ADVANCED DOCUMENT DRAFTING FOR THE ELDER LAW ATTORNEY

Wednesday, November 13, 2013
White Plains

Thursday, November 14, 2013
Buffalo

Wednesday November 20, 2013
Melville, L.I.

Friday, November 22, 2013
Syracuse

Wednesday, December 4, 2013
Albany

Tuesday, December 10, 2013
New York City

Co-sponsored by the Elder Law Section and the Committee on Continuing Legal Education of the New York State Bar Association

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 1.800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

Program Agenda

8:30-9:00 a.m. REGISTRATION (outside meeting room)

9:00-10:15
I. DRAFTING REVOCABLE TRUSTS AND WILLS IN THE ELDER LAW CONTEXT
Will and Trust provisions to address disabled beneficiary's elective share; how family relationships and long-term health concerns affect dispositive decision making; estate, gift and income tax issues; credit shelter trusts; disclaimer trusts; married couples v. single individuals; pour over wills.

10:15-10:30 Coffee Break

10:30-11:20
II. PROBLEMS / BENEFITS OF NEW POA STATUTE THREE YEARS LATER
Sample Modifications to the Statutory Document; Gift Rider or not?; discussion of powers of particular relevance in an elder law context; acceptance of power of attorney by financial institutions; when gifts are in the best interest of the principal; fiduciary responsibility of the agent.

11:20-12:35 p.m.
III. DRAFTING IRREVOCABLE TRUSTS
Advantages of trust v. outright transfer; advantages of trust v. retention of a life estate; acceptable Medicaid language (e.g. limited power of appointment v. unlimited general power of appointment); basis issues; capital gains exclusion; senior citizen tax exemptions; drafting issues regarding purpose of trust – for Medicaid vs. for VA purposes and differences in language/requirements for each type.

12:35-1:50 LUNCH (on your own)

1:50-2:40
IV. MISCELLANEOUS DRAFTING ISSUES: FROM PROMISSORY NOTES TO CAREGIVER CONTRACTS TO COST BASIS OF GIFTED ASSETS: MISTAKES NOT TO MAKE
Applicable ADM regarding DRA compliant provisions for Notes; ADM regarding caregiver contracts; tax considerations of same; family agreements - including "reimbursement agreements"; sample forms

2:40-2:55 Coffee/Soft Drink Break

2:55-3:45
V. BASIC OVERVIEW OF ESTATE DISCOUNT VEHICLES:
FLPs, CRTs, etc.
When to use discount vehicles; what works and what does not; understanding applicable IRC provisions; QPRTs, LLC and FLPs; what assets should be used; how much control does the Grantor have? IRC Section 2036 estate inclusion; traps and tricks.

3:45-4:35
VI. DRAFTING SUPPLEMENTAL NEEDS TRUSTS
Third-party supplemental needs trusts; Self-settled under 65 payback trusts; what can the trust pay for; testamentary vs. intervivos; revocable vs. irrevocable; Medicaid/SSI provisions; choosing the right trustee, corporate/individual; trusts "to or for the sole benefit" of a disabled individual; relevant Social Security POMS provisions.

4:35 p.m. ADJOURNMENT

Program Faculty

Statewide Program Planning Co-Chairs

Ronald A. Fatoullah, Esq., Ronald Fatoullah & Associates, Great Neck
Laurie L. Menzies, Esq., Pfalzgraf, Beinhauer & Menzies, LLP, Buffalo

Local Panels

White Plains Session: Anthony J. Enea, Esq., Enea, Scanlan & Sirignano LLP, White Plains (Chair and Moderator) * **Howell Bramson, Esq.**, McCarthy Fingar LLP, White Plains* **Robert J. Kurre, Esq.**, Kurre Levy Schneps LLP, Manhasset * **Sara E. Meyers, Esq.**, Enea, Scanlan & Sirignano, LLP, White Plains * **Matthew J. Nolfo, Esq.**, The Law Offices of Matthew J. Nolfo, New York City and White Plains * **Frances M. Pantaleo, Esq.**, Walsh, Amicucci & Pantaleo LLP, Purchase * **Neil T. Rimsky, Esq.**, Cuddy & Feder LLP, White Plains.

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DRAFTING WILL PROVISIONS

by

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DRAFTING WILL PROVISIONS

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I. GENERALLY

A. Do not simply reduce the client's wishes to writing. Advise on disadvantages of desired provisions. (Expense of administration, vagueness, ruling from grave)

B. Be sure to develop exact extent and nature of assets.

C. Where testator has insurance policies, inquire into alternate beneficiaries, particularly if there are minor children. Infants should not be named beneficiaries.

II. CHOICE OF FORMS

A. Banks provide form books and books are available from publishers.

B. Develop your own forms for common clauses from all sources.

1. Wording will be consistent in all cases.

2. You can reduce those clauses which you use most often to forms so as to save time in Will drafting and avoid remembering when you last used the wording you want.

3. Eliminates extensive dictation, copying and opportunity for mistakes.

4. Reduces stylistic and grammatical differences which would make the Will look like it came from forms.

5. If you have word processing equipment, it streamlines Will drafting and speeds it up.

6. BEWARE of blindly following forms however. Each clause in each Will must be considered for appropriateness.

III. COMPLEXITY

A. Greatest volume of litigation in Surrogate's Court stems from deficiencies in Will drafting or estate planning.

B. Treat potential problems, not just the present problems. For example, if there is any possibility of an infant coming into a share, some provision should be made for handling that share. Do the job, don't save paper.

IV. WILL VS. REVOCABLE TRUST

A. General Treatment: When a revocable trust is used as the centerpiece of an estate plan, it is important that the disposition of property be handled with care. For example, a bequest under a Will would be impossible to carry out if all or substantially all of the client's assets were held in a revocable trust. It is generally preferable therefore that everything passing to a beneficiary be defined in the revocable trust and not in the Will.

1. Non-dispository language, such as a tax apportionment clause, should be considered between the Will and revocable trust carefully. First, similar provisions should not conflict with one another. Secondly, if tax is being paid from a fund, it should be one arising in the trust rather than under the Will. The Will may pass nothing if the trust is fully funded.

B. Revocation of Trust: Even though a trust is created at the time the Will is signed, and the trust is valid, it may not be at death. In addition to pouring over property from the estate into the revocable trust, the Will should provide an alternative disposition in the event the trust has been revoked. That alternative disposition in the Will would, presumably, be the same disposition as called for in the trust.

1. If the client makes dispositive amendments to the trust, the same amendments should be incorporated in a new Will each time, so as to keep them consistent.

SAMPLE PROVISION - Pour over Will.

XX : All the residue of my estate, both real and personal and wheresoever situate, I give, devise and bequeath to the Trustee of a living trust created under an agreement which I have executed immediately before my execution of this will, which is designated the JOHN DOE TRUST. If the living trust has terminated at my death, or if it is ineffective for any other reason, then I give the residue to my wife, MARY P. CLIENT, if she is living, or if not to my children then living and the issue of any deceased child, per stirpes.

V. GENERAL & SPECIFIC BEQUESTS

A. Types of Pre-Residuary Transfers: Pre-residuary gifts under a Will generally fall into 3 categories. They are specific, general or demonstrative dispositions.

1. Specific Gift: A gift of personal property or real property owned by the decedent and specifically identified in a devise or bequest is a specific gift. *EPTL §1-2.16.*

PRACTICE NOTE: The client should be discouraged from disposing of an entire estate by a series of specific bequests. The disposition of a bank account or general securities account is almost always inappropriate. Making such gifts allows an agent under a power of attorney or a guardian to manipulate the estate plan by depositing to or withdrawing from accounts specifically bequeathed. It also allows changes in the dispository plan by the client's mistake.

a. Ademption: If the decedent does not own the item specifically gifted at the time of death, then the gift fails. EPTL §3-4.3 An exception to this would occur where the specifically gifted property is lost or damaged and insurance proceeds are payable to the estate as a result. *EPTL §3-4.5.* Or if the committee or conservator of an incapacitated person transfers the specifically gifted property prior to death, in which case, the traceable proceeds pass to the beneficiary. *EPTL §3-4.4.*

b. Anti-Lapse Statute: When a testamentary benefit is provided for issue or brothers or sisters of a testator, the default rule is that the bequest does not lapse. For instruments executed prior to September 1, 1992, the benefit would pass to the surviving issue of the deceased, per stirpes. *EPTL §3-3.3(a)(1).* In the case of instruments executed on or after September 1, 1992, the issue of a deceased take by representation. *EPTL. §3-3.3(a)(2).*

PRACTICE NOTE: While gifts to issue, brothers or sisters may be intended by the client not to lapse, that is not always so. For example, a gift of a specific item of tangible property may be meant exclusively for the benefit of that beneficiary. If the intent is for the gift to lapse if the beneficiary dies, it should be specifically stated. Similarly, if a named alternate is intended, it should be stated.

