneficiary's estate (other than any taxing authority), and the instrument conferring such power upon the Beneficiary may require the consent of the Trustee (other than any Interested Trustee) to exercise the power, (2) revoke any such instrument previously executed, with or without executing a replacement instrument and/or (3) irrevocably relinquish the powers conferred under (1) and/or (2). Without limiting the Trustee's discretion, the Trustee may use the authority conferred by this paragraph to subject the trust property to estate tax instead of the generation-skipping transfer tax when it appears that it may reduce overall taxes to do so. If a power is conferred upon a Beneficiary by the Trustee in accordance with this paragraph, such power shall not be exercisable in any manner so as to postpone the vesting of any estate or interest in the appointed property or to suspend the absolute ownership or power of alienation of the appointed property for a period ascertainable without regard to the date of this Agreement, and the validity of any exercise shall be measured with respect to that date.

E. **Maximum Duration for Trusts.** Any trust under this Article still in existence upon the expiration of the Maximum Duration for Trusts as defined elsewhere in this Agreement shall thereupon terminate and the remaining trust property shall be distributed to the Beneficiary of the trust.

F. Supplemental Needs Trusts. Notwithstanding any other provision of this Article to the contrary, any distribution to such Beneficiary shall only be made in accordance with the provisions of the Supplemental Needs Trust hereunder, and such Beneficiary shall be treated as the Beneficiary of a Supplemental Needs Trust hereunder.

ARTICLE VI Supplemental Needs Trust Provisions

Notwithstanding anything to the contrary, any property disposed of hereunder or any trust created hereunder that is directed to be held in this Agreement pursuant to the terms of a Supplemental Needs Trust shall be administered as a separate trust pursuant to the terms of this Article. The Grantor directs that such trust be administered as follows:

A. Payment of Benefits. The Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may, at any time and from time to time, apply for the benefit of the Beneficiary, so much (even to the extent of the whole) of the income and/or principal of this trust as the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may deem advisable, subject to the limitations set forth below. The Trustee shall add to the principal of this trust the balance of net income not so applied.

B. Intent of Trust. It is the Grantor's intent to create a Supplemental Needs Trust. The Grantor intends that the trust assets be used to supplement and not supplant, impair or diminish, any benefits or assistance of any Federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving. Consistent with that intent, it is the Grantor's desire that, before expending any amounts from net income and/or principal of this trust, the Trustee consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the Beneficiary.

C. No Reduction of Benefits. Subject to the provisions of the paragraph entitled Discretionary Distributions, none of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any Federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving.

D. No Revocation or Assignment. The Beneficiary does not have, and shall not be deemed to have, the legal authority or power: (i) to revoke or terminate the trust, or (ii) to compel or direct the use or distribution of the trust assets. Additionally, the Beneficiary cannot assign, encumber nor sell the Beneficiary's beneficial interest in the trust.

E. Use of Income and Principal. The trust income and principal may, in the sole and absolute discretion of the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee), be used to provide the Beneficiary with extra and supplemental care, maintenance, support and education and will not be made available to provide primary support for the Beneficiary, including, but not limited to, basic food, shelter or health care. The Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) is authorized to make trust distributions to or on the Beneficiary's behalf in such a manner that the Beneficiary's life will be enriched and made more enjoyable, including, but not limited to, recreational and vacation opportunities away from places of residence, expenses for traveling companions, if requested or necessary, entertainment expenses and social services expenses. The Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) is authorized to expend the trust property to obtain more sophisticated and/or extensive medical and/or dental treatment than may otherwise be available to the Beneficiary and to seek private rehabilitative and/or educational training. For purposes of this paragraph, basic "health care" shall not include health insurance premiums, and the Trustee is explicitly authorized to pay such premiums if the Trustee determines, in the exercise of sole and absolute discretion, that it is in the Beneficiary's best interest to do so. The Grantor desires that the Beneficiary be able to maintain contact with his or her children and other family members, and the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) is authorized to expend trust income and/or principal for transportation costs for the Beneficiary or other family members to facilitate such contacts. The Grantor desires, but does not direct, that the Trustee exercises the discretionary powers conferred in this Article in such a manner as will provide flexibility in the administration of the trust, and, in exercising such powers, the decision of the Trustee shall be conclusive as to the advisability of any distribution of income and/or principal, and as to the person or persons to or for whom such distribution is to be made, and such decision shall not be subject to judicial or governmental review.

F. Use of Residence. To the extent consistent with a Supplemental Needs Trust, the Trustee may acquire, hold, and maintain any residence (whether held as real property, condominium, cooperative apartment or otherwise) for investment or for the use and benefit of the Beneficiary of this trust, as the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may, in the exercise of sole and absolute discretion, determine, including allowing the Beneficiary the exclusive right to occupy and use the real property and to permit members of the Beneficiary's family or friends or medical or household employees (including independent contractors) for the Beneficiary also to occupy the property with the Beneficiary. If the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) determines that it would be in the best interests of the Beneficiary to maintain a residence for the use of the Beneficiary but that the residence owned by the Trustee should not be used for such purpose, the Trustee is authorized to sell said residence and to apply the net proceeds of sale, or a portion of such net proceeds, to the purchase of such other residence or residences or to make such other arrangements as the Trustee (excluding, however, any Interested Trustee and any

Disqualified Trustee) may deem suitable for the purpose. Any proceeds of sale not needed for reinvestment in a residence as provided above are to be added to the principal of the trust and thereafter held, administered, and disposed of as a part thereof. The Trustee shall use the proceeds to pay all carrying charges of such residence, including but not limited to any taxes, assessments, and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including independent contractors), and other expenses incident to the maintenance of a household for the benefit of the Beneficiary of the trust, to make such improvements to the residence as the Trustee may, in the exercise of sole and absolute discretion, determine to be appropriate to make the residence suitable for the Beneficiary, and to expend such amounts as the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may determine to be appropriate to maintain the current life style of the Beneficiary, or to improve the life style of the Beneficiary, including, but not limited to, providing for the personal care and comfort of the Beneficiary in any manner.

G. Discretionary Distributions. Notwithstanding any other provisions contained in this Article, the Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may make distributions to meet the Beneficiary's need for food, shelter or health care even if such distributions may result in an impairment, diminution or elimination of the Beneficiary's receipt or eligibility for Government Benefits but only if the Trustee determines that (i) the Beneficiary's needs will be better met if such distribution is made, and (ii) it is in the Beneficiary's best interest to experience the consequent effect, if any, on the Beneficiary's eligibility for or receipt of Government Benefits; provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to this paragraph shall result in the Beneficiary's loss of Government Benefits, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as otherwise provided elsewhere in this Article, without exception.

H. Limited Power to Amend. The Trustee (excluding, however, any Interested Trustee and any Disqualified Trustee) may, by an instrument in writing, amend this Trust in any manner required to protect the Beneficiary's eligibility for public benefits or assistance including Medicaid or SSI, or to meet any of the Grantor's intentions or objectives set forth in this Trust. This includes amending this Trust in order to conform the Trust to current federal or state law. No amendment under this paragraph may increase the class of beneficiaries. Any expenses in this regard, including reasonable attorneys' fees, shall be a proper charge to the Trust. No Trustee shall be liable for any loss of Trust assets by reason of the exercise or failure to exercise the authority under this paragraph, except for any loss caused by the Trustee's bad faith, wanton conduct or negligence.

I. Death of Beneficiary. Upon the death of the Beneficiary, the Trustee shall pay over and distribute the principal and undistributed income of such trust as otherwise provided in this Agreement as though the provisions of this Article had never applied to the trust.

J. Definition of Beneficiary. For purposes of this Article, the term "Beneficiary" shall mean the person for whose benefit the property was directed to be held in a Supplemental Needs Trust hereunder.

ARTICLE VII Marital Trust

Property that is to be held as the Marital Trust shall be held under this Article and all references to the "Marital Trust" shall be to the trusts held under this Article.

A. During Wife's Life. The following provisions shall apply during the Grantor's Wife's life:

1. The Distributions Trustee shall distribute to the Grantor's Wife the net income of the Trust at least annually.
2. The Distributions Trustee may, but shall not be required to, distribute to the Grantor's Wife as much of the principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, for any purpose.
3. Without limiting the Trustee's discretion, the Trustee may consider the needs of the Grantor's Wife as more important than the needs of the Grantor's descendants or any other beneficiary.
4. The Grantor's Wife may direct the Trustee to make any unproductive assets productive of income or to convert any unproductive assets to property that produces income, within a reasonable time, notwithstanding any provision of this Agreement or any applicable law otherwise authorizing the Trustee to retain unproductive property. The application of any specific provision of this Agreement to the Marital Trust shall in all events be construed so as to give the Grantor's Wife that degree of beneficial enjoyment of the trust property during his life which the principles of the law of trusts accord to a person who is the sole income beneficiary of a trust, and to ensure that the Marital Trust qualifies for the Federal estate tax marital deduction to the extent so elected.

B. Upon Wife's Death. The following provisions shall apply after the Grantor's Wife's death:

1. Unless the Grantor's Wife provides otherwise by specific reference to this paragraph in a Will or other writing, the Trustee shall pay any increase in death taxes payable upon the death of the Grantor's Wife caused by the

inclusion of a marital trust or a portion of a marital trust in his gross estate from the principal of the trust or portion so included. The Trustee may rely upon the written statement by the Grantor's Wife's Executor of the amounts thus payable.

2. The balance of the property then held in the Marital Trust shall be distributed to such persons out of a class composed of the Grantor's descendants, on such terms as the Grantor's Wife may appoint by a Will or other signed writing that is acknowledged before a notary public specifically referring to this power of appointment; or in default of appointment or insofar as an appointment is not effective.

3. The balance of the property then held in the Marital Trust shall be set aside and divided into per stirpital shares for the Grantor's then-living descendants, and the share so set aside for a descendant shall be distributed to the Trustee of a Descendant's Separate Trust to be held as a separate trust and to be disposed of under the terms of the Descendants' Separate Trusts under this Agreement, the descendant for whom the share is set aside to be the Beneficiary of his or her own Descendant's Separate Trust.

C. Wife's Disclaimer. If the Grantor's Wife disclaims any of his interest in the income and principal of the Marital Trust, the disclaimed property shall be added to the Family Trust under this Agreement to be disposed of under the terms of that trust; provided however that the Grantor's Wife shall have no power of appointment over the fractional share of the Family Trust consisting of disclaimed property, including any accumulated income of that share unless such right is limited by an ascertainable standard. If the Grantor's Wife disclaims all of his interest in the income of the Marital Trust or a portion of the income of the Marital Trust, he shall be deemed to have disclaimed his interest in all or a corresponding portion of the principal of the Marital Trust.

D. Allocation of Management Expenses. To the extent the following authorization does not cause any interest hereunder to fail to qualify, in whole or in part, for the Federal estate tax marital deduction which otherwise would so qualify, the Trustee is authorized to allocate management expenses within the meaning of Reg. §20.2056(b)-4(d)(1)(i) to any interest hereunder that qualifies for the Federal estate tax marital deduction.

VIII. Substance Abuse

The following provisions apply to all trusts created under this Agreement, except as expressly provided to the contrary in this Article entitled "Substance Abuse:"

A. Dependence. If the individual serving as Trustee reasonably believes that: (1) a beneficiary of any trust created under this Agreement (i) routinely or frequently uses or consumes any illegal drugs or other illegal chemical substance so as to be physically or psychologically dependent upon that drug or substance, or (ii) is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a licensed medical doctor or psychiatrist in a current program of treatment supervised by that doctor or psychiatrist; and (2) as a result of such use or consumption, the beneficiary is incapable of caring for himself or herself, is likely to dissipate the beneficiary's financial resources; then the individual serving as Trustee must follow the procedures set forth below.

B. Testing. The individual serving as Trustee will request the beneficiary to submit to one or more examinations (including laboratory tests of hair, tissue, or bodily fluids) determined to be appropriate by a licensed medical doctor or psychiatrist selected by the individual serving as Trustee. The individual serving as Trustee will request the beneficiary to consent to full disclosure by the examining doctor or facility to the individual serving as Trustee of the results of all the examinations. The individual serving as Trustee shall disclose the results of all of the examinations to any corporate trustee. The Trustee shall maintain strict confidentiality of those results and will not, without the beneficiary's written permission, disclose those results to any person other than the beneficiary. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the individual serving as Trustee.

C. Treatment. If, in the opinion of the examining doctor or psychiatrist, the examination indicates current or recent use of a drug or substance as described above, the beneficiary must consult with the examining doctor or psychiatrist to determine an appropriate method of treatment for the beneficiary. Treatment may include counseling or treatment on an in-patient basis in a rehabilitation facility. If the beneficiary consents to the treatment, the Trustee may pay the costs of treatment directly to the provider of those services from the income or principal otherwise authorized or required to be distributed to the beneficiary, if the Trustee otherwise determines that the funds are available to do so and it is in the best interests of the beneficiary to do so.

D. Mandatory Distributions Suspended. If the examination indicates current or recent use of a drug or substance as described above, all mandatory distributions and all withdrawal rights from the trust estate with respect to the beneficiary during the beneficiary's lifetime (including distributions upon termination of the trust for reasons other than the death of the beneficiary) will be suspended until:

1. in the case of use or consumption of an illegal drug or illegal substance, examinations indicate no such use; and

2. in all cases of dependence, until the Trustee, in the Trustee's judgment, determines that the beneficiary is fully capable of caring for himself or herself and is no longer likely to dissipate his or her financial resources.

E. Discretionary Distributions. While mandatory distributions are suspended, the trust will be administered as a discretionary trust to provide for the beneficiary according to the provisions of the trust providing for discretionary distributions in the Trustee's discretion (other than an Interested Trustee) and those provisions of the trust relating to distributions for the beneficiary's health, education, maintenance or support.

F. Resumption of Mandatory Distributions and Withdrawals. When mandatory distributions to and withdrawals by the beneficiary are resumed, the remaining balance, if any, of the mandatory distributions that were suspended may be distributed to the beneficiary at that time and the balance of any rights of withdrawal by the beneficiary shall be immediately exercisable by the beneficiary. If the beneficiary dies before mandatory distributions or rights of withdrawal are resumed, the remaining balance of the mandatory distributions that were suspended will be distributed to the alternate beneficiaries of the beneficiary's share as provided herein.

G. Other Prohibitions During Mandatory Suspension of Benefits. If mandatory distributions to a beneficiary are suspended as provided above in this Article, then as of such suspension, the beneficiary shall automatically be disqualified from serving, and if applicable shall immediately cease serving, as a Trustee, Trust Protector, or in any other capacity in which the beneficiary would serve as, or participate in the removal or appointment of any Trustee or Trust Protector hereunder.

H. Exoneration Provision. It is not the Grantor's intention to make the Trustee (or any doctor or psychiatrist retained by the Trustee) responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to inquire whether a beneficiary uses drugs or other substances. The Trustee (and any doctor or psychiatrist retained by the Trustee) will be indemnified from the trust estate for any liability in exercising the Trustee's judgment and authority under this Article, including any failure to request a beneficiary to submit to medical examination and including a decision to distribute suspended amounts to a beneficiary.