2. General Gift: A general bequest is a gift of a dollar amount. It comes out of the general estate after payment of tax, debts and expenses of the estate. Since the gift does not look to any specific property, it does not adeem if the nature of the assets change.

a. Abatement of Dispositions: All of the property of a decedent is

subject to payment of administration and funeral expenses, debts of the decedent and taxes which the estate may owe. *EPTL. §13-1.3.* The expense of the estate obligations are applied to dispositions in the priority provided by the statute. *EPTL. §13-1.3(c)*. The expenses are applied to the following shares until they are fully consumed, at which time the expenses would begin being born by the subsequent share:

i. Distributive shares which pass by intestacy (not disposed of by Will).

ii. Residuary dispositions.

iii. General dispositions.

iv. Specific dispositions.

v. Any disposition to a surviving spouse which qualifies for the estate tax marital deduction.

b. Protecting Residue: Often clients are choosing the amount of general bequests so that the total of such bequests leaves a substantial residue. The residual beneficiary is typically the one of most importance to the client. Consideration should be given to limiting the general bequest by defining it as the *lesser* of the dollar amount or a percentage of the estate. If the estate shrinks to the point where the general bequests are too large, then the residual beneficiary would be entitled only to the percentage. Alternatively, the residuary beneficiary can be given a general bequest which would assume some priority, if the estate shrinks.

3. Demonstrative Disposition: A demonstrative disposition is a gift of property to be taken out of specific or identified property. *EPTL. §1-2.3.* Like a specific bequest, a demonstrative gift will fail if the subject property is not owned at death. It also may fail because of the need to use the property to pay the expenses of the estate. In that case however, a demonstrative disposition will have the same priority as a specific gift, thus staying in tact until all general bequests and residuary dispositions have been consumed. *EPTL. §13-1.3*.

a. Example: An example of a demonstrative gift would be "I direct that all of my shares of General Electric Co. common stock be sold and that the sum of Five Thousand Dollars ($5,000) from such sale

proceeds shall be paid to my brother, ROBERT F. SMITH".

PRACTICE NOTE: It is very rare for a demonstrative gift to be appropriate. It is not uncommon however for a client to suggest it. The risk of a demonstrative gift should be pointed out to the client and alternatives explored.

B. Gifts of Business Interest: Special care must be taken in designing the disposition of a client's business interest.

1. If the business is incorporated, then care must be given to adequately describe the stock being transferred. Is it voting stock only? Is it all stock? If a beneficiary of stock is non-participating in the business, how will he or she be assured of being treated fairly? Is it possible to substitute another asset for the non-participant family member? Could those in control of the business be delegated to purchase the shares of others over time?

2. If the business is a partnership, what are the terms of the partnership agreement? Can a new partner be admitted? Will the beneficiary want to be a partner?

3. If the client does business as a sole proprietor, then special care must be given to the definition of what will pass to the beneficiary of the business. It is often difficult to define business assets in such a case versus personal assets. If there is inventory, tools and equipment, customer lists, patents or trademarks, vehicles, office equipment and accounts payable, special consideration must be given to each of these assets. The client must determine whether they are necessary for the operation of the business, or whether they could pass other than to the beneficiary of the operating business. Cash contained in business bank accounts must also be considered carefully by the client.

4. If it is necessary for the fiduciary to operate and manage a business for any period of time during estate administration or as an asset of a trust, then it is important that specific authority be given the fiduciary to manage the business and that some method of compensation, apart from fiduciary commission, is allowed for.

SAMPLE PROVISION - Operation of Business.

(A) To retain and continue the operation of any business, either incorporated, unincorporated or limited or general partnership (whether or not income-producing or resulting in lack of diversification) which I may own or in which I may have an interest at the time of my death, and any successor business thereto; and to

purchase or otherwise acquire any business or interest in any business (incorporated or limited or general partnership) and to operate the same; and in connection with any business, to have the following authority and to exercise the following powers, as may be deemed advisable: to take part in the management of such business and to delegate such duties, with the requisite powers, to any employee, manager, partner or associate, without liability for such delegations; 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 advance money or other property from my estate or any other source to any such business as may be deemed advisable; to make loans 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 from any lender and to secure such loan or loans by a pledge or mortgage of any part of my 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 and to reasonably compensate such directors, partners, associates and officers, including any person who is a beneficiary or fiduciary under this my Will; to establish and to join with others in establishing such partnerships, limited partnerships, corporations and other business organizations and associations for the carrying on of any such business, and to contribute to the capital of such business any part or all of my estate as may be deemed advisable; to deposit securities with a voting Trustee; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to sell any such business, any interest in any such business, or any stock or other securities representing the interest of my estate or any trust estate in any such business; to liquidate, either alone or jointly with others any such business or any or any interest in such business; and generally, to exercise any and all powers as my Executor and Trustee may deem necessary with respect to the continuance, management, sale or liquidation of any such business.

(B) In the event "Subchapter S Corporation" stock is to be allocated to a trust created hereunder and the recipient trust must qualify as a "Qualified Subchapter S Trust" (QSST) or an "Electing Small Business Trust" (ESBT) as defined in the Code, the Trustee shall be authorized to amend the terms of such trust so as to qualify it as a QSST or ESBO, but only to the extent that doing so does not affect the availability of the estate tax marital deduction for such trust.

C. Gifts to Charity: A gift to charity under a Will is not too different from other bequests:

PRACTICE NOTE: In the case of bequest to charity, it is critical that the correct corporate name of the charity be identified and confirmed. If the local organization is an affiliate of a national organization, which is to receive the gift? If there are restrictions on the use of the funds, be clear concerning them. If the restrictions might cause the charity to refuse the gift, be sure that an alternate is provided.

1. Tax Considerations: If an estate is subject to estate tax, then the property passing outright to charity would be entitled to a charitable deduction, without limitation IRC §2055(a)(2) . Most estates are exempt from estate taxation however, either because the sum of the assets is less than the amount protected from the tax or because a marital deduction will defer the tax until the second spouse dies.

    a. Charitable Deduction: Since there is no estate tax due in the typical estate, and because there is no income tax charitable deduction applying to property passing to a charity by Will, there is no deduction for the charitable gift. Further, because the income tax basis on a decedent's capital assets is "stepped up" to the date of death value, *IRC §*1014(a) there is no avoidance of capital gain tax resulting from a gift to charity through a Will. A client with a non-taxable estate wishing to leave an amount to charity, should be counseled about alterative approaches which might be more tax efficient.

        i. IRA Beneficiary: A client with an IRA or qualified plan may name family members as beneficiaries. Those family members could receive the benefits of the plan subject to both estate tax (if the estate passing other than to a spouse is large enough) and income tax (in all cases). Even a non-taxable estate would result in income tax being due on all funds in such a plan as they pass out to the beneficiaries. If the client wishes to benefit a charity under a Will, and has a non-taxable estate, a good suggestion would be to name the charity as an IRA beneficiary instead. The amount passing to the charity would escape income taxation completely. The family members, on the other hand, who no longer are IRA beneficiaries could receive an equivalent increased amount from the estate, not subject to income taxation.

        ii. Precatory Bequest: Another approach in the non-taxable estate to generate an income tax deduction arises from the use of a precatory bequest to a trusted relative. In such a case, the relative is given an amount of money and requested (not directed) to contribute that amount to charity. The individual beneficiary then makes a voluntary

contribution which entitles him or her to an income tax deduction for the gift to charity. The following is suggested language to accomplish this:

SAMPLE PROVISION: "If my wife MARY X. SMITH survives me, I give and bequeath the sum of Ten Thousand Dollars ($10,000) to her. It is my wish and hope, but I do not direct, that she make a donation in my memory to SMITH MUSEUM, Syracuse, New York. If my wife does not survive me, I give such amount to that organization for its general uses and purposes."

iii. Bequest of IRD: A third option to maximize income tax savings is to direct that an asset constituting Income in Respect of a Decedent (IRD) be used to satisfy the bequest. For example, a client with substantial taxable interest from US Series EE savings bonds might leave those (or their proceeds) directly to a charity so that the IRD ends up passing to the non-taxable entity.

VI. TANGIBLE PERSONAL PROPERTY

A. Personal Property: Personal property is generally divided into two major categories. Tangible personal property is that which is "used" and has an intrinsic value. Intangible personal property is simply evidence of a value. For example, furniture would be tangible property, but a stock certificate would be intangible. No statute specifically defines tangible personal property and case law must be looked to when certain assets might be tangible or intangible. Examples of problematic assets are cash, coin or currency collections and collectible stamps.

B. Specific Bequests of Tangibles: It is almost always good practice to provide for the specific disposition of tangible personal property. The reasons are many:

1. Often tangible personal property, like household furniture, has very little market value and may be difficult to dispose of at more than a nominal price.

2. While tangible property often has very little economic value, it can have substantial sentimental value to those family members closest to the decedent. Forcing the sale of such property would often be contrary to the desires of the family members.

3. It may be advantageous for an estate to be capable of trapping taxable income at the estate level, so as to protect it from income taxation totally by use of estate deductions or to make use of the lower brackets of the

estate. To accomplish that objective, it is necessary to control distributions of the estate which would carry Distributable Net Income (DNI) with it. A distribution from the residue of an estate carries DNI out to the beneficiaries. IRC §662(a)(2). The distribution of a specific bequest does not. IRC §663.

4. If a trust is created from the residue of the estate, and if tangibles are not specifically bequeathed, the Trustee would be obligated to dispose of them and make the proceeds income producing, unless specific language to the contrary is provided authorizing retention of such tangibles.

5. If, on the other hand, the Trustee retains tangibles, how will the Trustee keep them under his control or in his possession? They should be insured in the name of the trust, which will be difficult or impossible to accomplish.

C. Drafting Considerations For Tangibles:

1. When tangibles are left to a class (such as children), should the anti-lapse statute be allowed to replace a deceased child with grandchildren? If the tangibles are of more emotional value than economic value, the question would be whether that emotional value applies only to the children or would be applicable to a grandchild. If the grandchildren are infants, the inclusion of one in the distribution of tangibles would complicate matters in that the infant would not be able to consent to or receipt for distributions personally. Most often in such a case therefore, the distribution of routine tangibles will be *per capita* rather than by representation or *per stirpes*.

2. What can be done if the intended beneficiaries of tangibles would not be expected to agree on their disposition, or if the beneficiaries do not get along with one another at all? Depending upon who has been named as Executor, authority may be given to that Executor to distribute the tangibles among the beneficiaries, using the Executor's discretion. In the alterative, some mechanism may be established in the Will for the beneficiaries to select items by lot or by bid.

3. The client may wish to provide for the disposition of tangibles in a separate writing (apart from the Will). New York law does not provide for the incorporation of an outside document by reference into a Will. An approach which can be used in New York would be a bequest of the tangibles to a single trusted individual with a precatory request that the individual distribute those items in accordance with the wishes of the client which will be provided in a separate writing. Because the assignment is so personal to the beneficiary under the Will, it is important that the anti-lapse statute *not* apply to this bequest.

4. Special consideration should be given to very valuable tangibles. Does the client want expensive jewelry and the automobile passing to children equally?

5. Special consideration should be given to tangible personal property used in conjunction with a business or some other special purpose. For example, farm equipment would typically best be passed to whomever receives the farm animals or land. A boat and motor would be useful to the person receiving lake front real estate.

6. Since title to specifically bequeathed personal property vests at death in the beneficiary, the costs of storing, shipping and insuring such property would be the beneficiary's. This result can be reversed if the client wishes, with the estate being directed to pay those costs out of the general estate assets.

7. Avoid describing tangibles as "contents of my house" or other such terms. This will allow fraud to be practiced by moving tangibles after death, or before.

SAMPLE PROVISIONS - Tangibles to spouse - alternate adult children:

> **__XX__: To my wife, MARY P. SMITH, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me.**

SAMPLE PROVISIONS - Tangibles to beneficiary with precatory request to distribute:

> **__XX__: To _____ (personally, and not in a fiduciary capacity), I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. It is my wish, but I do not direct that the beneficiary will distribute such property in accordance with my instructions, which I shall provide during my life. If _____ fails to survive me, then I give such property to**

_____ with the same request.

DRAFTING NOTES: A clause such as this one allows the client to make elaborate lists and to revise them periodically, without the need of revising the Will. Unlike many other states, there is no provision in New York law allowing incorporation of an outside list into a Will, by reference. The above language might be a useful substitute for that concept. The risk of the beneficiary not carrying out the client's wishes must be pointed out. If there are tangibles which have substantial economic value, consideration should be given to excluding them from a clause such as this. Automobiles, jewelry and art work might better be disposed of specifically. An alternate beneficiary is also useful so as to prevent the anti-lapse statute from passing the tangibles to the children of the intended beneficiary. In the alternative, consider language requiring the beneficiary to be living to receive the bequest.

SAMPLE PROVISIONS - Tangibles to children with direction to select by lot:

The tangible personal property described above shall be divided among my children in approximately equal shares. If the children do not all agree on such division, I direct that they shall choose items individually in order of age, with the oldest child choosing one item first, followed by the second oldest and so on, until all items are selected or until the children have no interest in taking more items. For purposes of this paragraph, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes or a table and chair set shall each be treated as one item. If such a formal procedure is used, the Executor shall first have such items appraised, and the appraisal value of each item shall be the charge to the share of the child who chooses it. Any items not chosen by any child shall be disposed of by the Executor in whatever manner seems reasonable. Adjustments between the beneficiaries for items which have greater or lesser value than those selected by other beneficiaries may be made from the residuary share of each under this Will.

SAMPLE PROVISION - Tangibles to spouse, or if deceased to children, with formal procedure for disposition and equalization of value for each:

XX To my wife, MARY P. SMITH, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me, subject however

to the following:

(A) It is my intent that the items of tangible personal property owned by me at my death will be distributed among my children fairly and consistent with their wishes, to the extent possible. It is also my wish that the economic value received by each will be approximately equal. To accomplish this objective, I direct that either my children reach unanimous agreement on the disposition of the tangible personal property or, in the alternative, that the Executor use the following procedure in order to dispose of such property:

(1) The Executor shall first obtain an appraisal of the fair market value of each item of my tangible personal property, except that items of little value may be assigned only a nominal dollar value.

(2) Upon receipt of the appraisal, a copy will be provided to each of my children. With each of them present (or with each of their representatives present), they shall be allowed to select items which they wish to receive, with the oldest child choosing first, followed by the second oldest, and so on. Each child may select one (1) item at each round of the selections. For purposes of this Article, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes, or a table and chair set shall each be considered one (1) item. The selection will continue until all children have chosen everything they wish to.

(3) After the completion of the selection process, as described above, there may be remaining items which one or more children have an interest in receiving, but which they do not believe to be worth the appraised value. If that is the case, each of my children may institute an auction of any remaining item. Each child will be entitled to bid, and the child who bids the greatest amount will be entitled to receive the item. All such bidding shall be open and will continue until there is a winner.

(4) The Executor shall record the value of each item selected by each of my children, either from its value on the appraisal or, if not selected in that stage, then its value from the auction. If the value of the items selected by one child is less than his or her equal share of the total of all such items, then cash shall be paid from the general estate to that beneficiary to make up any difference. If the value of such items is greater than the child's equal share, then cash will be paid from the general estate to those other children who received less than their equal share, so as to make the distribution of tangibles equal among all children.

(5) Any items not selected in the above process shall be disposed of by the Executor in accordance with any method agreed to unanimously by all of my children. If there is no such agreement, then the remaining items shall be disposed of in a commercially reasonable manner. Items which have no reasonable sale value may be donated to charity or given to grandchildren or more remote descendants of mine. Any net proceeds from the sale of any such property shall become part of the value being distributed to my children pursuant to this Article.