I. Tax Savings Provisions. Notwithstanding the provisions of the preceding subparagraphs or any other provision of this Agreement, the Trustee shall not suspend any mandatory distributions required for a trust to qualify, in whole or in part, for any Federal or state marital deduction or charitable deduction or as a qualified subchapter S trust, nor shall the Trustee suspend any rights of withdrawal necessary for qualification of a gift as a gift of a present interest. Additionally, nothing herein shall prevent a distribution mandated by the provisions hereof relating to the Maximum Duration of Trusts.

ARTICLE IX Takers of Last Resort

The Trustee shall distribute any property that is not otherwise disposed of under this Agreement to the persons who would have inherited the Grantor's personal estate, and in the shares that they would have inherited it had the Grantor died a resident of the State of Texas, unmarried and without a valid Will, on the date on which expires the interest of the last beneficiary of the property under this Agreement.

ARTICLE X Trust Without Current Beneficiaries

During a time when a trust hereunder has not terminated but no one is eligible to receive distributions of income from the trust, the Trustee may distribute as much of the net income of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine to such one or more persons as the Trustee (excluding, however, any Interested Trustee) may from time to time select out of a class composed of the persons who would then receive the trust principal under the terms of this Agreement were the trust then to terminate, determined without regard to the exercise of any power of appointment granted hereunder. Any income not so distributed shall from time to time be accumulated and annually added to principal. During such period, the Trustee shall not be required to make any such distributions and may accumulate all the trust's income and add it to principal.

ARTICLE XI Maximum Duration for Trusts

A. Maximum Duration for Trusts Defined. The Maximum Duration for Trusts is the longest period that property may be held in trust under this Agreement under the applicable rules governing perpetuities, vesting, accumulations, the suspension of alienation and the like (including any applicable period in gross such as twenty-one (21) years or ninety (90) years). If under those rules the Maximum Duration for Trusts shall be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals alive upon the Grantor's death or the Grantor's Wife's death, or at such other time that the application of such rules limiting the maximum duration of trusts is deemed to begin, those individuals shall consist of those measuring lives described in the paragraph below entitled "Measuring Lives."

B. Measuring Lives. The measuring lives under the paragraph above entitled "Maximum Duration for Trusts Defined" shall consist of those of the following individuals who are living at the time that the application of such rules

limiting the maximum duration of trusts is deemed to begin: the Grantor's Wife, all of the Grantor's descendants and any surviving spouse of a descendant of the Grantor.

C. Powers of Appointment. This Article shall also apply to a trust created by the exercise of a power of appointment conferred by this Agreement (unless the exercise of the power of appointment commences a new rule against perpetuities or similar rule that limits the time that property may remain in trust).

ARTICLE XII Certain Income Taxes

The Trustee shall not reimburse the Grantor from assets of any trust hereunder for the Grantor's income tax (Federal, state, local, or foreign) on the amount (if any) of the gross income of such trust that is reportable directly on the Grantor's return under Code Sec. 671. The Grantor hereby waives any right or eligibility to be reimbursed for such taxes.

ARTICLE XIII Spendthrift Provision

A. No Assignment. Each trust shall be a spendthrift trust to the maximum extent permitted by law and no interest in any trust hereunder shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation. Additionally, the interest of a beneficiary of any trust hereunder may not be either voluntarily or involuntarily transferred within the meaning of Texas Property Code § 112.035. Notwithstanding the foregoing, no provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment.

B. Protection from Creditors. If the Trustee shall determine that a beneficiary (other than the Grantor's Wife with respect to any Marital Trust) would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to the beneficiary's creditors, the Trustee shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the Trustee to give the beneficiary the maximum possible benefit and enjoyment of all the trust income and principal to which the beneficiary is entitled.

C. Protection from Marital Claims. All benefits granted to a beneficiary under this instrument shall be the separate and individual property of such beneficiary (as distinguished from marital property, community property, quasi-community property or any other form of property as to which such beneficiary's spouse might have a claim or interest arising out of the marital relationship under the law of any jurisdiction, domestic or foreign). All benefits granted to a beneficiary hereunder shall also be free of any interference from, or control or marital power of, his or her spouse. For purposes of this paragraph, the term "benefits" shall include real or personal property, tangible or intangible, and the provisions of this paragraph shall apply not only to benefits actually paid to any beneficiary but also to trust property allocated to a trust in which the beneficiary possesses an interest hereunder.

ARTICLE XIV Payments to Minors

Whenever property becomes distributable to a person under twenty-one (21) years of age (described herein as the "Minor" regardless of the actual legal age of majority) for any reason, the Trustee may make the distribution in any way in which the Trustee shall deem appropriate, including (but not limited to) those enumerated in this Article:

A. Distribution to Trust. The Trustee may hold the property in a separate trust for the Minor until the Minor attains twenty-one (21) years of age. The Trustee may distribute to the Minor as much of the net income and/or principal of the trust as the Trustee may at any time and from time to time determine, for any purpose, annually adding to principal any undistributed net income. When the Minor reaches twenty-one (21) years of age, the Trustee shall distribute the property to the Minor. If the Minor dies before reaching twenty-one (21) years of age, then upon the Minor's death, the Trustee shall distribute the property held in trust for the Minor as follows:

1. to the Minor's descendants surviving the Minor, per stirpes; or if there are no such descendants then living, then
2. if the Minor was a grandchild or more remote descendant of the Grantor, to the descendants then living, per stirpes, of the Minor's nearest ancestor who was a descendant of the Grantor with descendants then living, or if there are no such descendants then living, or if the Minor was a child of the Grantor, then
3. to the Grantor's descendants then living, per stirpes.

Any trust under this paragraph entitled "Distribution to Trust" shall terminate upon the expiration of the Maximum Duration for Trusts as defined elsewhere in this Agreement, and the remaining trust property shall be distributed to the Minor in one of the other ways authorized in this Article.

B. Distribution to Custodian. The Trustee may distribute the property to a custodian or successor custodian under any state's version of the Uniform Transfers (or Gifts) to Minors Act, including a custodian selected by the Trustee. The Trustee may select any age for termination of the custodianship permitted under the Act, giving due consideration to selecting twenty-one (21) years of age if that is permitted, and may designate successor custodians.

C. Distribution to Donee of a Power During Minority. The Trustee may actually distribute the property to anyone serving as Trustee under this Agreement, in a manner so that it then vests in the Minor, to hold the same as donee of a power during minority, such donee to have all the powers of a Trustee under this Agreement (including the power to apply the property for the Minor) and to be compensated as if the property were a separate trust, but with no duty to account to any court periodically or otherwise.

D. Distribution to a Guardian of a Minor's Property. The Trustee may distribute the property to a Guardian of the Minor's estate.

E. Distribution to a Minor's Parent. The Trustee may distribute the property to a parent of the Minor even if the parent does not assume any formal fiduciary capacity concerning the property. Distributions shall be made to a parent of a beneficiary only if the parent either (1) is a descendant of the Grantor, or (2) was married to a descendant of the Grantor at the date of death of the descendant of the Grantor who was the spouse of the parent to receive the distribution.

F. No Distribution to Grantor. Nothing in this Article shall authorize distribution of any trust property to or for the benefit of the Grantor, either individually or in any fiduciary capacity.

G. Exoneration of Fiduciary for Distributions for Minor. The Trustee shall be free from any responsibility for the subsequent disposition of property following the disposition of such property by the Trustee in one of the ways specified in this Article.

ARTICLE XV

Payments to Incapacitated Persons

Whenever property becomes distributable to a person whom the Trustee reasonably and in good faith shall determine is experiencing substantial difficulty in managing financial matters and that such difficulty is not expected to be short-term (described herein as "an Incapacitated Person" regardless of whether a court of competent jurisdiction has determined such person to be incompetent and regardless of whether a guardian, conservator or other legal representative has been appointed for such person), the Trustee may make the distribution in any way in which the Trustee shall deem appropriate, including (but not limited to) those enumerated in this Article:

A. Distribution to Trust. The Trustee may hold the property in a separate trust for the Incapacitated Person until the Incapacitated Person is no longer incapacitated as defined above. The Trustee may distribute to the Incapacitated Person as much of the net income and/or principal of the trust as the Trustee may at any time and from time to time determine, for any purpose, annually adding to principal any undistributed net income. When the Incapacitated Person is no longer incapacitated, the Trustee shall distribute the property to the formerly Incapacitated Person. If the Incapacitated Person dies before the property is distributed to him or her, then upon the Incapacitated Person's death, the Trustee shall distribute the property to the Executor of the Incapacitated Person.

B. Distribution to Incapacitated Person of a Power. The Trustee may actually distribute the property to anyone serving as Trustee under this Agreement, in a manner so that it then vests in the Incapacitated Person, to hold the same as donee of a power during incapacity, such donee to have all the powers of a Trustee under this Agreement (including the power to apply the property for the Incapacitated Person) and to be compensated as if the property were a separate trust, but with no duty to account to any court periodically or otherwise.

C. Distribution to a Guardian of Incapacitated Person's Property. The Trustee may distribute the property to a Guardian of the Incapacitated Person's estate.

D. Distribution to Incapacitated Person's Spouse or Parent. The Trustee may distribute the property to a spouse or parent of the Incapacitated Person even if the spouse or parent does not assume any formal fiduciary capacity concerning the property.

E. No Distribution to Grantor. Nothing in this Article shall authorize distribution of any trust property to or for the benefit of the Grantor, either individually or in any fiduciary capacity.

F. Exoneration of Fiduciary for Distributions for Incapacitated Person. The Trustee shall be free from any responsibility for the subsequent disposition of the property if it is distributed in one of the ways specified in this Article.

ARTICLE XVI

Exercise of Powers Created Hereunder

A. Form of Appointment. A power of appointment conferred hereunder upon a person in his or her individual capacity (a "Non-Fiduciary Power") may be exercised in favor of one or more persons to or for whom the power may be exercised, in any proportions, in any lawful estates and interests, whether absolute or in further trust. Such a Non-Fiduciary Power may be exercised to create further Non-Fiduciary Powers which may be made exercisable in the same or a different manner. A limited power of appointment may be exercised to confer a limited or general power, including a presently exercisable limited or general power.

B. Trustees under Appointment. The Trustee under an appointment in further trust may be any person not prohibited from serving as Trustee under this Agreement and may be given fiduciary powers (including discretionary powers over distributions), exercisable, however, only in favor of permissible objects of the exercised power.

C. Testamentary Power. A Non-Fiduciary Power, if any, that is exercisable only by the powerholder's last will and testament, may also be exercised by a separate written instrument signed by the powerholder (other than the powerholder's last will and testament) if the powerholder's last will and testament contains a direction that the exercise in the other instrument be honored.

D. Trustees Can Create Trusts. The authorized Trustee (as defined in this paragraph) may, subject to the provisions set forth in this paragraph, exercise any power to invade the principal of the invaded trust by appointing (whether or not there is a current need to invade principal under any standard for invasion of principal set forth in the invaded trust) part or all of the principal of the invaded trust in favor of a trustee of another trust (referred to as the "appointed trust," and defined further below) for the benefit of one, or more or all of those beneficiaries for whom the principal of the invaded trust may be currently paid to the exclusion of any one or more of such beneficiaries. The exercise of the power to invade the principal of a trust under this paragraph shall be subject to the following additional provisions:

1. If all of the assets of the invaded trust are to be paid to the appointed trust under the applicable appointment, then the exercise of the power by the authorized Trustee under this paragraph shall apply both to (1) all of the assets currently comprising the principal of the invaded trust, including undistributed accumulated income, and (2) to all assets subsequently paid to or acquired by the invaded trust after the payment to the appointed trust, unless the authorized Trustee who so appoints the principal of the invaded trust provides otherwise in writing at the time of appointment. If only a portion of the trust assets of the invaded trust are to be paid over to the appointed trust under the applicable appointment, then subsequently discovered assets of the invaded trust or assets subsequently paid to or acquired by the invaded trust shall remain assets of the invaded trust, unless the authorized Trustee who so appoints the principal of the invaded trust provides otherwise in writing at the time of appointment.

2. The exercise of the power to invade the principal of a trust under this paragraph shall be by an instrument in writing, signed, and acknowledged by the authorized Trustee. The instrument exercising the power shall be maintained with the records of the invaded trust and may be filed in any court having jurisdiction over the invaded trust.

3. The exercise of the power to invade the principal of a trust under this paragraph shall not be treated as being prohibited by any provision in the invaded trust instrument that prohibits amendment or revocation of the trust or that constitutes a spendthrift clause.

4. The provisions of this paragraph shall not be construed to abridge the right of any Trustee to appoint property in further trust that arises under any statutory law or under common law, or as directed by any court having jurisdiction over the invaded trust.

5. Nothing in this paragraph shall be construed as creating or implying a duty on any Trustee acting hereunder to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a Trustee not exercising the power conferred under this paragraph.

6. The authorized Trustee, acting pursuant to the authority granted by this paragraph, may not exercise a power to decrease or indemnify against a Trustee's liability or exonerate a Trustee from liability for failure to exercise the duty of care, diligence and prudence otherwise applicable to the Trustee or to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

7. The authorized Trustee, acting pursuant to the authority granted by this paragraph, may not exercise a power to increase the total compensation of any Trustee of the appointed trust, other than by reason of extending the period, as may be permitted hereunder, during which such Trustee will serve. No Trustee shall receive any paying commission with respect to property transferred pursuant to this paragraph.

8. If any contribution to the invaded trust qualified for the annual exclusion under Code Sec. 2503(b), the marital deduction under Code Sec. 2056(a) or 2523(a), or the charitable deduction under Code Sec. 170(a), 642(c), 2055(a) or 2522(a), is a direct skip whether or not a nontaxable gift under Code Sec. 2642(c), or qualified for any other specific tax benefit that would be lost by the existence of the authorized Trustee's authority under this paragraph for income, gift, estate, or generation-skipping transfer tax purposes under the Code, then the authorized Trustee shall not (1) have the power to invade the principal of a trust pursuant to this paragraph in a manner that would prevent the invaded trust from qualifying for or would reduce the exclusion, deduction, nontaxable gift or other tax benefit which was originally claimed with respect to that contribution, (2) have the power to make a change, including the grant of a power of appointment, that will result in (a) a change or modification of any standard of payment to or for one or more of the beneficiaries of the invaded trust or (b) a reduction, limitation or other change in any beneficiary's right to a mandatory distribution of income, a mandatory annuity or unitrust interest, a right annually to withdraw a percentage of the value of the trust or a right annually to withdraw a specified dollar amount provided that such mandatory or annual right has already come into effect with respect to the beneficiary. Notwithstanding the foregoing (2) but subject to (1), the authorized Trustee may pay to an appointed trust that is a supplemental needs trust.

9. The authorized Trustee exercising the authority granted by this paragraph may not make a change that will violate any rule against perpetuities or similar rule limiting the duration of trusts applicable to the invaded trust and may not make a change that will disqualify a trust which owns S corporation stock and is a permitted shareholder under Code Sec. 1361(c)(2) from being a permitted shareholder.