VII. GIFTS OF REAL PROPERTY

A. Specific Devise: For a number of reasons, it may be desirable for a client to specifically devise real property. For example, a primary residence may be devised to a spouse in order to prevent it passing into a trust. A seasonal residence may be devised to some or all of the children to facilitate its being retained long into the future.

1. Advantages of specific devise of real property:

a. Vest title immediately in the beneficiary.

b. Eliminates the asset from being used to compute the commission of the Executor.

c. Gives priority to the devise over property passing in the residue.

d. Avoids any part of the real property being deemed as income and carrying out income earned in the estate. IRC §662 & §663.

2. Disadvantages of specific devise of real property:

a. If the beneficiary does not want the property, it is no longer possible to sell it as an estate asset and distribute it with the residue.

b. An Executor may sell real property owned as part of the residue of the estate without it being subject to liens of the beneficiaries. Specifically devised real property however would be subject to such liens**.**

c. Unless specifically provided otherwise, the beneficiary will take the real property subject to liens and mortgages. *EPTL§3-3.6.*

B. Special Detail: Real property should be described with as much detail and specificity as possible. Try to avoid over-broad descriptions such as "all my real

estate, wherever located". Such language raises the question of whether it is intended that all forms of real property (such as leases, partnerships, cooperative apartments, real estate investment trusts and condominiums are to be included). Such broad language also would pass property acquired after the Will is made, such as an inheritance from another.

1. At least the street address of the property, with municipality and county, should be provided. Better practice is to refer to the deed(s) by which title was taken, a tax map number or even the legal description.

2. Often with a devise of a vacation home, the client desires to include the furniture and other tangibles in the gift. Use of the word "contents" as defining tangibles to be included should be avoided. During the period the client is occupying the property, there may be valuable jewelry or other property which is not necessary for the operation of the real property and not intended to be included with it. Specificity in defining the tangibles to go with real property is critical. Consider language such as **"together with all furniture, rugs, appliances, dishes, silverware, art work permanently maintained in the property and tools necessary for the maintenance and operation of the property".**

3. Beware of the anti-lapse statute causing an infant to become an owner of an interest in real property. If the objective is to provide ownership to pass through multiple generations, a trust should be considered instead of a specific devise.

4. Out of state property creates special concerns. The probate of a Will in New York does not give authority to an Executor to administer or dispose of real property in another state. Such authority must be gotten by the ancillary probate of the Will in the state where the property is located.

    a. To avoid the complications of ancillary probate, it may be helpful to have it pass other than by the Will. This can be accomplished by putting the property in joint ownership, by conveying it to a revocable trust or partnership or by deeding it to the ultimate beneficiaries with a life use retained by the client.

C. Life Estate Transfers: On occasion, a client will wish to grant use of real property to someone for life, with the remainder passing to others. It is used primarily where there are not sufficient funds available to create a trust with the property and other assets to pay for its maintenance and operation.

1. If the life beneficiary fails to maintain the property and pay the taxes, the remaindermen may be adversely affected. This type of transfer is very difficult for the remaindermen to adequately monitor what is going on with such property, and it may be lost before they know there is a problem. A devise of real property for life is an approach which should be used sparingly, and only when there are no other alternatives available.

SAMPLE PROVISIONS - Language for Devise of Life use of Real Property:

XX : To WINONA SMITH (beneficiary), if she survives me, I give and devise the real property located at 123 Main St., Pristine Forest, NY 12345 in the County of St. Lawrence and State of New York, together with all appurtenances and improvements used in connection therewith. Such devise shall, however, be only for the period of the beneficiary's life, or until she ceases to use the property as her principal residence, whichever occurs first.[1] If she fails to reside in the said property for a continuous period of one hundred eighty (180) days, she will be deemed to have changed principal residence, and her interest therein shall terminate.

(A) The beneficiary shall be required to pay all costs of maintenance, assessments, insurance premiums, taxes, water charges, and repairs to the property. Upon failing to pay any such charge, any one or more of the remaindermen may pay the same, and in such event, the person or persons shall be entitled to reimbursement from the beneficiary, and shall have a lien against the property for the amount so expended plus interest at nine (9%) percent per annum. If the property is sold to a bonafide purchaser for value, such lien shall be deemed extinguished as to the real property, but shall follow the proceeds, payable first from the beneficiary's share of the proceeds, if any.

(B) The beneficiary shall obtain and keep in force a policy of insurance (at her own expense) with sufficient fire insurance coverage to represent the replacement value of all structures from time to time; and personal injury liability coverage in a minimum amount of $150,000. Such policy shall include the remaindermen as additional insureds.

(C) No bond or other security shall be required of the beneficiary.

(D) Upon the termination of the interest of the beneficiary in the said property, I give and devise it to my then living children, equally per capita and not be representation.

(E) If any beneficiary under this Article is a minor, the property distributable to the minor may be delivered to the guardian or other person with whom the child resides, without further responsibility to the child. Any cash proceeds due a minor may be paid or held as otherwise provided under the terms of this Will.

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[1] This provision would prevent the estate tax martial deduction if the life beneficiary is a spouse. QTIP trusts require interest for life, and no shorter period.

VIII. ESTATE TAX TREATMENT

A. Federal Estate Tax: The Federal Estate Tax has permanently set the exemption which one individual may leave to any beneficiary to $5,250,000. The federal tax continues to have a gift tax and, because the gift tax and estate tax exemptions have been unified, it has a lifetime exemption of $5,250,000. It also has an annual exclusion of $14,000 per person. This exclusion is inflation adjusted, but it only rises when inflation causes it to go up by an even $1,000. New York has no gift tax.

B. New York Estate Tax:

1. New York repealed its state estate tax, but the structure of the repeal causes the tax to be resurrected as the federal government eliminates the state death tax credit. New York's estate tax has been be automatically reinstituted, with the New York exemption equivalent frozen at $1,000,000.

2. The consequence of New York law is that the estate of a person dying with a taxable estate of $2,500,000 in 2013 will bear a New York estate tax of $138,800.

C. Planning Approaches: Because of the dramatic changes scheduled in the federal estate tax exemption and the possibility of a substantial New York estate tax being applied even if a spouse survives, estate tax planning has become far more uncertain.

1. For those with a combined family estate of $1,000,000 or only slightly more, the avoidance of federal estate tax will be quite easy, because the federal exemption will exceed the family wealth.

2. Special care must be taken to avoid paying a substantial New York estate tax in an effort to avoid a federal estate tax which may not apply any longer. Flexibility in planning becomes most important.

D. Planning Options: There are several drafting alternatives which could be used to protect against estate tax exposure in this uncertain time.

1. Disclaimer: For several years, it has been common to incorporate use of the disclaimer into a Will so as to allow a surviving spouse to choose whether a credit trust should be created to protect the estate tax exemption, and if so, how large that trust should be. This planning technique becomes even more important as the uncertainty of the tax intensifies.

SAMPLE PROVISION - Disclaimer in Wills:

__XX:__ All the residue of my estate, whether real or

personal and wheresoever situate, I give, devise and bequeath to my wife, MARY P. CLIENT, if she survives me. In the event my wife validly disclaims all or any part of this legacy, I direct that the disclaimed interest shall pass pursuant to Article XXX hereof and that my wife may enjoy such interest provided her thereunder.

The provisions of New York Estates, Powers and Trusts Law, Section 2-1.11, or any similar subsequent New York statute concerning renunciation or disclaimer shall control, regardless of my domicile at death. A disclaimer which would be sufficient in form and manner of service thereunder shall be deemed sufficient for my estate.

XXX: In the event my wife fails to survive me, or having survived me, disclaims all or part of her legacy under this Will, I give, devise and bequeath all of the undisposed portion or residue of my estate, whether real or personal and wheresoever situate, including any part of the bequest to my wife under Article XX which she may have disclaimed, as follows:

(A)(1) If my wife survives me, all of the property passing under this Article shall pass to the Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect and receive the income therefrom, and to pay or apply the income not less frequently than quarterly to or for my wife.

(2) I authorize my Trustee, at any time and from time to time, to invade the principal and to distribute such amounts to or for the benefit of my wife. Such invasions may be made whenever the Trustee determines it to be appropriate to provide for the support, education, health and maintenance of my wife during her life.

(3) Upon the death of my wife, the trust shall terminate and the Trustee shall transfer the remaining trust principal, together with any accrued income to such of my descendants as would share in the residue of my estate if my wife had failed to survive me and I had died immediately following her death (pursuant to (B) following).

(B) If my wife fails to survive me then the residue shall pass to my surviving children and the living descendants of any deceased child, per stirpes.

2. Limiting Size of Credit Trust: Pre-residual credit shelter trusts have traditionally been defined as holding the greatest amount which can pass free of *federal* estate tax. Such language would create a New York estate tax potentially. If it is appropriate for the client to avoid that tax, it may be desired to limit the amount of the credit trust to the amount which can pass

free of *New York* estate tax. This would cause the credit trust to be frozen at $1,000,000, but would eliminate the possibility of federal estate tax at the first death. If it is likely that the surviving spouse would not have an estate later sufficient to generate a federal estate tax, this may be a good solution.

SAMPLE PROVISION - Limited Credit Shelter Provision - Medicaid Protected:

XX: (A) If my wife survives me, I give and bequeath an amount equal to the largest amount, if any, by which my [New York] taxable estate (determined before giving effect to this Article XX) may be increased without causing an increase in the [New York] estate tax payable by reason of my death, to the Trustee hereinafter named.

(B) The Trustee shall receive such property IN TRUST, for the following uses and purposes: To hold, manage, and invest the property, to collect the income thereof and to pay over or apply so much or all of the net income, to or for the benefit of my wife and any living descendant of mine from time to time, to such extent, in such amounts or proportions, equal or unequal, and to the exclusion of any of them, and at such time or times, as the Trustee (other than any then eligible income beneficiary), in the exercise of absolute discretion, shall deem advisable. Any net income not so paid or applied shall be accumulated and added to the principal of the trust at the end of each calendar year.

(C) In addition, the Trustee shall be authorized at any time to pay over to or apply for the benefit of any then eligible income beneficiary, out of the principal of the trust, any amount, including the whole thereof, as the Trustee, other than any then eligible income beneficiary, in the exercise of absolute discretion shall deem advisable, without limitation. Without in any way limiting the absolute discretion given the Trustee, it is my intention that my wife be considered the primary beneficiary of the trust and that her present and future needs be given primary consideration.

Payments of income or principal for any beneficiary shall only continue, however, subject to the provisions of paragraphs "1" and "2" following. This trust is created to supplement, not replace any and all available public benefits and entitlements, and to supplement the support of a beneficiary. It is intended to allow a beneficiary to live independently or at home in reasonable comfort. It is the intent of this Will that the trust's income and principal is not to be considered income to, nor assets of any beneficiary for any purposes as stated in statute, rules or regulations of any governmental unit, agency or department.

(1) In applying the income or principal for the benefit of a beneficiary, the Trustee shall have absolute discretion to pay to or apply the income or principal to provide for the needs of such beneficiary over and above basic maintenance, support, medical, and dental care, paid for by any local, State or Federal government or agency or department thereof. Nothing herein shall preclude the Trustee from purchasing those services and items which promote the beneficiary's happiness, welfare and development, including but not limited to, vacation and recreation trips away from place of residence, expenses for a traveling companion (if requested), entertainment expenses, clothing, transportation costs, education and training costs, medical, dental and insurance needs. Under no circumstances shall my Trustee exercise discretion to utilize funds for the payment of such services that would otherwise be borne by any publicly funded program. There shall be no invasion of principal for the benefit of any beneficiary of this trust ordered by any court pursuant to EPTL §7-1.6(b) or any other provision of law.

(2) The income and the principal of the trusts established under this Will shall not in any way or manner be subject to or liable for any of the debts, contracts, engagements or liabilities of the respective beneficiaries thereof, and shall not be liable to anticipation, sale or pledge, nor subject to attachment, execution or sequestration under any legal, equitable or other process of law.

(D) My wife shall have the power to appoint any part or all of the principal of the trust property to any or all of my lineal descendants and to impose such additional trusts or conditions as she deems appropriate, except that no appointment shall be made to my wife, her estate, her creditors, or the creditors of her estate. The exercise of this power of appointment shall be made in her Will and by specific reference to this power. To the extent the power is not validly exercised, then the trust property shall pass according to the terms of this Will. If the Trustee has not received actual notice of the existence of a will of my wife within 90 days of her death, and if no such will has been offered for probate in the appropriate court, then the remainder of this trust may be distributed as if such power had not been exercised, and the Trustee shall be released from any liability for distributing pursuant to the provisions of this Will.

(E) In computing the amount to pass pursuant to this Article, the final determination in the federal estate tax in my estate shall control. The value of assets used to satisfy this bequest shall be the value of such assets on the date of distribution, but the total value of all assets so distributed shall be the amount calculated to pass under this Article. To the extent such assets are available for this purpose, this trust shall be funded with assets which are ineligible for the

marital deduction under the federal estate tax, and assets which are not productive of income. To the extent practicable, I direct that this legacy not be satisfied with assets which are items of gross income in respect of a decedent such as individual retirement accounts or qualified pension or profit sharing plans.

(F) I recognize that the amounts passing to the Trustee under this Article may be partially reduced or totally eliminated by nondeductible gifts and the payments of certain estate taxes and charges required by other provisions of this Will and that such amount may be affected by determinations or elections made by my Executor or in the exercise of discretion under this Will or under the provisions of the Internal Revenue Code.

(G) The trust shall terminate upon my wife's death, or when the trust property has been exhausted, and, subject to the valid exercise of the power of appointment granted her under "D" of this Article, the remaining principal shall pass to those individuals, and in those proportions, as my residuary estate would pass under Article XXX hereof, if I had died immediately after my wife's death.

3. QTIP Trust: Structuring a residuary provision of the Will or the terms of a trust to receive the maximum amount protected by the federal credit to qualify for QTIP election (marital deduction) would allow an Executor to partially elect QTIP so as to prevent New York estate tax. Unlike the limitation in the last paragraph, there would be some flexibility to pay a tax if it appeared after death that it would be advantageous.

   A. The ideal solution to the QTIP election would be if New York allowed a separate QTIP election to be made just for New York tax purposes. In this way, both the federal and New York estate tax credits could be optimized with any resulting tax being paid at the second death. At this time, there is no proposal to enact a New York specific QTIP, because of a concern that the surviving spouse would leave the State of New York after the first death, causing the state to never receive its tax at the second death.

4. Clayton QTIP: The Clayton QTIP is a variant of a single divisible QTIP. In planning for the Clayton QTIP, two trusts would be created under the Will or trust agreement. One trust would not be eligible for the marital deduction and might have sprinkling income and principal among family members. The second trust would provide all income to the spouse and would be qualified for the marital deduction. The allocation of the assets between the two trusts is controlled by the share of the estate which the Executor elects to qualify for QTIP treatment. Whatever the Executor does not qualify for the marital deduction would automatically go to the non-qualified trust. This technique is approved in IRC Reg. 20-2056(d)(3).

a. The advantage of the Clayton approach is that the non-qualified trust can be designed in any way the client wishes, increasing flexibility. As the QTIP election does not have to be made until the extended due date of the return, then there are 15 months, rather than the 9 months available for a disclaimer.

b. The disadvantage of the Clayton election is that a fiduciary (Executor) is making disposition decisions over the client's property. The inherent conflict of interest of the spouse if he or she is the Executor (or any other beneficiary who is Executor) suggests that an independent party should be making that election. Many clients are hesitant to give dispositional control of their estates to anyone other than a spouse or, occasionally, a child. In the case of a second marriage, the surviving spouse might have to elect against the Will, or risk the Executor electing QTIP in such a way that the spouse has little or no benefit because all is in the credit trust. The Executor can wait until the time to elect has expired, and then allocate the property by the QTIP election.

5. Tax Apportionment Clause: The payment of estate tax should be provided for. For example, client usually wants tangibles to pass free of tax contributions. It is typical to charge the tax against the residue of the estate, rather than apportioning it.

a. If client owns a large IRA or life insurance policy passing to beneficiaries or joint accounts passing, should the estate tax on these assets pass free of tax, but reducing or even eliminating the residue with the burden of estate tax?

b. Following is language to charge the estate tax or probate assets to the residue of the estate, but to otherwise apportion tax on non-probate property pursuant to statute.