10. The current beneficiaries of the appointed trust shall be one, more than one or all of the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be one, more than one or all of the successor or remainder beneficiaries of the invaded trust. If a beneficiary includes a class of persons, such class shall include any person who falls within the class of persons after the payment to the appointed trust. The appointed trust may grant to one or more of the beneficiaries of the appointed trust a power of appointment.

11. The term "appointed trust" shall mean an irrevocable trust other than the invaded trust to which principal is appointed under this paragraph including, but not limited to, a new trust created by the authorized Trustee.

12. The standard for invasion in the appointed trust may be no greater than the standard for invasion of the invaded trust.

13. As used in this paragraph, the term "authorized Trustee" shall refer to the Trustee of any trust hereunder, provided, however, that with respect to any trust which provides that principal may be invaded for any reason other than support, maintenance, health and education within the meaning of Code Sec. 2041(b), the authorized Trustee of that trust shall exclude any Interested Trustee.

ARTICLE XVII

Irrevocability

This Agreement shall be irrevocable. The Grantor shall have no right to alter it or amend it in any way and, notwithstanding any other provision hereof, none of the principal and none of the income therefrom shall ever be payable to the Grantor or to discharge any obligation of the Grantor to the Grantor's creditors, to the Grantor's estate or to the creditors of the Grantor's estate. The authorization to distribute income or principal for a beneficiary's support does not include authority to make distributions that would discharge or substitute for any obligation of the Grantor to support the beneficiary. The Grantor intends that no distribution from a trust hereunder shall be deemed to discharge or substitute for the Grantor's obligation to support a beneficiary of a trust hereunder, and the Grantor directs that no distribution shall be made that would have that effect.

ARTICLE XVIII

Outright Transfers if Trust Already Terminated in Whole or Part

Where property is directed under this Agreement to be held in trust and the time for termination of such trust has been reached, then the property shall not pass in trust but rather shall pass as the remainder of such trust is directed to be transferred at the time for termination of such trust. In addition, if property is directed under this Agreement to be distributed to a trust, the terms of which direct a partial distribution of the assets of the trust upon the occurrence of a specified date or event (referred to in this Article as the "Distribution Event"), and the Distribution Event has occurred, the portion of such property subject to partial distribution shall not pass in trust but shall instead pass as such property is directed to pass upon the occurrence of the Distribution Event.

ARTICLE XIX

Trustees

A. **Appointment of General Trustee.** The Grantor appoints Steve Gorin to serve as the Initial General Trustee hereunder.

B. **Appointment of Administrative Trustee.** The Grantor appoints Big Trust Company of Alaska to serve as Administrative Trustee hereunder.

C. **Appointment of Distributions Trustee.** The Grantor appoints Mickey Davis to serve as Distributions Trustee hereunder.

D. **Appointment of Investment Trustee.** The Grantor appoints Steven Trytten to serve as Investment Trustee hereunder.

E. **Co-Trustees.** A Co-Trustee may be appointed by a then serving Trustee (the "appointing Trustee") at any time when only one trustee is serving. A Co-Trustee so appointed hereunder shall serve while the appointing Trustee serves, and shall continue to serve if the appointing Trustee fails or ceases to serve only if no successor has been named or identified by the Grantor or all successors named or identified by the Grantor are unable or unwilling to serve. Any appointment of a Co-Trustee hereunder shall be made by an acknowledged instrument delivered to any and all other Trustees who may then be serving.

F. **Number of Trustees.** There shall never be more than two Trustees serving as Trustee hereunder as to any type of Trustee.

G. Successor Trustees. If a specific successor Trustee is named to succeed a particular Trustee named in this Article, such specific successor Trustee shall serve as successor as appointed above. In all other cases, a Trustee (the "appointing Trustee") may appoint successor Trustees in accordance with this paragraph:

1. If only one trustee is serving hereunder and if no successor trustee has been named or identified herein or has been otherwise named pursuant to the provisions hereof, such trustee may appoint a successor trustee to serve when the appointing trustee fails or ceases to serve as trustee.
2. If an appointing Trustee names a successor Trustee, and if the Grantor has also named or provided for the appointment of one or more successor Trustees herein, the appointments the Grantor has made herein shall take priority.
3. Any appointment of a successor Trustee shall be made by an acknowledged instrument delivered to any and all other Trustees who may then be serving.

H. Acceptance of Appointment. Each Trustee appointed hereunder shall accept the appointment by executing an acknowledged instrument filed with the trust records, within 60 days of the date such person is advised of the opportunity to become a successor Trustee hereunder.

I. Trustee Exclusions. None of the Grantor, the spouse or a former spouse of the Grantor, the spouse nor a former spouse of any beneficiary of any trust hereunder, and anyone who is married to any of the persons described above shall ever serve as Trustee. No successor Trustee or Co-Trustee appointed by a beneficiary shall be a person or entity that is related or subordinate to such beneficiary within the meaning of Code Sec. 672(c) and the Regulations thereunder.

J. Age Requirements. Notwithstanding anything contained in this Agreement to the contrary, no individual who has attained the age of 75 years shall become a Trustee hereunder and each individual serving as a Trustee hereunder shall cease serving as a Trustee hereunder upon attaining the age of 75 years.

K. Filling Trustee Vacancies. If there is neither an effectual appointment of a successor Trustee nor any effectual provision otherwise hereunder for the appointment of a successor Trustee, the Grantor's eldest then living descendant shall have the right to appoint an individual, corporation or other entity with fiduciary powers to replace the removed Trustee or whenever the office of Trustee becomes vacant.

L. Compensation of Trustees. Individual Trustees shall receive reasonable compensation in accordance with the law of the State of Texas in effect at the time of payment, unless the Trustee waives compensation; provided, however, that neither the Grantor's Wife nor any descendant of the Grantor who is named herein or otherwise appointed to serve as Trustee hereunder shall receive compensation for serving as Trustee hereunder. A corporate Trustee shall be compensated by agreement with the individual Trustee or, in the absence of such agreement, in accordance with its fee schedule as in effect at the time of payment. The Grantor authorizes a corporate Trustee to charge additional fees for services it provides to a trust hereunder that are not comprised within its duties as Trustee; for example, a fee charged by a mutual fund it administers in which a trust hereunder invests, a fee for providing an appraisal or a fee for providing corporate finance or investment banking services. The Grantor also recognizes that a corporate Trustee may charge separately for some services comprised within its duties as Trustee; for example, a separate fee for investing cash balances or preparing tax returns. Such separate charges shall not be treated as improper or excessive merely because they are added on to a basic fee in calculating total compensation for service as Trustee. In calculating any compensation based on the value of a trust, a policy of insurance on the life of a living person shall be deemed to have no value.

M. Beneficiary. For purposes of this Article, the term "beneficiary" shall mean any person who is named as a recipient of property under this Agreement or who is, or in the future may be, eligible to receive income or principal under any trust created hereunder, or have the right to use any property owned by any trust created hereunder. A person shall be considered a beneficiary for purposes of this Article even if his or her only interest is as a potential distributee or user of trust property under a discretionary power held by a Disinterested Trustee of any trust created hereunder, but shall not be considered a beneficiary for such purposes if his or her only interest hereunder is as a potential appointee under any non-fiduciary power of appointment held by another person which has not yet been exercised or the exercise of which can take effect only in the future, such as a testamentary power held by a living person.

N. Appointment of Trust Protector. The Grantor appoints Jonathan G. Blattmachr to serve as Trust Protector hereunder. The Trust Protector may be one or more individuals, corporations or other entities. Multiple Trust Protectors shall act by majority.

O. Trust Protector Provisions.

1. Anyone serving as Trust Protector may resign by acknowledged instrument delivered to the Trustee then acting hereunder.
2. No discretionary distribution shall be made from any trust that would discharge or substitute for a legal obligation of any person serving as Trust Protector even if such a distribution otherwise would be authorized under the terms of the trust.

3. To the extent not prohibited by applicable law, no Trust Protector shall be treated as acting under a fiduciary duty but, in all events, the Trust Protector must act in good faith. Furthermore, the Trust Protector shall be under no duty or requirement to monitor any Trustee hereunder and shall not be liable to anyone for failure to do so, and shall be under no duty or requirement to exercise the powers conferred upon the Trust Protector hereunder and shall not be liable to anyone for failure to do so.

4. If the Grantor is serving as the Trust Protector, then the Trust Protector shall not appoint an individual or corporation that is related or subordinate to the Grantor within the meaning of Code Sec. 672(c), unless that individual or corporation would be an Interested Trustee. Additionally, no Trust Protector shall appoint an individual or corporation that is related or subordinate to such Trust Protector within the meaning of Code Sec. 672(c) when such Trust Protector is an Interested Trustee, or would be an Interested Trustee if such Trust Protector were serving as Trustee, unless that individual or corporation would also be an Interested Trustee. If more than one person is serving as Trust Protector, the preceding sentence shall prohibit the appointment of any Trustee that could not be appointed by each such person or corporation if serving alone as Trust Protector.

5. The Trustee shall advise each person appointed as a Trust Protector hereunder of such appointment and each person so appointed shall accept such appointment by an acknowledged instrument delivered to the Trustee then serving within sixty (60) days of such notification. If a person so appointed shall fail to deliver such acceptance to the Trustee within that time frame, such person shall be treated as having renounced the appointment as Trust Protector, and the Trustee shall, by an acknowledged instrument, appoint as Trust Protector one or more individuals or entities other than any Trustee or successor Trustee named hereunder or any individual or entity that is related or subordinate (within the meaning of Code Sec. 672(c) and the Regulations thereunder) to any such Trustee or beneficiary hereunder.

P. Compensation of Trust Protectors. Each Trust Protector shall act as Trust Protector hereunder without compensation and shall, as a condition of appointment, execute an acknowledged instrument agreeing to act as Trust Protector hereunder without compensation.

Q. Trust Protector Powers. The Trust Protector shall have the following powers:

1. The power to appoint one or more individuals, corporations or other entities to be successor Trust Protector to take office upon such Trust Protector ceasing to act as such, and any such appointment may be changed prior to becoming effective.

2. The power to remove and replace any and all Trustees.

ARTICLE XX Fiduciary Provisions

A. General Provisions Regarding Changes in Fiduciaries.

1. In the event that the sole Trustee of a trust is a beneficiary of the trust, the Trustee may appoint, but shall not be required to appoint, a Co-Trustee as provided herein. A beneficiary's interest shall not be merged or converted into a legal life estate or estate for years because the beneficiary is the sole Trustee. If this would still happen under applicable law, then a Co-Trustee shall be appointed in preference to such merger or conversion.

2. Separate trusts hereunder may have different Trustees.

3. To the extent not prohibited by applicable law, any Trustee may resign at any time without court approval, whether or not a successor has been appointed, provided the resigning Trustee complies with any applicable state law governing the resignation of the Trustee that may not be waived by a governing instrument. Such resignation shall be by acknowledged instrument executed by the resigning Trustee and delivered to any other fiduciary (and any Trust Protector) acting hereunder, or if none, to the Grantor's then living eldest adult and competent descendant (who, if a Trustee is resigning, is a beneficiary of the trust of which such Trustee is resigning), or if none, then to the guardian of the Grantor's then living eldest descendant (who, if a Trustee is resigning, is a beneficiary of the trust of which such Trustee is resigning), or, if such descendant is a minor and no guardian for such minor has been appointed and is acting, then to the parent of such descendant or other individual with whom such minor resides.

4. No individual fiduciary hereunder shall participate in any decision with respect to any tax election or option, under Federal, state or local law that could enlarge, diminish or shift his or her beneficial interest hereunder from or to the beneficial interest hereunder of another person. Any such tax election or option shall be made only by a fiduciary or fiduciaries that do not have a beneficial interest hereunder or whose beneficial interest could not be enlarged, diminished or shifted by the election or option. If the only fiduciary or fiduciaries who otherwise could exercise such tax election or option hold beneficial interests hereunder that could be so enlarged, diminished or shifted, another individual or a bank or trust company (but not an individual, bank or trust company that is related or subordinate within the meaning of Code Sec. 672(c) to any acting fiduciary hereunder) shall be appointed by the fiduciary or fiduciaries by an acknowledged instrument delivered to the person so appointed and the fiduciary so appointed shall alone exercise any such election or option.

5. If any Trustee is removed, resigns or otherwise ceases to act as Trustee of any trust hereunder, the Trustee shall deliver all records and trust property in the Trustee's possession with respect to such trust to the then acting Trustees or, if no other Trustee is then acting with respect to such trust, to the successor Trustee upon receipt of written notice of the designation of the successor Trustee from the person appointing such successor Trustee, or any other person entitled to the records or trust property within a reasonable amount of time after the Trustee ceases to act, and unless a Trustee is then acting with respect to such trust, the Trustee who ceases to act shall continue to have all of the duties of a Trustee and the powers necessary to protect the records and trust property until delivered as provided herein.

B. Accountings and Other Proceedings.

1. The Grantor directs that a trust hereunder be subject to independent administration with as little court supervision as the applicable state law allows. The Trustee shall not be required to render to any court annual or other periodic accounts, or any inventory, appraisal, or other returns or reports, except as required by applicable state law. The Trustee shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as the Trustee shall determine. The Trustee shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians, out of the property of the trust. The Trustee shall not be required to register any trust hereunder except as required by law.

2. The Grantor directs that in any proceeding relating to a trust hereunder, service upon any person under a legal disability need not be made when another person not under a disability is a party to the proceeding and has the same interest as the person under the disability. The person under the disability shall nevertheless be bound by the results of the proceeding. The same rule shall apply to non-judicial settlements, releases, exonerations and indemnities.

C. Fiduciary to Fiduciary Self-Dealing. Except to the extent a restraint on self-dealing may not be waived under applicable local law by a governing instrument, the Grantor authorizes any Trustee acting hereunder, without court approval or notice, (i) to purchase or otherwise acquire assets from and (ii) to sell, transfer, exchange or loan any assets to any trust of which such Trustee is acting as a trustee and/or any estate of which such Trustee is acting as an Executor in any manner, at any time or times, and upon such terms, credits and conditions as the Trustee may deem advisable notwithstanding that such participation otherwise may be an act of self-dealing under applicable state law.