SAMPLE PROVISION - Tax Apportionment.

XX : All estate, inheritance, succession, transfer and other death taxes, including any interest and penalties thereon, paid to any domestic or foreign taxing authority, with respect to all property taxable by reason of my death, whether such taxes be payable by my estate or any recipient of any such property shall be charged against and paid without apportionment out of my residuary estate; provided, however, that any non-probate property which is included in my estate for estate tax purposes shall bear its proportionate share of all such taxes to the extent any such property generates a tax by reason of my death.

c. Following is language to charge tax on probate assets to the residue, but to protect any charitable share from bearing that tax:

SAMPLE PROVISION - Charitable Share.

__XX__: All estate, inheritance, succession, transfer and other death taxes, including any interest and penalties thereon, paid to any domestic or foreign taxing authority, with respect to all property taxable by reason of my death, whether such taxes be payable by my estate or any recipient of any such property shall be charged against and paid without apportionment out of that portion of my residuary estate for which no charitable deduction is allowed for federal estate tax purposes; provided, however, that any non-probate property which is included in my estate for estate tax purposes shall bear its proportionate share of all such taxes to the extent any such property generates a tax by reason of my death.

IX. RESIDUARY GIFTS

A. Powers of Appointment: A power of appointment may be created under any Will or trust. If the client is a beneficiary of such a power, then it is important for the attorney to know that and to consider whether the power should be exercised or not. Knowledge of such a power is critical even if it is drafted in such a way that specific reference to the document which is the source of the power must be made in order to effectively exercise it.

1. If a power of appointment is held by the client, and if the terms of the instrument created that power does not require specific reference in order to exercise, then the residuary clause of the client's Will will exercise it. *EPTL §10-6.1 (a)(4).*

   PRACTICE NOTES: If there are powers of appointment unknown to the client, or if the client expects to be a beneficiary of multiple family trusts, then it may be advantageous to specifically provide that no powers of appointment are intended to be exercised by the terms of the Will.

B. Trusts for Infants: An issue of primary importance to younger clients is the protection of their underage children in the event of both parents dying. The financial concerns fall into two categories. First, the clients wish to protect the needs of their youngest children until they are "out of the nest". Once all of the children have reached adulthood, the second priority is to treat them all equally.

1. In order to provide for the needs of the youngest, it is most often desirable to keep the funds together in a single trust so that they can be applied for the needs of the youngest without concern about equality. This is referred to as a Sprinkling Trust or a Pot Trust.

2. After the children have reached adulthood, or typically when the youngest has had an opportunity to complete an undergraduate education, the

preferred approach is to divide the trusts so that each has a separate fund. This prevents the needs of one adult child from consuming the share of another. The ultimate outright disposition to the individual child can then be tailored to the desires of the client. Where the children are very young, so that the parent does not know how they will turn out, or when the children are older and the parent is not totally satisfied with how they turned out financially, multiple distributions may improve the chances that the child will use the benefits more responsibly, or at least some of them.

SAMPLE PROVISION - Gift of residue to spouse with alternate to children. (Sprinkling to 21 and Distribution at 30/35):

__XX__: All the rest, residue and remainder of my estate, both real and personal and wheresoever situate, I give, devise, and bequeath to my wife, MARY P. CLIENT, if she survives me.

(A) If my wife does not survive me, and I leave no child under 21 years of age, I give all the residue of my estate in equal shares to my living children, and the issue of any deceased child, per stirpes, subject however to the provisions of Article __XX__ hereof.

(B) If my wife does not survive me, and if any of my living children (including any afterborn child) is under 21 years of age, I give the residue to the Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal in the sole and uncontrolled discretion of the Trustee, for the support, maintenance, health, education and cost of a wedding of my children and the descendants of any child who dies (whether before or after my death) as their respective circumstances may indicate, without regard to inequality among the beneficiaries in respect of sums so paid or applied, even to the extent of exhausting the entire principal. It is my wish that priority be given to the needs of my children who have not reached the age of 21 years. The trust shall continue until such time as there is no living child of mine under 21 years, whereupon the trust shall terminate and the remaining principal, together with all accumulated or accrued income shall be divided among my then living children and the then living descendants of any deceased child, per stirpes, subject to the provisions of Article __XX__hereof.

__XX__: In the event any beneficiary under this Will is under the age of 35 years at the time he or she becomes entitled to a principal share hereunder (even at the conclusion of a trust hereunder), I direct that the amount due such person be paid to or retained by the Trustee, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal, in the sole and uncontrolled

discretion of the Trustee for the support, maintenance, health, education or cost of a wedding of said individual as his or her circumstances may indicate, even to the extent of exhausting the entire principal. For all purposes of this Will, education expenses shall include the costs of tuition, room, board and transportation expenses for college, post-graduate programs, private primary or secondary schools and occupational training programs. Upon the beneficiary reaching the age of 30 or upon creation of this trust if the beneficiary has already reached that age, an amount equal to one half of the value of the property held for such beneficiary shall be distributed to the beneficiary. The trust shall continue until such time as the beneficiary reaches the age of 35 years or sooner dies, whereupon the trust shall terminate and the remaining principal together with all accumulated or accrued income shall be paid to the beneficiary, if living, or to his or her Executor or administrator if deceased.

X. **FIDUCIARY APPOINTMENTS -** The fiduciaries commonly appointed in a Will are Executor, Trustee and Guardian of an infant.

A. Executor: An Executor can be any natural person or an institution authorized to be a fiduciary, so long as the individual is not an infant, incompetent, a non-domiciliary alien, a felon or unable to fulfill the duties due to "drunkenness, dishonesty, improvidence or want of understanding". *SPCA § 707.*

1. The most commonly appointed Executor is the beneficiary who is entitled to the largest share. Such an individual would be most likely to waive the statutory commission. If the commission is not waived, then it would be passing to the person who would have received the same benefit as an inheritance anyway. If there is no single predominant beneficiary, then the next most frequently chosen individual is one of several residuary beneficiaries. That person should have the client's absolute trust, as well as the respect of the other beneficiaries.

   Often when there is no candidate from among the beneficiaries to act as Executor, the client will choose a friend or professional advisor (accountant or attorney). A corporate fiduciary can also be designated.

2. Conflicts of interest must be considered in the selection of Executors and other fiduciaries. For example, a business partner might be very close to the client and trusted, but after the death of the client the partner might have personal interests which are in conflict with those of the estate. An attorney should be careful to draft his or her own appointment only in those circumstances where the selection is in the best interest of the client.

B. Co-Executors: Frequently when there are two equal beneficiaries, Co-Executors will be considered. If the primary beneficiary is not comfortable handling the assignment of Executorship, there may be a Co-Executor to help him or her. A

Co-Executor may also be useful where the estate will hold assets requiring specialized knowledge. An example of this would be the estate of an author or painter. In such a case, the duties of the Executors can be divided by specific drafting, so that the Executor with specialized knowledge handles only those assets requiring it.

1. Where Co-Executors are designated, there can be difficulties encountered. For example, certain documents must be signed by each Executor, and delay can result from having to circulate to each and possibly in different parts of the country. Multiple Executors also cause multiple compensation to be paid.

C. Executor Compensation: The statutory commission for an Executor is provided at *SPCA §2307.* If the commissionable estate amounts to less than $100,000, then only one commission is paid, regardless of how many Executors may act together. If the estate is $100,000 or more, but less than $300,000, up to two commissions can be divided among multiple Executors. If the commissionable estate is $300,000 or more, then three commissions can be divided among three or more Co-Executors.

1. The Will can provide any specific compensation plan the client would like. For example, a family Co-Executor might be prohibited from taking any commission, while a professional Co-Executor is allowed a full commission, regardless of how small the estate is.

   a. It is not good practice to name two individuals as Co-Executors who do not get along with each other. Such a situation tends to make more court involvement necessary and frequent. It does not encourage the efficient settlement of the estate, and may be a circumstance where an Executor from outside the family would be appropriate to consider.