D. Required Release of Protected Health Information. Each individual named herein or appointed pursuant to the provisions hereof as Trustee or Trust Protector, as a condition precedent to such person so serving or being appointed, shall execute a written statement (a) authorizing and directing all of his or her health care providers to release, to any person having an interest hereunder (herein "Information Recipient") any and all Protected Health Information (including, but not limited to, the results of any medical examination requested in accordance with the provisions of this paragraph) for purposes of allowing a determination of whether the individual lacks the required capacity to continue to so serve hereunder and (b) in a form sufficient to permit such release pursuant to 45 CFR 164.508 (or any successor thereto). The term Information Recipient shall include, but not be limited to, another Trustee or Trust Protector acting hereunder. Any individual who revokes such authorization shall thereupon be treated as resigning as Trustee or Trust Protector hereunder upon the date of discovery of such revocation by any Information Recipient; provided that, notwithstanding the foregoing, upon discovery of such revocation, such fiduciary shall not be treated as resigning if the requisite authorization described above is executed by such individual within twenty (20) days after notice of such discovery is given to such individual by any Information Recipient. In addition, each individual so serving who fails within a reasonable time to undergo a medical examination at the written request of any person having an interest hereunder (including, but not limited to, another Trustee or Trust Protector acting hereunder) for the sole purpose of determining if the individual lacks the required capacity to continue to so serve hereunder or fails to cause the results of such examination to be made available within a reasonable time to the person making the written request, shall be treated as resigning as such fiduciary, provided that there is reasonable basis to request the medical examination be undertaken and provided further that no such request may be made more than once every thirty-six (36) months. The cost of the medical examination shall be borne by the trust with respect to which such individual is acting as Trustee or Trust Protector.

E. Continuation of Trustee's Powers. Powers granted to the Trustee hereunder or by applicable law shall continue with respect to all property held hereunder to be exercisable by the Trustee until property is actually distributed to a beneficiary. By way of illustration and not by way of limitation, the Trustee may invest and reinvest and take all investment action with respect to property that has been directed to be distributed and notwithstanding any direction that the property be distributed "as it is then constituted" until such property is actually distributed.

F. Additional General Provisions Regarding Fiduciaries.

1. Under this Agreement, if two or more separate trusts with the same beneficiaries and same terms are created, either by direction or pursuant to the exercise of discretion, the Grantor intends that the separate trusts may but need not have the same investments and may, but need not, follow the same pattern of distributions. The Trustee's powers shall be exercisable separately with respect to each trust.

2. Except to the extent, if any, specifically provided otherwise in this Agreement, references to the Trustee shall, in their application to a trust hereunder, refer to all those from time to time acting as Trustee and, if two Trustees are eligible to act on any given matter, they shall act unanimously, and if more than two Trustees are eligible to act on a

given matter, they shall act by majority. In the exercise of discretion over distributions, if this Agreement provides that certain Trustees may participate in distributions limited by an ascertainable standard while a different set of Trustees may participate in distributions for any purpose, and if the two sets of Trustees (each acting by its own majority) want to distribute the same item of income or principal to different recipients, then the distribution desired by the set of Trustees participating in distributions for any purpose shall prevail.

3. The Trustee shall be entitled to reimbursement for any out-of-pocket expenditures, with interest as appropriate, made or incurred in the proper administration of the trusts under this Agreement or in furtherance of his or her fiduciary duties and obligations.

4. No Trustee shall be liable to anyone for anything done or not done by any other Trustee or any beneficiary.

5. The fact that a Trustee is active in the investment business shall not be deemed a conflict of interest. Purchases and sales of investments may be made through a corporate Trustee or through any firm of which a corporate or individual Trustee is a partner, member, shareholder, proprietor, associate, employee, owner, subsidiary, affiliate or the like. Property of a trust hereunder may be invested in individual securities, mutual funds, partnerships, LLCs, private placements or other forms of investment promoted, underwritten, managed or advised by a Trustee or such a firm.

6. The Trustee may employ and rely upon advice given by investment counsel, delegate discretionary investment authority over investments to investment counsel and pay investment counsel reasonable compensation in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation. The Trustee may, but need not, favor retention of assets originally owned by the Grantor. The Trustee shall not be under any duty to diversify investments, regardless of any rule of law requiring diversification, and any such duty is hereby waived. The Trustee may retain and acquire property that does not produce income, subject to any restrictions or qualifications of this power set forth elsewhere in this Agreement.

7. The fact that a Trustee (or a firm of which a Trustee is a member or with which a Trustee is otherwise affiliated) renders legal or other professional services to a trust hereunder shall not be deemed a conflict of interest, and the Trustee may, if permitted by applicable state law, pay fees for such services to such Trustee or firm without prior approval of any court or any beneficiary, whether or not there is a Trustee to approve such payment. An attorney or other Trustee who also renders professional services shall receive full compensation for both services as a Trustee and the professional services rendered, except as specifically limited by law.

8. No state law restraint on acts of self-dealing by a fiduciary shall apply to a Trustee who is the Grantor's Wife or a descendant of the Grantor, except to the extent (but only to the extent) such restraint may not be waived under applicable local law by a governing instrument. Except when prohibited by another provision of this Agreement, such Trustee may enter into transactions on behalf of a trust hereunder in which that Trustee is personally interested so long as the terms of such transaction are fair to the trust. For example, such Trustee may purchase property from the trust at its then fair market value without court approval.

9. If the Grantor has given the Trustee discretion concerning distributions of income or principal, that discretion shall be absolute and uncontrolled and subject to correction by a court only if the Trustee should act utterly without reason, in bad faith, with reckless indifference to the purposes of the trust or the interests of the beneficiaries, or in violation of specific provisions of this Agreement. If the Grantor has set forth general guidelines (as opposed to directions or dollar limits) for the Trustee in making distributions, those guidelines shall be merely suggestive and shall not create an enforceable standard whereby a distribution could be criticized or compelled. It is the Grantor's strong belief that the Trustee will be in the best position to interpret and carry out the intentions expressed herein under changing circumstances. This paragraph shall not, however, apply to any standards framed in terms of health, education, maintenance or support (including support in an accustomed manner of living), as those words shall create an ascertainable standard for Federal tax purposes under Code Sec. 2041(b), when applied to a Trustee's power or a power held individually, although even in those cases the holder of the power shall have as much discretion as is consistent therewith. An Interested Trustee who is otherwise authorized to make distributions to himself or herself subject to an ascertainable standard may exercise such discretion, notwithstanding any contrary rule of law, unless such authorization would cause the trust property to be subject to the claims of the creditors of such Interested Trustee.

10. Notwithstanding any other provision of this Agreement, each Trustee is prohibited from making, voting on or otherwise participating in any discretionary distribution of income or principal from a trust that would discharge or substitute for a legal obligation of that Trustee, including the obligation to support a beneficiary of the trust. Further, notwithstanding any other provision of this Agreement, any Trustee authorized to distribute income or principal for his or her own health, education, maintenance or support in his or her accustomed manner of living, as those words shall create an ascertainable standard for Federal tax purposes under Code Sec. 2041(b), shall consider all resources reasonably available to himself or herself. Subject to that, in exercising discretion over distributions, the Trustee may consider or disregard other resources available to any beneficiary.

11. A Trustee may irrevocably release one or more powers held by the Trustee while retaining other powers.

12. Any Trustee may delegate to a Co-Trustee any power held by the delegating Trustee, but only if the Co-Trustee is authorized to exercise the power delegated. A delegation may be revocable, but while it is in effect the delegating Trustee shall have no responsibility concerning the exercise of the delegated power.

13. Unless the Grantor has specifically provided otherwise, and subject to any ascertainable standard governing its exercise for Federal tax purposes under Code Sec. 2041(b), the Trustee's discretionary power to distribute income or principal includes the power to distribute all of such income and/or principal to one or more members of a class to the exclusion of others, whether or not the terms of the trust specifically mention that possibility.

G. Waiver of Bond. No Trustee shall be required to give bond or other security in any jurisdiction and, if despite this exoneration, a bond is nevertheless required, no sureties shall be required.

H. Amending, Revoking or Modifying Instrument. Notwithstanding any provision contained in this document or any statute or common law, the Grantor shall have no right, either alone or in conjunction with any other person(s) to revoke, amend or modify this Agreement or any trust created by it.

ARTICLE XXI

Governing Law and Trustee Powers

The interpretation and operation of the trust shall be governed by the laws of the State of Alaska. The Trustee may, without prior authority from any court, exercise all powers conferred by this Agreement or by common law or by any fiduciary powers act or other statute of the State of Texas or any other jurisdiction whose law applies to the trust. The Trustee shall have sole and absolute discretion in exercising these powers. Except as specifically limited by this Agreement, these powers shall extend to all property held by the Trustee until actual distribution of the property. The powers of the Trustee shall include the following:

A. Powers of Investment Trustee. In addition to any other power granted by applicable law or herein granted, and except as may otherwise be provided herein, the Investment Trustee shall have the sole and absolute authority (acting alone and without the consent or approval of any other Trustee acting hereunder) to execute documents or take other action regarding decisions about the investment of the assets of any trust hereunder including, but not limited to, the purchase, retention or sale of any assets held in any such trust. In addition to all investment powers conferred by law upon trustees, and all other powers herein granted to the Investment Trustee, the Investment Trustee is expressly authorized, in the exercise of sole and absolute discretion:

1. To purchase or otherwise acquire, and to retain, whether originally a part of the trust estate or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property, whether within or without the United States, including, but without limitation, foreign real estate or foreign securities, securities of a corporation in which any Trustee is a director, officer, employee or shareholder, securities of any corporate fiduciary, interests in any business venture (incorporated or unincorporated), and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, and interests in any partnership, limited liability company or other entity and including, but without limitation, acquiring or purchasing from the Grantor assets in exchange for a note bearing interest at the current applicable federal rate;

2. To sell, lease, pledge, mortgage, transfer, exchange, convert, grant options with respect to, or otherwise dispose of, any and all real or personal property or interest therein, at any time forming a part of any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions; and to enter into leases, mortgages or options which extend beyond the period fixed by law for leases and options made by fiduciaries or beyond the term of the trust;

3. To borrow money from any lender, including, but without limitation any individual or corporate fiduciary hereunder or any member of the Grantor's family, or any trust, corporation or association in which any one or more of the foregoing may be interested, for any purpose connected with the preservation or improvement of any trust estate, and to mortgage or pledge as security upon any terms and conditions any real or personal property forming a part of the trust estate;

4. To purchase from the legal representatives of the Grantor's estate or the estate of any beneficiary of any trust created under this instrument any property constituting a part thereof at its fair market value and to make loans for adequate consideration to the legal representatives of the Grantor's estate or the estate of any beneficiary of any trust created under this instrument, upon such terms and conditions as the Investment Trustee, in the exercise of sole and absolute discretion, may determine;

5. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps proper to obtain the benefits of any such transaction;

6. To the extent permitted by law, to register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; to hold any security in bearer or non-

certificated form; and to use a central depository for securities; to employ a broker-dealer as custodian of all or part of the securities at any time held by any trust estate and to register such securities in the name of such broker-dealer;

7. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which may at any time form part of any trust estate or which may be liens or charges against any property of the trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of any trust estate against others or of others against any trust estate upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith;

8. To place and leave all or any part of the funds or securities at any time held by any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of the Investment Trustee to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account"; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal as the Investment Trustee may determine;

9. To continue the operation of any business, incorporated or unincorporated, which may be held or acquired by the Trustee, and any successor business thereto, and to purchase or otherwise acquire any business or interest in any business; to take part in the management of any business in which investment is retained or made hereunder and to delegate duties with respect to such management, with the requisite powers, to any employee, manager, partner or associate of such business, without liability for such delegation; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to subject to the risks of any such business, any part or all of any trust estate, for such term or period as the Investment Trustee, in the exercise of sole and absolute discretion, may determine; to advance money or other property to any such business; to make loans, subordinated or otherwise, of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business either alone or with other persons interested therein, and to secure such loan or loans by a pledge or mortgage of any part of any trust estate; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners, associates and officers of any such business either individually or through an officer or officers if any Trustee is a corporation, and to receive compensation from such business for so acting; to enter into stockholders' agreements with corporations in which any trust estate has an interest and/or with the stockholders of such corporations; to liquidate, either alone or jointly with others, any such business or any interest in any such business; and generally to exercise any and all powers as the Investment Trustee may deem necessary with respect to the continuance, management, sale or liquidation of any such business;

10. To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein which may form at any time a part of any trust estate; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith;

11. To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as the Investment Trustee may deem advisable;

12. To delegate any duties or powers, discretionary or otherwise, to a co-fiduciary or any other person or institution for such periods and upon such terms and conditions as may be designated in an acknowledged, written instrument delivered to such co-fiduciary, other person or institution; and if such duties or powers are delegated to a co-fiduciary, the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument so delivered at any time; provided, however, that no duties or powers described may be delegated to any person who is prohibited by the terms of this instrument from exercising any such duty or power;

13. To appoint, employ and remove at any time and from time to time any accountants, attorneys, investment or other expert advisers, agents, clerks and employees; and to fix and pay their reasonable compensation; and to delegate discretionary authority to make changes in investments to investment counsel;

14. To execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with any trust estate created hereunder as in the judgment of the Investment Trustee the best interests of such trust may require.

B. Powers of Distributions Trustee. In addition to any other power granted by applicable law or herein granted, and except as may otherwise be provided herein, the Distributions Trustee shall have the sole and absolute authority (acting alone and without the consent or approval of any other Trustee acting hereunder) to execute documents or take other action regarding the exercise of, or decision not to exercise, any discretion over beneficial payments, distributions, applications, uses or accumulations of income or principal to or for the benefit of the beneficiaries of the any trust hereunder. In addition to all other powers herein granted to the Distributions Trustee, the Distributions Trustee is expressly authorized, in the exercise of sole and absolute discretion:

1. To purchase, acquire, hold and maintain any residence (whether held as real property, condominium or cooperative apartment) for the use and benefit of one or more of the beneficiaries of any trust, as the Distributions Trustee, in the exercise of sole and absolute discretion, may determine, and, if the Distributions Trustee, in the exercise of sole and absolute discretion, determine that it would be in the best interests of the beneficiaries of any trust to maintain a residence for the use of such one or more of the beneficiaries, but that the residence owned by the Trustee should not be used for such purposes, the Distributions Trustee are authorized to sell said residence and to apply the net proceeds of sale to the purchase of such other residence or to make such other arrangements as the Distributions Trustee, in the exercise of sole and absolute discretion, may deem suitable for the purpose, any proceeds of sale not needed for reinvestment in a residence as provided above to be added to the trust principal and thereafter held, administered and disposed of as a part thereof; to pay all carrying charges of such residence, including but not limited to, any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including those providing services as independent contractors) and other expenses incident to the maintenance of a household for the benefit of one or more of the beneficiaries of the trust as the Distributions Trustee, in the exercise of sole and absolute discretion, may determine; to expend such amounts to maintain the current life style of any one or more of the beneficiaries, as the Distributions Trustee, in the exercise of sole and absolute discretion, may determine, including, but not limited to, complete authority to provide for the personal care and comfort of any one or more of the beneficiaries in any manner whatsoever (and the power conferred upon the Distributions Trustee by this paragraph shall supersede the powers of the Investment Trustee to the extent the Distributions Trustee may direct in an acknowledged, written instrument delivered to the Investment Trustee acting hereunder);

2. To purchase, acquire, hold and maintain as a part of each trust created hereunder any and all articles of tangible personal property for the use and benefit of the beneficiaries of any trust, as the Distributions Trustee, in the exercise of sole and absolute discretion, may determine, whether such property is productive, underproductive or unproductive of income, and without any duty to convert such property to productive property; to pay the expenses of safekeeping of any such property, including insurance, and all expenses of the repair and maintenance of such property, and to sell such property and to apply the net proceeds of sale to the purchase of such other property as the Distributions Trustee, in the exercise of sole and absolute discretion, may deem suitable for the purpose (and the power conferred upon the Distributions Trustee by this paragraph shall supersede the powers of the Investment Trustee to the extent the Distributions Trustee may direct in an acknowledged, written instrument delivered to the Investment Trustee acting hereunder);

3. To permit any one or more of the beneficiaries of any trust hereunder, as the Distributions Trustee, in the exercise of sole and absolute discretion, determines, to occupy any real property and to use any tangible personal property forming part of the trust estate on such terms as the Distributions Trustee in the exercise of sole and absolute discretion, determines, whether for rent, rent-free, in consideration of payment of taxes, insurance, maintenance or ordinary repairs, or otherwise; (and the power conferred upon the Distributions Trustee by this paragraph shall supersede the powers of the Investment Trustee to the extent the Distributions Trustee may direct in an acknowledged, written instrument delivered to the Investment Trustee acting hereunder);

4. To divide the trust, into one or more separate trusts for the benefit of one or more of the beneficiaries (to the exclusion of the other beneficiaries) of the trust so divided, as the Distributions Trustee, in the exercise of sole and absolute discretion, determines and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a Subchapter S corporation as described in section 1361(d)(3) of the Code, or for any other purpose as the Distributions Trustee, in the exercise of sole and absolute discretion, determines;

5. To grant a term of years interest or a life estate to any one or more of the beneficiaries of any trust created hereunder, as the Distributions Trustee, in the exercise of sole and absolute discretion, determines, and to terminate the same, retaining the reversionary interest in the trust or for the benefit of any other beneficiary of the trust and to make any property of the trust available for the use and benefit of any beneficiary hereunder;

6. To make distributions from any trust in kind or partially in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and any property distributed in satisfaction of a distributive share shall be valued as of its date of distribution;

7. To guarantee the loans of any trust beneficiary (and the power conferred upon the Distributions Trustee by this subparagraph shall supersede the powers of the Investment Trustee to the extent the Distributions Trustee so direct in an acknowledged, written instrument delivered to the Investment Trustee acting hereunder);

8. To make such elections under the tax laws as the Distributions Trustee, in the exercise of sole and absolute discretion, may determine to be appropriate, regardless of the effect thereof on any interests in any trust created under this Agreement of Trust, and to determine whether or not any adjustment of such interests shall be made by reason of any such election;

9. To make or terminate elections with respect to S corporation stock, and to make such adjustments between income and principal to compensate for the consequences of the trust's ownership of S corporation stock as the Distributions Trustee shall deem just and equitable; provided, however, that if the trust holds S corporation stock, the Distributions Trustee shall immediately take such actions to insure that the trust qualifies as either an Electing Small Business Trust within the meaning of section 1361(e)(1)(A) of the Code or a Qualified Subchapter S Trust within the meaning of section 1361(d)(3) of the Code and (A) if the Distributions Trustee seeks to qualify the trust as an Electing Small Business Trust, the Distributions Trustee shall have the authority to exclude by an acknowledged, written instrument any person or organization from having any interest therein, and (B) if the Distributions Trustee seeks to qualify the trust as a Qualified Subchapter S Trust, the Distributions Trustee shall not make (and no other Trustee hereunder shall be authorized to make) adjustments that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled for the trust to qualify as a Qualified Subchapter S Trust under section 1361(d) of the Code; and no Trustee shall exercise any power conferred under this Article or under this instrument that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled for the trust to qualify as a Qualified Subchapter S Trust under section 1361(d) of the Code; and provided further, during the term of any trust created hereunder, (i) if the Trustee sell any interest in a corporation or if the assets of any entity constituting a corporation in which the trust has an ownership interest are sold, and (ii) if that corporation has made an election to be taxed under Subchapter S of the Code, then in the sole and absolute discretion of the Distributions Trustee, the Trustee may distribute to the income beneficiary such amounts of principal as shall be necessary to pay any income tax caused by that sale, if the income or gain attributable to that sale is taxed directly to the income beneficiary under applicable federal tax law;

10. To delegate any duties or powers, discretionary or otherwise, to a co-fiduciary or any other person or institution for such periods and upon such terms and conditions as may be designated in an acknowledged, written instrument delivered to such co-fiduciary, other person or institution; and if such duties or powers are delegated to a co-fiduciary, the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument so delivered at any time; provided, however, that no duties or powers may be delegated to any individual who is prohibited therein from participating in the exercise of such duties or powers or who is not eligible to act as a Distributions Trustee hereunder, and no duties or powers may be delegated to the Grantor, a former spouse of the Grantor, or anyone who is related or subordinate within the meaning of section 672(c) of the Code with respect to any of the foregoing;

11. To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country;

12. To allocate receipts and expenses between income and principal in such manner as the Distributions Trustee may determine, in the exercise of sole and absolute discretion; and

13. To execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with any trust estate created hereunder as in the judgment of the Distributions Trustee the best interests of such trust may require and the Distributions Trustee may, by an acknowledged, written instrument delivered to the Investment Trustee, direct the Investment Trustee to make cash available for the implementation of any of the foregoing powers.

C. If more than one person is acting as Distributions Trustee of any given trust hereunder, decisions of the Distributions Trustee shall be made (i) by a majority vote if more than two (2) persons are so acting or (ii) by unanimous vote if only two (2) persons are so acting.

D. Administrative Powers. In addition to any other power granted by applicable law or herein granted, and except as may otherwise be provided herein, the Administrative Trustee is authorized to maintain books and records of the trusts created hereunder; prepare and file or to arrange for the preparation and filing of all tax returns required to be filed by any trust created hereunder; to the extent deemed appropriate by the Investment Trustee, to maintain custody of any assets of the trusts created hereunder (other than real property and other than tangible personal property which the Distributions Trustee, in the exercise of sole and absolute discretion, may determine to make available for the use of any beneficiary hereunder); undertake any other duties to assist the Investment Trustee as the Investment Trustee, in the exercise of sole and absolute discretion, may determine to be appropriate; implement without responsibility therefor any decisions of the other Trustee hereunder; appoint, employ and remove, at any time and from time to time, any accountants, attorneys, expert advisers, agents, clerks and employees in furtherance of fulfilling the responsibilities of Administrative Trustee hereunder, and to pay them such reasonable compensation for their services as approved by the Investment Trustee; place and leave all or any part of the funds or securities at any time held by any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify

the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of the Trustee to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account"; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal as the Trustee shall determine; and execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to inquire into its validity or to see to the application of any money or other property paid or delivered pursuant to the terms of any such instrument. If more than one person is acting as Administrative Trustee of any given trust hereunder, decisions of the Administrative Trustee shall be made (i) by a majority vote if more than two (2) persons are so acting or (ii) by unanimous vote if only two (2) persons are so acting.

E. Powers of General Trustee. In addition to any other power granted by applicable law or herein granted, the General Trustee, shall have the sole and absolute authority (acting alone and without the consent or approval of any other Trustee acting hereunder), in the exercise of sole and absolute discretion, to exercise all powers conferred by applicable law to the extent such powers have not been specifically granted exclusively to another Trustee or Trustees hereunder.

F. Special Trustee Liability Provision. Some persons may be hesitant to serve as Trustee hereunder because of a concern about potential liability. Therefore, with respect to any trust created hereunder (i) no Trustee shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken in connection with the administration of any trust created hereunder if in good faith reasonably believed by such Trustee to be in accordance with the provisions and intent hereof, except for matters involving such Trustee's willful misconduct or gross negligence proved by clear and convincing evidence, (ii) no Trustee shall have any fiduciary responsibility to observe, monitor or evaluate the actions of any other Trustee and shall not be liable to any party for the failure to seek to remedy a breach of trust, or in a recurring situation to request instructions from a court having jurisdiction over the trust, even if a Trustee may be guilty of a gross violation of fiduciary duties hereunder, and (iii) each Trustee shall be fully indemnified by the trust estate against any claim or demand by any trust beneficiary or trust creditor, except for any claim or demand based on such Trustee's willful misconduct or gross negligence proved by clear and convincing evidence. Expenses incurred by a Trustee in defending any such claim or demand shall be paid by the trust estate in advance of the final disposition of such claim or demand, upon receipt of an undertaking by or on behalf of such Trustee to repay such amount if it shall ultimately be determined that such Trustee is not entitled to be indemnified as authorized by this paragraph. In no event shall any Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

G. Negating Power of Appointment for Interested Trustee as Beneficiary. Notwithstanding any other provision of this Agreement, no Interested Trustee who is a beneficiary of any trust created hereunder shall ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, uses or accumulations of income or principal by the Trustee to or for any beneficiary other than pursuant to an ascertainable standard, if any, expressly set forth and authorized in this Agreement, or (ii) the exercise of any general power of appointment described in Code Sec. 2041 or 2514 (but this shall not apply to a general power of appointment, if any, granted in a non-fiduciary capacity). If any Trustee is under a duty to support a beneficiary or is acting as a guardian, conservator, or similar fiduciary of any person who is a beneficiary, such Trustee shall not participate in the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Code Sec. 2042(2)) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall have any power of appointment over or power to direct the beneficial enjoyment of the fractional share of any trust hereunder consisting of disclaimed property, including any accumulated income of that share, unless such power to direct the beneficial enjoyment is limited by an ascertainable standard.

H. Security Interests. The Trustee may grant security interests and execute all instruments creating such interests upon such terms as the Trustee may deem advisable.

I. Tax Elections and Allocations. The Trustee may make all tax elections and allocations the Trustee may consider appropriate; provided, however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. Tax elections and allocations made in good faith shall not require equitable adjustments.

J. Investment Responsibility. The Trustee may retain any property originally owned by the Grantor and invest and reinvest in all forms of real and personal property, whether inside or outside the United States, including, without limitation, common trust funds of a corporate Trustee, mutual funds, partnerships (including a partnership in which a Trustee is a partner) and other forms of joint investment (which may but need not be managed by, advised by or affiliated with a Trustee), without regard to any principle of law limiting delegation of investment responsibility by the Trustee.

K. Compromise Claims or Debts. The Trustee may compromise claims or debts and abandon or demolish any property which the Trustee shall determine to be of little or no value.

L. Borrowings. The Trustee may borrow from anyone, even if the lender is a Trustee under this Agreement, and may pledge property as security for repayment of the funds borrowed, including the establishment of a margin account. No Trustee shall be personally liable for any such loan, and such loan shall be payable only out of assets of the trust.

M. Sale or Exchange of Property. The Trustee may sell property at public or private sale, for cash or upon credit, exchange property for other property, lease property for any period of time and give options of any duration for sales, exchanges or leases. The Trustee may give such warranties or indemnifications as the Trustee may deem advisable.

N. Participation in Mergers and Reorganizations. The Trustee may join in any merger, reorganization, voting-trust plan or other concerted action of security holders and delegate discretionary powers (including investment powers) in entering into the arrangement.

O. Allocate Gain to Income or Principal. The Trustee (other than any Interested Trustee) may allocate within the meaning of Reg. §1.643(a)-3(b) to income or to principal, or partly to income and partly to principal, all or part of the realized gains from the sale or exchange of trust assets; provided, however, that, if income is defined under an applicable state statute as a unitrust amount and the trust is being administered pursuant to such statute, the allocation of gains to income must be exercised consistently and the amount so allocated may not be greater than the excess of the unitrust amount over the amount of distributable net income determined without regard to Reg. §1.643(a)-3(b).

P. Character of Unitrust Amount Paid. The Trustee (other than any Interested Trustee) may, within the meaning of Reg. §1.643(a)-3(e), specify the tax character of any unitrust amount paid hereunder. The Trustee (other than any Interested Trustee) may take any action that may be necessary in order for such specification to be respected for tax purposes.

Q. Distributions as Paid from Capital Gains. The Trustee (other than any Interested Trustee and other than the Grantor) may deem, within the meaning of Reg. §1.643(a)-3(e), any discretionary distribution of principal as being paid from capital gains realized during the year. The Trustee (other than any Interested Trustee and other than the Grantor) may take any action that may be necessary in order for such deeming to be respected for tax purposes.

R. Distributions in Cash or Kind. The Trustee may, without the consent of any beneficiary, distribute in cash or in kind, and allocate specific assets in satisfaction of fractional shares or pecuniary sums among the beneficiaries (including any trust) in such proportions, not necessarily pro rata, as the Trustee may determine, even though a Trustee has an interest affected by the distribution and even though different beneficiaries entitled to the same sum or share may thereby receive different mixes of assets, possibly with different income tax bases, as long as the fair market value of property on the date of distribution is used in determining the extent to which any distribution satisfies a sum or share. The decision of the Trustee in dividing any portion of the trust property between or among multiple beneficiaries shall be binding on all persons.

S. Application of Property. The Trustee may apply to the use or for the benefit of any individual, any property whether principal or income, that otherwise would or could be distributed directly to such individual.

T. Acquisition and Maintenance of Real Property. The Trustee may acquire, hold and maintain any residence (whether held as real property, condominium or cooperative apartment) for the use and benefit of any one or more of the beneficiaries of any trust whenever that action is consistent with the terms of that trust, and, if the Trustee shall determine that it would be in the best interests of the beneficiaries of that trust (and consistent with the terms of that trust) to maintain a residence for their use but that the residence owned by that trust should not be used for such purposes, the Trustee may sell said residence and apply the net proceeds of sale to the purchase of such other residence or make such other arrangements as the Trustee shall deem suitable for the purpose. Any proceeds of sale not needed for reinvestment in a residence as provided above shall be added to the principal of that trust and thereafter held, administered and disposed of as a part thereof. The Trustee may pay all carrying charges of such residence, including, but not limited to, any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including independent contractors) and other expenses incident to the running of a household for the benefit of the beneficiaries of that trust. Without limiting the foregoing, the Trustee may permit any income beneficiary of any trust created hereunder to occupy any real property or use any personal property forming a part of that trust on such terms as the Trustee may determine, whether rent free or in consideration of payment of taxes, insurance, maintenance and ordinary repairs or otherwise. In the case of any trust created under this Agreement that qualifies for the marital deduction, such occupancy shall be rent free and any other condition shall be consistent with the intention that the Grantor's Wife have that degree of beneficial enjoyment of the trust property during life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, so that the Grantor's Wife's interest is a qualifying income interest for life for purposes of the marital deduction.

U. Acquisition and Maintenance of Personal Property. The Trustee may acquire, hold and maintain as a part of each trust hereunder any and all articles of tangible personal property or any other property whether productive, underproductive or unproductive of income, and without any duty to convert such property to productive property, subject, however, to any right of the Grantor's Wife to demand that any property held in a trust for him be made

productive and pay the expenses of the repair and maintenance of such property, and sell such property and apply the net proceeds of sale to the purchase of such other property as the Trustee deems suitable for the purpose.