D. Alternate & Successor Executors: Depending upon the age of the client and other circumstances, it is important to have one or more alternate or successor Executors designated for the possibility of the original appointees being unable or unwilling to serve through the whole estate administration. If no alternate is named, then an Administrator CTA (with Will annexed) will be designed. *SPCA §1418.* An Administrator CTA would be subject to the requirement of a bond and the selection of the fiduciary could be the cause for dispute among the beneficiaries. If there are no alternates agreeable to the client, then a suggestion should be made that the primary appointee be given authority to select his or her own successor. *SPCA §1418 (1).*

E. Trustees: The legal requirements to serve as a Trustee are the same as those of an Executor. *SPCA §707.* Because the term of the trust can be very long, the mortality of individuals becomes a factor in selection of Trustees. It can be very disruptive to a trust to have a Trustee become incapacitated so as to be unable even to resign. It is therefore more common to see corporate fiduciaries used as

Trustees than as Executors.

1. The duties of a Trustee fall into two major categories. First, the Trustee is responsible for investment of the trust funds so as to generate income and/or growth for the trust beneficiaries. Secondly, the Trustee must make decisions about distributions, particularly those distributions which are made in the discretion of the Trustee. For this reason, it is common to have Co-Trustees designated on family trusts. One Trustee would be chosen because of skills in managing the assets or the ability to seek out adequate managers. Another Trustee would be chosen because of familiarity with the family and understanding of the circumstances each beneficiary will be in.

F. Alternate Trustees: It is even more important that alternates be designated as Trustee, because the term of the trust is likely far longer than the term of the estate administration.

G. Removal of Trustees: A Trustee can become inappropriate after the passage of time, even though that individual or institution was an appropriate choice initially. For example, the sole beneficiary of a trust created in New York might live his or her adult life in California. A California Trustee would become more appropriate. A Trustee might become senile or otherwise incapacitated with age, but be unwilling to resign. The Trustee might even lose touch with the family members who are beneficiaries, and be incapable of adequately performing the duties expected. For all of these reasons, and others not mentioned, it is useful to provide the flexibility to replace a Trustee, even against the Trustee's wishes.

1. Giving the beneficiary the right to replace the Trustee can have substantial tax disadvantages. For example, a trust which is created to prevent the inclusion of the trust principal in the beneficiary's estate, when the beneficiary dies, could suffer tax inclusion if the beneficiary is given discretion to remove the Trustee and appoint another, particularly where distributees can be made without an ascertainable standard.

2. The client may be hesitant to give authority to remove a Trustee to a beneficiary also because of the client's distrust of the beneficiary's judgment. It is possible to select an independent individual who has authority to remove a Trustee and appoint another. This would solve the tax problem created by the beneficiary having the power and also might satisfy the client that the beneficiary would not misuse the power. **An example of such a power follows**:

   I hereby appoint _____ of _____ as the Trust Protector. The Trust Protector is authorized, in the exercise of absolute discretion, to remove any and all Trustees acting hereunder (other than my wife), to designate successor Trustees in their place and to appoint co-Trustees; provided, however, no Trust Protector may appoint as Trustee himself or herself, any relative or employee of a

Trust Protector, or any person who has a beneficial interest in any trust hereunder or who is married to, related to or employed by any person who has such a beneficial interest. The Trust Protector also is authorized, in the exercise of absolute discretion, to designate, by instrument in writing delivered to the Trustee, a successor Trust Protector to act if there is not a Trust Protector otherwise appointed hereunder who is willing and capable of serving, and to revoke any such designation before it becomes effective. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

I am not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee or otherwise. Except for any matter involving the Trust Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Trust Protector 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 hereunder if in good faith reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof. The Trust Protector shall not be liable for failure to remove any Trustee even if cause exists. Each trust existing hereunder shall indemnify the Trust Protector against all costs of legal proceedings which involve the Trust Protector, including legal fees.

H. Trustee Compensation: An individual Trustee is entitled to commission computed at the statutory rates provided in *SCPA §2309*. As with Executors, if there are multiple Trustees, then there may be multiple commissions payable, depending upon the size of the trust. *SCPA §2309 (6).* As with executorial commissions, the Will can provide for specific compensation for a Trustee, or for an alternate method of computing it.

1. Unlike an individual, a corporate Trustee will be entitled to such commissions as "may be reasonable" if the trust value exceeds $400,000. *SPCA §2312 (2).* In drafting for a corporate Trustee, it is important that the proposed Trustee have an opportunity to review the document. Most will want specific language concerning commissions. Typically, a minimum commission will be called for, no matter how small the trust becomes.

I. Guardians: Guardians of a minor child's person are responsible for the child's upbringing. They take over the role of the parents. Guardians of a child's property are charged with protecting, preserving and managing the property of the infant. *SPCA §1723.* The Court has power over the property of an infant. *SCPA §1701.* An annual account is required of the Guardian and no payments can be made from Guardian funds without authorization by the Court.

1. When the client has selected a Trustee in whom the client has confidence, it is the objective of the planning process to prevent any funds from falling into a court supervised Guardianship. Rather, all assets left for the benefit of any infant would be best contained in trust. Even with careful drafting,

funds can come into ownership of an infant, particularly if the infant is named specifically as an alternate beneficiary of life insurance, an IRA or some other type of beneficiary account.

2. A client with multiple children will be concerned about the ability of the Guardian to care for those children. There may also be a concern with keeping all of the children in a single household. Further, the client may be concerned about the financial burden being put upon the Guardian in taking on this assignment.

SAMPLE PROVISION: The following is sample language for lifting the financial burden for Guardianship. Such language might not be appropriate if the Guardian and sole Trustee are the same individual:

(A) I am relying upon the Guardian of the person of my children to take care of them. This will result in increased living expenses for her and may require her to buy a larger home or to add to the house in which she already lives. It is my wish that the shouldering of the burden of my children should not cost her anything, and I therefore authorize and direct my Trustee to pay any amounts to her for any added out-of-pocket expense resulting from her doing so, even though, as in the case of an addition to the Guardian's existing house for the purpose of housing my children, the expense may be of direct benefit to her. My Trustee shall make such payments out of the trust.

(B) My Trustee shall be under no duty to seek, nor the Guardian to make, repayment for any benefit she may receive hereunder.

(C) My Trustee shall be entitled to rely upon statements of fact made by the Guardian in arriving at the amount of any payment made hereunder, without any further verification.

J. Guardian Compensation: A Guardian of the property is entitled to the same compensation as an Executor. *SCPA §2307 (1).* If income is received and paid over, the Guardian is entitled to annual commissions at the principal rate. *SCPA §2307 (4).* As with other compensation, the Will can provide some specific alternative compensation. *SCPA §2307 (5).*

K. Guardianship After Divorce: Even though a deceased was the custodial parent, he or she cannot appoint a Guardian that will take priority over the surviving, non-custodial parent. *DRL §81.* An ineffective appointment results in the appointee becoming a donee of a power to manage property during minority, subject to all of the provisions of the Guardianship statute. *SCPA §1714.* The effect of such an appointment is to leave management of the property of the infant in the hands of the person selected by the client, rather than the surviving parent of the infant.

XI. **IN TERROREM CLAUSE:** When the client is concerned that one or more of the distributees will contest the will, a solution may lie in an In Terrorem Clause which takes away the benefit left to any contesting distributee. Such clauses are strictly and narrowly construed. It is not possible to prevent an incompetent or infant from contesting by such a clause. EPTL §3-3.5(b)(2). Further, the effectiveness of the clause is proportionate to the size of the bequest which would be forfeited. The greatest protection comes where a substantial benefit would be lost by the distributee who chooses to contest.

A. The following is language which could be used to discourage a contest:

_____: In the event that any beneficiary named herein shall, directly or indirectly, under any pretense or for any cause or reason whatever, oppose the probate of my last Will and Testament, or institute, abet, take or share, directly or indirectly, in any action or proceeding against my estate to impeach, impair, set aside, or invalidate any of the provisions of my Will, or make any agreement, direct or indirect, in connection with any of the foregoing, with any person instituting, abetting, taking or sharing in such action directly or indirectly, I do hereby revoke any and all devises, bequests, trusts, or other provisions to or for the benefit of any such person, and I direct that any such devises, bequests, trusts, or other provisions, to or for the benefit of any such person, shall become part of my residuary estate, except that if such person shall be entitled to share in or benefit from my residuary estate, then the share of such person shall be disposed of as if such person had predeceased me, without leaving issue surviving him or her. Any beneficiary who makes or attempts to make any inquiry about the Will, other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her share of the estate.