V. Hold Trusts as Combined Fund. The Trustee may hold two or more trusts hereunder as a combined fund (allocating ratably to such trusts all receipts from, and expenses of, the combined fund) for convenience in investment and administration, but no combination of trusts for this purpose may alter their status as separate trusts.

W. Consolidation of Trusts. After complying with any applicable state law, such as providing notice to all beneficiaries, the Trustee may consolidate any trust with another trust if the consolidation will not impair the rights of any beneficiary or adversely affect the achievement of the purposes of the trust and administer the two as one trust, provided that each portion of the consolidated trust shall terminate and vest in possession no later than the date required for the separate trust from which it came. Without in any way limiting the discretion of the Trustee granted by this paragraph, the Grantor envisions that the Trustee will not elect to consolidate two or more trusts with different inclusion ratios for generation-skipping transfer tax purposes.

X. Division of Trusts. After complying with any applicable state law, such as providing notice to all beneficiaries, the Trustee may divide any trust into two or more separate trusts and administer them as separate trusts, either before or after the trust is funded, to enable the GST Exemption to be allocated separately to one of the trusts, to enable the election under Code Sec. 2652(a)(3) to be made separately over one of them or otherwise to make possible a separate trust with a zero inclusion ratio because the trusts have different transferors for GST purposes or for any other tax or non-tax purpose, provided the division does not impair rights of any beneficiary or adversely affect the achievement of the purposes of the trust. Any such division shall be by fractional shares and each share shall participate pro rata in income, appreciation and depreciation to the time of division. Any relevant pecuniary amount (such as the obligation to pay an annuity, or the right to withdraw that amount referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars (\$5,000)) shall be applied to the separate trusts based on the fractional shares into which they are divided. Any such division may be retroactive to an earlier effective date, and each separate trust created by the division shall be treated as a separate trust for all purposes from the date on which the division is effective. If a trust is divided pursuant to this paragraph into two trusts, one that is exempt from Federal generation-skipping transfer tax ("GST Exempt Trust") and one that is not exempt from Federal generation-skipping transfer tax ("GST Non-Exempt Trust"), then, without limiting the Trustee's discretion, hereunder the Grantor suggests that no distribution of principal be made from such GST Exempt Trust until the principal of such GST Non-Exempt Trust is exhausted, unless there is a compelling reason to do so.

Y. Loans. The Trustee may make loans to, may buy property from, and generally shall have the power to make contracts with the Grantor's estate or the Grantor's Wife's estate or the trustee of any trust subject to any wealth transfer tax upon either of their deaths, regardless of the fact that one or more or all of the persons serving as Trustee hereunder are also serving as a selling or borrowing or otherwise contracting Executor or Trustee; provided that such loans shall be for adequate interest and shall be adequately secured, and such purchases shall be for the property's then fair market value.

Z. Reliance Upon Advice. The Trustee may employ and rely upon advice given by accountants, attorneys, investment bankers, and other expert advisors and employ agents, clerks and other employees and pay reasonable compensation to such advisors or employees in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

AA. Trustee as Agent. Trustees serving in any jurisdiction in which a corporate trustee is unable to serve as Trustee may use such corporate trustee as an agent to perform any task that may lawfully be performed by such an agent in that jurisdiction, and may pay to such corporate trustee such compensation for its services as an agent as shall be agreed upon by all Trustees.

BB. Additions to Trust. The Trustee may accept or decline to accept additions from any source.

CC. Administration of Multiple Trusts. Whenever two trusts created under this Agreement are directed to be combined into a single trust (for example, because property of one trust is to be added to the other trust), whether or not the trusts have different inclusion ratios with respect to any common transferor or have different transferors for generation-skipping transfer tax purposes, the Trustee is authorized, instead of combining said trusts, to administer them as two separate trusts with identical terms in accordance with the provisions that would have governed the combined trusts. However, the Trustee may manage and invest such separate trusts *in solido*. If anyone (for example, the Grantor's Wife) adds or is deemed to add by gift or bequest property to a trust created under this Agreement, the Grantor authorizes the Trustee to hold the added property as a separate trust with terms identical to the trust to which it would have been added and the Trustee may manage and invest such separate trusts *in solido*.

DD. Combining Trusts. The Trustee is authorized to combine any one or more trusts with identical terms for an identical beneficiary or beneficiaries created under this Agreement as a single trust. The Trustee is also authorized later to divide such trust as provided above in this Article. Without in any way limiting the discretion of the Trustee granted by this paragraph, the Grantor envisions that the Trustee will not elect to combine two or more trusts with different inclusion ratios for generation-skipping transfer tax purposes.

EE. Custodian Employed. The Trustee may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any bank, trust company, brokerage house or other institution employed as

custodian), and pay reasonable compensation to a custodian in addition to any fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

FF.No Portion of Trust Includible in Gross Estate. It is the Grantor's intent that no portion of any trust hereunder be includible in the Grantor's gross estate or the gross estate of the Grantor's Wife for Federal estate tax purposes. Accordingly, and notwithstanding any provision herein contained to the contrary, this Agreement shall be construed and the trusts hereunder administered in accordance with and to achieve that intention.

ARTICLE XXII

S Corporation Stock

Before the date on which any "S Corporation Shares" (defined below) otherwise would pass to or be treated as held by an "Ineligible Trust" (defined below), the Trustee (excluding, however, any Interested Trustee) may elect to hold these S Corporation Shares in one or more separate trusts or shares as set forth in this Article. The Trustee (excluding, however, any Interested Trustee) may elect to hold such S Corporation Shares under the paragraph entitled "Qualified Subchapter S Trusts" or the paragraph entitled "Electing Small Business Trusts," as the Trustee (excluding, however, any Interested Trustee) shall deem appropriate, considering the changes that such provisions would require from the terms and conditions under which such shares otherwise would be held under this Agreement.

A. Qualified Subchapter S Trusts. Any S Corporation Shares held under this paragraph shall be on the following terms:

1. Each trust held under this paragraph shall be a separate trust or substantially separate and independent share, as defined in Code Sec. 1361(d)(3), held for the benefit of one beneficiary. Any reference in this paragraph to a beneficiary's separate trust shall refer equally to any substantially separate and independent trust share.

2. Until the "QSST Termination Date" (defined below), the Trustee shall annually distribute all the trust's "Net Income" (defined below) to the sole beneficiary of each trust held under this paragraph, together with as much of that trust's principal as is appropriate under the standard contained in the trust which otherwise would have held such S Corporation Shares. The Trustee shall not distribute income or principal to anyone other than the beneficiary to whom Net Income is distributable until the QSST Termination Date.

3. Upon the QSST Termination Date, the Trustee shall distribute the remaining trust assets to the beneficiary to whom Net Income was then distributable, if then living, or otherwise in accordance with the terms of the Trust which would otherwise have held such S Corporation Shares.

4. The Trustee shall notify the sole beneficiary of each trust held under this paragraph that he or she must timely and properly elect under Code Sec. 1361(d)(2) to cause such trust held to be treated as a Qualified Subchapter S Trust for Federal income tax purposes, and if the beneficiary fails or refuses to do so, the Trustee shall hold such S Corporation Shares under the paragraph entitled "Electing Small Business Trusts."

5. The Trustee (excluding, however, any Interested Trustee) shall administer any trust under this paragraph as a Qualified Subchapter S Trust, as defined in Code Sec. 1361(d)(3).

6. In the event there is more than one income beneficiary of an Ineligible Trust (defined below), the Trustee shall divide the S Corporation Shares that will be held under this paragraph into separate trusts, based on each beneficiary's interest in the income of the Ineligible Trust that otherwise would have held those shares. If no beneficiary was entitled to income of such Ineligible Trust at that time, the Trustee may divide the S Corporation Shares into separate trusts for the beneficiaries of such Ineligible Trusts in such manner as the Trustee (excluding, however, any Interested Trustee) shall deem appropriate.

B. Electing Small Business Trusts. Any S Corporation Shares held under this paragraph shall be held on the following terms:

1. The Trustee (excluding, however, any Interested Trustee) shall apportion to the trusts under this paragraph a reasonable share of the unallocated expenses of all trusts under this Agreement in a manner consistent with the applicable Internal Revenue Code and Treasury Regulations.

2. The Trustee shall make that election required by Code Sec. 1361(e)(3) to qualify the trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).

3. The Trustee (excluding, however, any Interested Trustee) shall administer each trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).

C. Implementation. The Trustee (excluding, however, any Interested Trustee) shall manifest its selection of the form in which it shall hold any S Corporation Shares by written notice to all persons who would be eligible or entitled at the time of such writing to receive income from the Ineligible Trust that otherwise would hold such S Corporation Shares.

D. Definitions. The following definitions apply for purposes of this Article:

1. "Ineligible Trust" means a trust whose ownership of any S Corporation Shares would cause the termination of that corporation's election to be taxed under subchapter S of the Code.
2. "Net Income" means income, as defined in Code Sec. 643(b).
3. "S Corporation Shares" means shares of any stock of a corporation that then operates or that the Trustee shall deem likely to operate in the future under an election to have its earnings taxed directly to its stockholders under subchapter S of the Code.
4. The "QSST Termination Date" means, separately, with respect to each trust held under the paragraph entitled "Qualified Subchapter S Trusts," the earlier of the date on which the beneficiary dies and the date on which the trust terminates.

ARTICLE XXIII **The Closely-Held Business**

A. Authority to Operate. The Trustee may operate "the Business" (as defined below) and retain any equity interests in the Business, even if these interests otherwise would be a speculative or inappropriate investment for a trust. This authority shall not supersede the right of the Grantor's Wife to compel that certain trust assets be made productive. The Trustee may do all things related to the operation of the Business that the Grantor could have done if living, in a fiduciary capacity:

1. The Trustee may carry out the terms of any option or buy-sell agreements into which the Grantor may have entered.
2. The Trustee may sell or liquidate any of the Business interests at such price and on such terms as the Trustee may deem advisable.
3. The Trustee may arrange for and supervise the continued operations of the Business.
4. The Trustee may vote (in person or by proxy) as stockholder or otherwise and in any matter involving the Business on behalf of the trust.
5. The Trustee may grant, exercise, sell, or otherwise deal in any rights to subscribe to additional interests in the Business.
6. The Trustee may take any actions appropriate to cause the capital stock or securities in the Business to be registered for public sale under any state or Federal securities act; may enter into any underwriting agreements or other agreements necessary or advisable for this registration and sale; and may grant indemnities to underwriters and others in connection with such registration.
7. The Trustee may participate in any incorporation, dissolution, merger, reorganization or other change in the form of the Business and, where appropriate, deposit securities with any protective committees and participate in voting trusts.
8. The Trustee may delegate to others discretionary power to take any action with respect to the management and affairs of the Business that the Grantor could have taken as the owner of the Business.
9. The Trustee may invest additional capital in, subscribe to additional stock or securities of and loan money or credit to the Business from the trust.
10. The Trustee may accept as correct financial or other statements rendered by the Business as to its conditions and operations except when having actual notice to the contrary.

B. Compensation. The Trustee shall be entitled to additional reasonable compensation for the performance of services with respect to the Business, which may be paid to the Trustee from the Business, the trust, or both, as the Trustee may deem advisable.

C. Conflict of Interest Waived. The Trustee may exercise the authorities granted under this Article even if the Trustee shall own personally an interest in the Business.

D. The "Business" Defined. The "Business" means any interest the Grantor, the Trust, or both, shall own at the Grantor's death, representing, in the aggregate, at least five percent (5%) of the total equity interests in any actively-conducted trade or business, whether incorporated or unincorporated. The "Business" shall also include, but not be limited to, any five percent (5%) or greater equity interests in any corporations, general and/or limited partnerships as well as membership interests in any limited liability company or other business enterprise formed, operated or beneficially owned by the Grantor prior to the Grantor's death or participated in (to the extent of five percent (5%) or more) by the Grantor prior to the Grantor's death. The "Business" does not include any interests that are regularly traded on an established exchange or over-the-counter.

ARTICLE XXIV
Real Estate Investments

A. **Authority to Retain.** The Trustee may retain all interests that the Grantor, the Trust, or both, may own in any real estate that the Trustee shall determine to have been held primarily for investment at the Grantor's death, even if it otherwise would be a speculative or inappropriate investment.

B. **Authority to Manage.** The Trustee may lease any real estate on such terms and conditions as the Trustee may deem advisable, and these leases may extend beyond the term of the administration of the trust. For this purpose, the Trustee may make any instruments and grant such covenants and warranties as the Trustee may deem advisable.

C. **Environmental Issues.** The Trustee shall take into account any environmental law that may be relevant to any real estate included in the trust.

1. The Trustee may inspect property held directly or indirectly as part of the trust, including any interests in incorporated or unincorporated business entities, comply with environmental laws affecting this property and respond to a change in, or any actual or threatened violation of, any environmental law affecting property held as part of the trust.

2. The Trustee may appropriately respond to a change in, or prevent, abate or otherwise remedy any actual or threatened violation of any environmental law affecting property held as part of the trust, either before or after the initiation of an enforcement action by any governmental body.

3. The Trustee shall not be personally liable to any beneficiary for any decrease in value because of the compliance by the Trustee with any environmental law, including any reporting requirement. Neither the acceptance by the Trustee of property nor the failure by the Trustee to inspect property shall create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

D. **"Environmental Law" Definition.** "Environmental law" means any Federal, state or local law relating to the protection of the environment or human health, and "hazardous substances" means any substances defined as hazardous or toxic or otherwise regulated by any environmental law.

ARTICLE XXV
The Farm or Ranch

A. **Authority to Retain.** The Trustee may retain and continue to operate the "Farm" (as defined below), even if it otherwise would be a speculative or inappropriate investment.

B. **Authority to Operate.** The Trustee may do all things related to the operation of the Farm that the Grantor could have done if living, all in a fiduciary capacity.

1. The Trustee may sell or liquidate any interest in the Farm at such price and on such terms as the Trustee may deem advisable.

2. The Trustee may arrange for and supervise the continued operations of the Farm.

3. The Trustee may participate in any incorporation, dissolution, merger, reorganization or other change in the legal form of the Farm and, where appropriate, deposit securities with any protective committees and participate in voting trusts.

4. The Trustee may operate the Farm with hired labor, tenants or sharecroppers; hire a farm manager or a professional farm management service to supervise operations; lease or rent the Farm for cash or for a share of the crops; and construct, repair and improve farm buildings of all sorts to the extent the Trustee may deem advisable.

5. The Trustee may use approved soil conservation practices in order to conserve, improve and maintain the fertility and productivity of the soil; protect, manage and improve any timber and forest on the Farm; and sell any timber and forest products.

6. The Trustee may ditch and drain damp or wet fields and areas of the Farm when and where needed, engage in livestock production and construct such fences and buildings and plant such pastures and crops as may be appropriate to carry on such a livestock program.

7. The Trustee may execute contracts, notes and chattel mortgages relating to agriculture with the Commodity Credit Corporation, the United States Secretary of Agriculture or any other officer or agency of the Federal or state governments; enter into acreage reduction agreements and make soil conservation commitments; and do all acts necessary to cooperate with any governmental agricultural program.

C. **Liabilities.** The Trustee shall satisfy any contractual and tort liabilities arising from the Farm first from its assets, and secondarily from the other assets of the trust. The Trustee shall have no liability to anyone for any loss arising from the operations, retention or sale of the Farm.

D. Additional Compensation. The Trustee shall be entitled to additional reasonable compensation for the performance of services with respect to the Farm, which may be paid to the Trustee from the assets of the Farm or from other assets under fiduciary administration, or both, as the Trustee may deem advisable.

E. Conflict of Interest Waived. The Trustee may exercise the authorities granted under this Article even if the Trustee shall own personally an interest in the Farm.

F. The "Farm" Defined. The "Farm" means any interest that the Grantor, the Trust, or both, shall own at the Grantor's death representing, in the aggregate, at least Five Percent (5%) of the total equity interests in any operating farm or ranch, whether incorporated or unincorporated.

ARTICLE XXVI

Crummey Rights of Withdrawal: Rules, Limitations and Procedures

The withdrawal rights created in the Article entitled "Crummey Rights of Withdrawal" shall be subject to the rules, limitations and procedures contained in this Article.

A. Withdrawal Rights of Wife. The Grantor's Wife shall have a right of withdrawal over an amount equal to the value of all contributions to the trust, subject to the limitations set forth below.

1. The maximum amount that the Grantor's Wife may withdraw with respect to all contributions made in any calendar year shall not, in any event, exceed the lesser of: (i) the Federal gift tax annual exclusion in effect at the time of each contribution, less the amount of prior gifts to the Grantor's Wife either outright or in trust, by the same donor during the same calendar year, which gifts were eligible for the Federal gift tax annual exclusion but not eligible for the Federal gift tax marital deduction; and (ii) the greater of that amount referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars (\$5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. Absent an express direction to the contrary by a donor at or before the time of a contribution, all gifts to the Grantor's Wife (other than gifts by the Grantor) that enter into the computation under this paragraph shall be treated as having been made equally by the donor and the donor's spouse if the donor was married when the gift was made and the gift was eligible for gift-splitting under Code Sec. 2513(a). The limitation on the amount of a contribution that may be withdrawn under this paragraph, with respect to contributions made by a donor who was married when the gift was made and which gift was eligible for gift-splitting under Code Sec. 2513, shall be separately calculated and applied as to each spouse's deemed half of the gift.

2. The amount withdrawable by the Grantor's Wife shall be noncumulative and shall lapse on the last day of each calendar year, or, if earlier, thirty (30) days after the contribution was made.

3. The Grantor's Wife's withdrawal right continues until it lapses. The Grantor's Wife's withdrawal right shall not terminate merely because of the termination of the Lifetime Trust, but shall continue with respect to all trusts under this Agreement until it lapses as described above. The Grantor's Wife's withdrawal right shall, upon termination of the Lifetime Trust, be exercisable first out of that portion of the Trust Fund that qualifies for the Federal estate tax marital deduction.

4. All other withdrawal rights granted under this Article shall be determined with respect to the difference between the value of the contribution to the trust and any amount that the Grantor's Wife could withdraw under this section as of the time of the contribution, even if the Grantor's Wife does not withdraw such amounts.

B. Withdrawal Rights of Children. Subject to the limitations set forth below, each of the Grantor's children (herein defined as "holders") shall have a right of withdrawal over an amount equal to the value of such holder's proportionate share of the Descendants' Withdrawal Amount. Such holder's "proportionate share" shall be determined by dividing the Descendants' Withdrawal Amount by the number of the then-living holders (not including any individual or individuals who may be excluded by the Grantor). The "Descendants' Withdrawal Amount" shall be an amount equal to all contributions made to the trust in any calendar year minus the amount over which the Grantor's Wife has a right of withdrawal.

1. The maximum amount that a child may withdraw with respect to all contributions made in any calendar year shall not, in any event, exceed the gift tax annual exclusion in effect at the time of each contribution, less the amount of prior gifts to the same child either outright or in trust, by the same donor during the same calendar year, which gifts were eligible for the Federal gift tax annual exclusion.

2. Absent an express direction to the contrary by a donor at or before the time of a contribution, all gifts that enter into the computation under this paragraph shall be treated as having been made equally by the donor and the donor's spouse if the donor was married when the gift was made and the gift was eligible for gift-splitting under Code Sec. 2513(a). The limitation on the amount of a contribution that may be withdrawn under this paragraph, with respect to contributions made by a donor who was married when the gift was made and which gift was eligible for gift-splitting under Code Sec. 2513, shall be separately calculated and applied as to each spouse's deemed half of the gift.

3. The amount withdrawable by any child shall be cumulative, and shall lapse on the last day of each calendar year, or, if earlier, thirty (30) days after the contribution to which it relates in an amount equal to the greater of that sum referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars (\$5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. Rights of withdrawal that do not lapse at the end of a calendar year shall continue to be exercisable by the child subject to this same limited annual lapse. Notwithstanding anything herein contained to the contrary, with respect to any contributions, no lapse of a power of withdrawal held by any individual hereunder shall occur with respect to any contributions until the later of the time specified above for such lapse to occur and thirty (30) days after notice of such right of withdrawal is given to such individual.

4. Withdrawal rights exercisable by a child under this section respecting a contribution made fewer than thirty (30) days before the end of a calendar year shall not lapse at the end of that calendar year but shall remain exercisable by the child until thirty (30) days after the date of the gift even though such period to withdraw extends into the following calendar year and notwithstanding any other provision of this section.

5. The withdrawal right of each of the Grantor's children shall continue until it lapses as described above and shall not terminate merely because of the termination of the Lifetime Trust but shall continue with respect to all trusts under this Agreement except as to any disposition to the Marital Trust of any trust property that is included in the Grantor's gross estate.

C. Notice. The Trustee shall promptly notify each competent adult who holds a withdrawal right under this Article of all contributions to which that person's withdrawal right relates. The Trustee shall notify a person who is under a legal disability, including (but not limited to) minority, by notifying:

1. the legal guardian or conservator of the individual's property, who is hereby authorized to exercise the withdrawal rights;
2. any living parent of the individual (excluding, however, with respect to any child of the Grantor, both the Grantor and any parent of the child who is not then married to the Grantor);
3. any other person taking care of the individual or with whom the individual resides; or
4. any other appropriate adult individual selected by the Trustee.

D. Exercise of Withdrawal Right. Withdrawal rights under this Article shall be exercisable by a writing delivered to the Trustee. The person to whom notice is properly given for a minor or disabled individual may decide whether to exercise that minor or disabled individual's withdrawal right, unless that person receiving notice is the donor of the contribution to which the withdrawal right relates, in which case the Trustee shall designate another appropriate adult individual to make such decision.

E. Satisfaction of Withdrawal Right. A withdrawal under this Article may be satisfied from the contribution itself or from other trust assets, as the Trustee shall choose. The principal of any GST Non-Exempt Trust must be exhausted in satisfying a withdrawal right before the principal of any GST-Exempt Trust may be used to satisfy a withdrawal right. A distribution under this Article may be made to the person who makes the withdrawal or who is, under this Article, entitled to act for the minor or disabled individual.

F. Power to Exclude. The Grantor may, by an instrument in writing executed before a contribution, exclude one or more individuals from having withdrawal rights over that contribution or any future contribution or both. The Grantor may not, however, limit or alter any rights resulting from prior contributions.

G. Power to Amend. The Trustee may, by an instrument in writing, amend this Article to the extent the Trustee shall deem it appropriate to assure that contributions to this trust qualify for the gift tax annual exclusion for Federal gift tax purposes. The Trustee may not amend the trust in any manner that would cause any portion of the trust funds to be included in the Grantor's gross estate, that of the Grantor's Wife, or that of any of the Grantor's children, to a greater extent than before such amendment. An amendment made in good faith shall be conclusive on all persons interested in the trust and the Trustee shall not be liable for the consequences of any amendment or for not having amended the trust. No amendment shall limit or alter the rights of a beneficiary in any trust funds held by the Trustee before the amendment. No Interested Trustee or Insured Trustee may participate in any action under this paragraph.

H. Priority of Withdrawal Rights. No Trustee may make any discretionary distributions of principal or income that would reduce the available trust principal below the total amount of the then-existing withdrawal rights without advance notice to each trust beneficiary who is entitled to make a withdrawal, or who is, under this Article, entitled to act for a minor or disabled beneficiary.

I. Special Definitions and Rules. The following definitions and rules apply for purposes of this Article:

1. "Contribution" means any cash or other assets transferred to the Trustee to be held as part of the trust funds, in a manner that constitutes a gift for Federal gift tax purposes. The amount of a contribution is its Federal gift tax value.

2. The amounts involved in a power to withdraw described as "an amount equal to the greater of that sum referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars (\$5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus" shall be measured after subtracting all other amounts that the same person could have withdrawn during the same calendar year from this or any other fund, to the extent that such powers must, under applicable Federal gift tax law, be aggregated in determining whether the lapse of the withdrawal power under this Article is a release of a general power of appointment.

3. If the Trustee shall incorrectly determine the amount that should be distributed to a beneficiary under this Article, then within a reasonable period after the correct amount is finally determined, the Trustee shall receive from the beneficiary, or the beneficiary shall receive from the Trustee, as the case may be, an amount equal to the difference between the amount that should properly have been distributed and the amount actually distributed.

4. All withdrawal rights with respect to a contribution to which this Article applies shall arise immediately upon such contribution to the Trust.

5. The Trustee may without liability assume that no prior gifts to any holder of a withdrawal power under this Article were made by a donor or a donor's spouse other than contributions to the trust, unless the Trustee shall have actual notice to the contrary.

ARTICLE XXVII **The Selector**

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Selector. Until the Grantor's death, the Selector is authorized, acting in an individual capacity and not in a fiduciary capacity, at any time and from time to time, to add one or more of organizations described in Code Sec. 2055 to the class of beneficiaries of any trust under this Agreement; provided, however, that in no event may the Selector add the Selector to such class of beneficiaries; provided, further, that in no event may the Selector add to the class of beneficiaries of any trust hereunder which may qualify (by election or otherwise) for the Federal marital deduction.

Any Selector may cease to act as Selector by delivery of a written and acknowledged notice to the Trustee. If the Selector should cease to act for any reason without having fully released the power to add to the class of beneficiaries pursuant to this Article, the successor Selector shall be such individual (other than the Grantor or any person who may be added as a beneficiary pursuant to this Article or any person who is a related or subordinate party within the meaning of Code Sec. 672(c) with respect to the Grantor or any person who may be added as a beneficiary) as shall be designated by a written and acknowledged instrument executed by the Trustee. If at any time prior to the complete release of the power to add to the class of beneficiaries under this Article there is no Selector acting hereunder, the Trustee (but acting in an individual capacity and not in a fiduciary capacity) shall exercise the Selector's powers under this Article until the appointment of a successor Selector as provided in this Article.

The Selector may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Grantor releasing such power. Any such release made by the Selector shall be irrevocable, and shall be binding upon all current and successor Trustee and the current and successor Selector and all persons interested hereunder, and no person shall thereafter have the power to add to the class of beneficiaries under this Article to the extent of such release.

ARTICLE XXVIII **Power to Substitute Property**

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Substitutor. During the Grantor's lifetime, the Substitutor shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity (within the meaning of Code Sec. 675(4)) without the approval or consent of any person in a fiduciary capacity within the meaning of that section, to acquire or reacquire any asset or assets forming part of the trust estate of any trust held under this Agreement (other than any direct or indirect interest in stock that would, by reason of such power of substitution, be included in the gross estate of the Substitutor for Federal estate tax purposes under Code Sec. 2036(b)) by substituting other property of an equivalent value, determined as of the date of such substitution. With respect to any such "2036(b)" stock described in the immediately preceding sentence, the Trustee shall appoint another individual, who is not a person in whose estate such stock would be so included if such person held the power, directly or indirectly, to vote such stock, to hold such power of substitution with respect to such assets, such person so appointed with respect to such assets being the "Substitutor" only with respect thereto. The Grantor directs that this power is not assignable, and any attempted assignment will make this power void. Without reducing or eliminating the fiduciary duties imposed on the Trustee hereunder or by applicable law, the Substitutor shall exercise this power to substitute property by certifying in writing that the substituted property and the trust property for which it is substituted are of equivalent value, and the Trustee shall have a fiduciary obligation to ensure the Substitutor's compliance with the terms of this power by being satisfied in advance of completing the substitution that the properties acquired and substituted are in fact of equivalent value, within the meaning of Revenue Ruling 2008-22. This power to substitute property cannot be exercised in a manner that can shift benefits among the trust beneficiaries. Without limiting the foregoing prohibition upon shifting benefits among trust beneficiaries, the Trustee shall have, with respect to any trust which is not being administered as a unitrust or the distributions from which are not

limited to discretionary distributions of principal and income (so that the power to reinvest the principal of the trust and the duty of impartiality are not required in order to avoid this power of substitution potentially causing a shift of benefits among trust beneficiaries, all within the meaning of Revenue Ruling 2008-22), the power to reinvest the principal of the trust and the duty of impartiality with respect to trust beneficiaries at all times while this power of substitution is in effect. The foregoing grant of a power of reinvestment and imposition of a duty of impartiality are included herein for compliance with Revenue Ruling 2008-22, and whenever such power and duty are not granted and imposed under this Article, the remaining provisions of this Agreement shall determine whether and to what extent such power and duty are granted and imposed. The Substitutor may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Trustee. Any such release made by the Substitutor shall be irrevocable, and shall be binding upon all current and successor Trustees, the current and any successor Substitutor, and all persons interested hereunder, and no person shall thereafter have the power to substitute trust property under this Article to the extent of such release. Any Substitutor may cease to act as Substitutor by delivery of a written and acknowledged notice to the Trustee. If the Substitutor should cease to act for any reason without having fully released the power to substitute property as provided under this Article, and if no successor Substitutor has otherwise been named, the successor Substitutor shall be such individual as shall be designated by a written and acknowledged instrument executed by the Trustee. If at any time prior to the complete release of the power of substitution there is no Substitutor acting hereunder, the Trustee (but acting in an individual capacity and not in a fiduciary capacity) shall exercise the Substitutor's powers under this Article until the appointment of a successor Substitutor as provided in this Article.

ARTICLE XXIX

Power to Compel Trustee to Loan Without Adequate Security

The Grantor appoints Jonathan G. Blattmachr or other person while acting as a Trust Protector hereunder as the Loan Director. During the Grantor's lifetime, the Loan Director shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity (within the meaning of Code Sec. 675) without the approval or consent of any person in a fiduciary capacity within the meaning of that section, to compel the Trustee to loan some or all of the trust property to the Grantor without adequate security within the meaning of Code Sec. 675(2) although with adequate interest within the meaning of that section. The Grantor directs that this power is not assignable. In the event that Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder dies before the Grantor dies, the successor Loan Director shall be such individual (other than the Grantor, any person acting as a Trustee under this instrument or anyone who is an adverse party within the meaning of Code Sec. 672) whom Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder shall have designated by instrument in writing. Any person other than Jonathan G. Blattmachr or other person acting as a Trust Protector hereunder acting as a Loan Director hereunder shall also have the power to name a successor Loan Director by an instrument in writing. In the event that no one else is acting as a Loan Director hereunder, the oldest individual acting as a Trustee hereunder (or if none, the corporation or other entity acting as Trustee hereunder) shall be the Loan Director but acting only in a non-fiduciary capacity.

The person acting as the Loan Director hereunder may at any time during the Grantor's lifetime release such power, in whole or in part, by delivery of an acknowledged instrument in writing to the Grantor releasing such power. Any such release made by the Loan Director shall be irrevocable, and shall be binding upon all current and successor Trustees and the current and any successor Loan Director and all persons interested hereunder, and no person shall thereafter have the power to compel the Trustee to make loans to the Grantor without adequate security.

ARTICLE XXX

Definitions and Miscellaneous Provisions

The following definitions and miscellaneous provisions shall apply under this Agreement:

A. **Children and Descendants.** References to "children" and "descendants" shall include children and descendants whenever born.

B. **Spouse.** An individual's "spouse" (other than with respect to the Grantor) is the person (if any) to whom that individual is married at any given time.

C. **Surviving Spouse.** The "surviving spouse" of an individual, other than with respect to the Grantor, is the person (if any) who survives that individual and who is married to and living with that individual as a married couple at the time of his or her death.

D. **The Grantor's Wife.** For purposes of this Agreement, any reference to the Grantor's Wife shall mean Martha Washington Zaritsky only, including if and when he becomes the Grantor's widower. However, Martha Washington Zaritsky shall be treated for all purposes hereunder (other than for purposes of applying the Maximum Duration of Trusts provisions hereof) as though he died when he and the Grantor became legally separated or divorced or their marriage was annulled.

E. **Determining Descendants.** One's children and other descendants shall be determined according to applicable law, except to the extent modified by this Article or by other specific provisions of this Agreement.

1. A child adopted before he or she attains eighteen (18) years of age (but not after attaining that age) shall be treated under this Agreement as a child of his or her adopting parents and a descendant of their ancestors.
2. A biological child shall not be treated as a child or descendant of any biological parent of the child or as a descendant of the ancestors of such biological parent if the child has been surrendered for adoption with the consent of such biological parent and the child's adoptive parent substitutes for the consenting parent under applicable state law.
3. A biological child born out of wedlock shall be treated as a child of his or her biological parent who is a descendant of the Grantor and as a descendant of their ancestors.
4. Adoptions and marriages that are recognized under this Agreement shall not affect prior distributions or other interests that have previously vested in possession, but they shall enable a person to receive distributions from or remainder or other interests in a trust still in existence. The descendants of a person who is treated as a child or descendant under this Article shall also be treated as descendants of such person's ancestors. The descendants of a person who is treated as not being a child or descendant under this Article shall also be treated as not being descendants of such person's ancestors.
5. The term "child" or "descendant" (and any plural form thereof) in this Agreement shall include any biological child or descendant of the Grantor (who has not been adopted by a person who is not a descendant of the Grantor unless the adoptive parent is married to a descendant of the Grantor or unless the adoptive parent was married to a descendant of the Grantor who died prior to the adoption) whose conception has resulted from the use of a frozen gamete of a deceased descendant of the Grantor and gamete of the Grantor's deceased descendant's surviving spouse and that posthumously conceived descendant has been born or is in utero by the time of the determination of the descendants who would take property outright or for whom it would be placed into separate trusts for descendants of the Grantor under this Agreement; provided, however that proof that such posthumously conceived person is the biological child or descendant of the Grantor shall be established by DNA or equally reliable testing.

F. Minor and Adult. Whether an individual is a minor or an adult shall be determined under the laws of the individual's domicile at the time in question, except in cases when this Agreement has specifically defined "Minor" to mean a person under twenty-one (21) years of age.

G. Code and Regulations. References to the "Internal Revenue Code" or "Code" or to provisions thereof are to the Internal Revenue Code of 1986, as amended at the time in question. References to the "Regulations" and "Regs." are to the Regulations under the Code. If, by the time in question, a particular provision of the Code has been renumbered, or the Code has been superseded by a subsequent Federal tax law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to the Grantor's intent as expressed in this Agreement. A similar rule shall apply to references to the Regulations.

H. Disqualified Trustee. A "Disqualified Trustee" is an individual who has a Developmental Disability, Mental Illness or Persistent Disability (as such terms are defined below) and who is eligible to receive or is receiving Government Benefits, if such individual is an Interested Trustee (as such term is defined in this Agreement), or would be an Interested Trustee, if serving. Notwithstanding any other provision of this Agreement, no Disqualified Trustee shall ever make, vote on or otherwise participate in any discretionary distribution of income or principal from any trust under this Agreement.

I. Interested Trustee. With respect to any trust, an "Interested Trustee" is a Trustee who is (i) a transferor of property to the trust, including a person whose qualified disclaimer resulted in property passing to the trust; or (ii) a person who is, or in the future may be, eligible to receive income or principal pursuant to the terms of the trust. A Trustee described in (i) is an Interested Trustee only with respect to the transferred property (including income and gain on, and reinvestment of, such property). A person is described in (ii) even if he or she has a remote contingent remainder interest, but is not described in (ii) if the person's only interest is as a potential appointee under a non-fiduciary power of appointment held by another person which has not yet been exercised or the exercise of which can take effect only in the future, such as a testamentary power held by a living person. A Trustee who is not an Interested Trustee is a "Disinterested Trustee."

J. Per Stirpes. Property that is to be divided among an individual's surviving or then-living descendants "per stirpes" or in "per stirpital shares" shall be divided into as many equal shares as there are children of the individual who are then living or who have died leaving surviving or then-living descendants. A share allocated to a deceased child of the individual shall be divided further among such deceased child's surviving or then-living descendants in the same manner.

K. Executor. Whenever herein a reference is made to the Grantor's or another person's Executor, such reference shall be to those serving as the fiduciary of that person's estate, whether or not their title is Executor under applicable state law.

L. Incapacitated Trustee. A Trustee shall be deemed to be "incapacitated" (and while incapacitated shall not serve as a Trustee) if another then-serving Trustee or, if there is none, the next successor Trustee receives written certification that the examined individual is physically or mentally incapable of managing the affairs of the trust, whether or not there is an adjudication of incapacity.

1. This certification shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee.
2. This certification need not indicate any cause for the Trustee's incapacity.
3. A certification of incapacity shall be rescinded when a serving Trustee receives a certification that the former Trustee is capable of managing the trust's affairs. This certification, too, shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee.
4. No person is liable to anyone for actions taken in reliance on the certifications under this paragraph or for dealing with a Trustee other than the one removed for incapacity based on these certifications.

M. Gross Estate. "Gross estate" means the Grantor's gross estate as determined for Federal estate tax purposes (or for state death tax purposes where relevant).

N. Terms Relating to Supplemental Needs Trust. The technical terms contained in the Supplemental Needs Trust shall be defined as follows:

1. "Government Benefits" refers to any program funded with either local, state, or federal funds which is only available to individuals who meet certain means tested criteria, as a result of having attained a certain age or as a result of a Persistent Disability. This includes, but is not limited to, Medicaid programs, Medicaid waiver programs, and Supplemental Security Income. The term Government Benefits is not intended to include programs such as Social Security and Medicare. The Trustee shall, in the exercise of sole and absolute discretion, determine whether an individual is receiving or is eligible to receive Government Benefits, and may determine that an individual is eligible to receive Government Benefits regardless of whether the agency or agencies administering such Government Benefits has made a final determination as to such individual's eligibility.
2. "Developmental Disability" means a disability of a person which
 - a) is attributable to:
 - (1) intellectual disability, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia or autism;
 - (2) any other condition of a person found to be closely related to an intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of intellectually disabled persons or requires treatment and services similar to those required for such person; or
 - (3) dyslexia resulting from a disability described in subparagraph (i) or (ii) of this paragraph.
 - b) originates before such person attains age twenty-two;
 - c) has continued or can be expected to continue indefinitely; and
 - d) constitutes a substantial handicap to such person's ability to function normally in society.
3. "Mental Illness" means an affliction with a mental disease or mental condition that is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.
4. "Persistent Disability" means a person:
 - a) with mental illness, developmental disability or other physical or mental impairment; and
 - b) whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services.

O. Change of Situs. The situs of the property of any trust created hereunder may be maintained in any jurisdiction that is appropriate to the trust purposes and its administration, in the discretion of the Trustee (other than an Interested Trustee), and thereafter transferred at any time or times to any such jurisdiction selected by the Trustee (other than an Interested Trustee) in accordance with applicable state law, which may include court approval of the transfer or adequate notice to trust beneficiaries. Upon any such transfer of situs, the trust estate of that trust may thereafter, at the election of the Trustee (other than an Interested Trustee) of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee (other than an Interested Trustee) of any trust created hereunder elects to change the situs of any such trust, said Trustee is hereby relieved of any requirement to qualify in any other jurisdiction and of any requirement to account in any court of such other jurisdiction.

P. Certain Survivorship Rules. A person (the "Non-Skip Person") shall not be deemed to have been alive on the date of any distribution from or any termination of any interest in a trust under this Agreement or any other event covered by Reg. §26.2651-1(a)(2)(iii) (or any successor thereto) for which date (the "Transfer Date") the date of the Non-Skip Person's death is relevant if (a) the Non-Skip Person actually was alive on the Transfer Date but is not actually alive on the date ninety (90) days following the Transfer Date, and (b) the existence of a condition of survivorship causes

another person who otherwise would be assigned to a generation below that of the Non-Skip Person to be assigned to the generation of the Non-Skip Person for purposes of the Federal tax on generation-skipping transfers.

**ARTICLE XXXI
Manifestation of Trustee's Actions**

When a Trustee takes action that is authorized hereunder and such action does not involve the participation of another person with respect to such action, the Trustee may (but shall not be required to) execute, within a reasonable time of taking such action, an acknowledged, written instrument describing the action taken, which instrument shall be maintained with the trust records and either filed in the court having jurisdiction over the trust or delivered to one or more of the adult and competent beneficiaries then eligible or entitled to distributions of income or principal of such trust or, if there is no such beneficiary, to one or more of the parent(s), guardian(s) of the person, conservator(s) or committee of the minor or incompetent beneficiaries then eligible or entitled to distributions of income or principal of such trust. Failure to execute or to file or deliver the instrument shall not make the action taken by a Trustee void, voidable or ineffective, and the Trustee or Trustees, as the case may be, shall not be subject to any liability or surcharge for failure to document such action.

**ARTICLE XXXII
Savings Clause**

Should any of the provisions or directions of this Agreement fail or be held ineffectual or invalid for any reason, it is the Grantor's desire that no other portion or provision of this Agreement be invalidated, impaired or affected thereby, but that this Agreement be construed as if such invalid provision or direction had not been contained therein.

**ARTICLE XXXIII
Captions**

The captions used in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement or the intent of any provision therein.

IN WITNESS WHEREOF, the Trustee and the Grantor have signed this Agreement, effective the day and year first above written and executed by each of them on the dates set forth below.

Dated: June _____, 2017

Howard M. Zaritsky, as Grantor

Dated: June _____, 2017

Steve Gorin, as General Trustee

Dated: June _____, 2017

ATTEST: Big Trust Company of Alaska, as Administrative Trustee

By: _____

Name

Title

Dated: June _____, 2017

Mickey Davis, as Distributions Trustee

Dated: June _____, 2017

Steven Trytten, as Investment Trustee

Signature of Witness

Name of Witness

Signature of Witness

Name of Witness

STATE OF VIRGINIA §

§

COUNTY OF ROCKBRIDGE §

I HEREBY CERTIFY that on June _____, 2017, before me, the subscriber, a Notary Public in and for the State of Virginia, personally appeared Howard M. Zaritsky, as Grantor, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the foregoing instrument, and acknowledged that the foregoing instrument was executed by Howard M. Zaritsky, as Grantor, for the purposes therein contained.

WITNESS my hand and notarial seal.

Dated: June _____, 2017

Notary Public

Print Name of Notary

My Commission Expires: _____

We, Howard M. Zaritsky, the Grantor and _____ and _____, the witnesses, respectively, whose names are signed to the attached or foregoing instrument, having been sworn, declared to the undersigned officer that the Grantor, in the presence of witnesses, signed the instrument as the Irrevocable Trust, that the Grantor signed or directed another to sign for the Grantor, and that each of the witnesses, in the presence of the Grantor and in the presence of each other, signed the trust as a witness.

Howard M. Zaritsky, Grantor

Witness

Print Name

Witness

Print Name

Subscribed and sworn to before me by Howard M. Zaritsky, the Grantor, and _____ and _____, each of whom is a witness, who is personally known to me or who has produced a driver's license as identification on June _____, 2017.

Notary Public

Print Name of Notary

My Commission Expires: _____

STATE OF TEXAS §

§

COUNTY OF HARRIS §

I HEREBY CERTIFY that on June _____, 2017, before me, the subscriber, a Notary Public in and for the State of Texas, personally appeared Mickey Davis, as Distributions Trustee, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the foregoing instrument, and acknowledged that the foregoing instrument was executed by Mickey Davis, as Distributions Trustee, for the purposes therein contained.

WITNESS my hand and notarial seal.

Dated: June _____, .

Notary Public

Print Name of Notary

My Commission Expires: _____

STATE OF CALIFORNIA §

§

COUNTY OF SAN FRANCISCO §

I HEREBY CERTIFY that on June _____, 2017, before me, the subscriber, a Notary Public in and for San Francisco County, California, personally appeared Steven Trytten, as Investment Trustee, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the foregoing instrument, and acknowledged that the foregoing instrument was executed by Steven Trytten, as Investment Trustee, for the purposes therein contained.

WITNESS my hand and notarial seal.

Dated: June _____, 2017

Notary Public

Print Name of Notary

My Commission Expires: _____

**WAIVER OF ELECTIVE SHARE AND
COMMUNITY PROPERTY RIGHTS**

I, Martha Washington Zaritsky, in exchange for good and valuable consideration, the receipt of which is hereby acknowledged, and the agreement of the Trustees named below to serve in such fiduciary capacity, do hereby waive any and all right, title and interest I may have or otherwise succeed to by reason of community property, equitable distribution, elective share, minimum share, or similar rights as a spouse in and to all property contributed by my Husband, Howard M. Zaritsky, to the irrevocable trust she intends to create soon between herself, as Grantor, and the Trustees named below. This is intended to be and shall constitute a third party beneficiary contract for the benefit of all the beneficiaries under the irrevocable trust and may be enforced by any of those beneficiaries and by the Trustees on behalf of the Trustees.

Dated: June _____, 2017

Martha Washington Zaritsky

Accepted by

Steve Gorin, General Trustee

Big Trust Company of Alaska, Administrative Trustee

Mickey Davis, Distributions Trustee

Steven Trytten, Investment Trustee