DRAFTING THE REVOCABLE TRUST

by

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DRAFTING THE REVOCABLE TRUST

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I. **REVOCABLE TRUST v. WILL**: It is becoming more common in many states for the estate plan to have a revocable trust as its centerpiece. Revocable trusts can be very useful tools for certain individuals, but just like any estate planning device, use of these trusts should be decided on an individual basis. Revocable trusts are often described as "will substitutes". While the two are treated similarly for many purposes, there are significant differences between them. There are advantages and disadvantages to the use of the revocable trust versus the last will and testament. Understanding these differences should help the practitioner, at the drafting stage, to decide the most appropriate estate planning vehicle for the client.

A. ADVANTAGES:

1. Unification of Assets & Avoidance of Ancillary Probate: By establishing a revocable trust and a corresponding pour over Will, a person can maintain all of his or her assets under one entity. This provides centralized ownership of assets which may be more manageable for some people. This is useful in the context of someone who owns property located in various states (eg: a summer home located outside of New York State). By transferring ownership of the assets to the trust, that person's estate will probably also be saved of the aggravation of ancillary probate proceedings in different states after death.

2. Asset Management: A revocable trust can be used as an asset management tool in the event of incapacity on the part of the individual. In many ways this is similar to a durable power of attorney, but more expansive. In the event the Grantor of the trust becomes incapacitated, the Trustee can continue to maintain the Grantor's assets, pay his or her bills and generally manage his or her affairs without the necessity of appointing a guardian. If there is a need for a Corporate Trustee to act, a revocable trust is the only entity to allow that.

Practice Note: The co-Trustee or Successor Trustee may need access to the Grantor's medical records or the power to discuss the Grantor's medical condition in the event of incapacity or to pay medical bills. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) limits access to an individual's medical records, including medical billing records, to the individual or to the individual's "personal representative". Therefore, the practitioner should include language in the trust that would clearly define the co-Trustee or successor Trustee as a "personal representative" under HIPAA to allow for the need to access medical records or billing records.

3. Flexibility: A revocable trust does provide flexibility in estate planning by its very nature of being revocable. The creator of the trust is always entitled to revise the ultimate disposition of the assets to the intended beneficiaries; or to revoke the trust completely. Of course, a Will is revocable, too. Since the execution requirements for a trust do not require witnesses, however, clients may find that revoking or amending a trust to be an easier process.

Flexibility may be of particular use when planning for optimal Federal and New York State estate tax savings. Since 2000, the Federal estate tax exemption has changed nine (9) times, including elimination during the repeal in 2010. The credit shelter and marital formula bequests drafted in the past may not produce the result the client originally intended. For instance, consider an estate of $1.5 million. A formula bequest that provides for the credit shelter share to be "the maximum amount that can pass free of federal estate tax" would have resulted, in the year 2001, in a credit shelter share of $675,000 and a marital share of $825,000. In 2013, that same formula will result in the credit shelter share of a $1.5 million and no marital share.

Practice Note: What if the client loses mental capacity - can the trust be revoked or altered? A guardian appointed under Article 81 of the Mental Hygiene Law may also have the power to create or amend revocable trusts on behalf of the

incapacitated person. MHL § 81.21(a). *In re Elsie B,* 265 AD2d 146, 707 N.Y.S.2d 695 (2000).

Can an agent under a durable power of attorney revoke or amend a revocable trust? See General Obligations Law § 5-1502A (9) and § 5-1502B (7).

There are differences of opinion as to whether a guardian or agent can or should exercise the power to revoke or amend a trust. The right to execute a will or codicil to a will is personal to the testator. Should the same right be personal to a settlor of a trust?

Drafting Tip: Giving an agent under a durable power of attorney or a guardian the authority to revoke or amend the trust may create undesired results. Most revocable trusts provide for the appointment of a successor or co-trustee in the event of incapacity. A carefully drafted trust should inject enough flexibility to anticipate change. The client should be advised to appoint a trustee in whom she has the utmost confidence and consider trust protector language if there is any doubt.

4. Control: A revocable trust will also provide control in the disposition of an individual's assets. Many people are unwilling to give up any element of control in their estate planning. A revocable trust offers the greatest level of control short of retaining the assets in the individual's name alone.

The elimination of the merger doctrine made this aspect of revocable trusts even more appealing. Prior to June 25, 1997, the merger doctrine (codified in the old EPTL § 7-1.1) prohibited a grantor from being sole beneficiary and sole trustee of a trust. EPTL § 7-1.1 was repealed and replaced with a new statute (still § 7-1.1) which allows for such arrangement.

5. **Avoiding Probate:** It is true that a revocable trust will avoid the necessity of probate proceedings at the death of the creator of the trust. This *may* avoid a lengthy, costly process in which heirs would have the opportunity to object and contest the Will. However, probate is usually not the demon it is often described as. The probate of a Will, in the most common situation and in many counties, can take less than a couple of weeks. Furthermore, it is not as costly as people may think when compared to the fees and commissions involved with creating and administering a trust. Therefore, avoiding probate should not be a major impetus for the creation of a revocable trust over a Will in New York State.

Nevertheless, where an individual has no known heirs, several distantly related heirs, or there are other factors which render a costly probate likely, the revocable trust for probate avoidance may be warranted.

> **Note:** Avoiding probate does *not* automatically mean avoiding a challenge against the trust. Although it is more difficult to challenge the terms of a trust agreement in existence during the grantor's lifetime, it is not impossible. **See** *Matter of the Estate of Davidson*, 177 Misc.2d 928 (Surr. Ct., New York County, 1998)

Furthermore, a revocable trust will not escape a claim for the right of election under EPTL § 5-1.1-A. A revocable trust is considered a testamentary substitute and will be included in the asset base for calculating the elective share. EPTL § 5-1.1-A (b) (1) (F).

> **Caution:** Probate is only avoided when all of the individual's assets are transferred to the trust during his or her life. If any assets remain in the Grantor's name outside of the trust at death, there will still be the necessity of a probate or administration proceeding in the Surrogate's Court.

Practice Note: When counseling a client as to the creation of a revocable trust, the practitioner should review all of the client's assets either through a comprehensive checklist or a questionnaire. Particular attention should be made to how property is held and the lawyering process should include titling assets to the trust.

See EPTL § 7-1.18 with regard to the funding of the revocable trust.

6. Avoidance of Delay and Immediate Distribution: Unlike a Will, there is no proceeding necessary to establish the validity of a revocable trust at the death of the Grantor. A Trustee is free to sell assets, pay bills and even distribute the assets without delay at death. This can be an effective opportunity if assets of the trust are subject to the volatility of the stock market, or otherwise have a risk of loss with delay.

Note: While the assets can be managed immediately, it may not be possible to *distribute* expeditiously. The Trustee of a revocable trust must account to the beneficiaries and the trust must be wound up by judicial proceeding or by agreement. It may be necessary to value assets, estate tax returns may be due, income tax returns due and there may be debts, both known and unknown which must be dealt with prior to the distribution of the trust assets to the beneficiaries.

7. Revocable Trust vs. Durable Power of Attorney: While the two may provide similar advantages, a trust has one important advantage over the durable power of attorney. A durable power of attorney will fail if the agent dies or becomes incapacitated and there is no alternate able to act. A trust will not fail under those circumstances since the Court will appoint a substitute Trustee, even if no alternate is designated.

In addition, an attorney in fact often runs into a problem with banks or other financial institutions accepting the power. Although the failure of a financial institution to honor a duly

executed power of attorney is "deemed unlawful" under NY Gen Oblig. Law § 5-1504, many still will not accept them. Trustees do not seem to run into the same problem with these institutions.

B. DISADVANTAGES:

1. Estate Taxes: A revocable trust will *not* save any estate taxes. Because the trust is revocable**,** the trust corpus will be included in the individual's estate for federal and New York State estate tax purposes under § 2038 of the Internal Revenue Code.

If the trust is structured properly, however, the fact that the trust assets may be included in the gross estate does not mean they will generate a tax. For instance, the trust may include provisions which take effect at death which would in fact save taxes. Such provisions would include those that take advantage of the marital deduction, charitable deduction and applicable credit amount - similar to what may appear in a Will.

Gift Tax There is no gift tax advantage to the trust. Since the grantor has not parted with dominion and control over the assets, there is no completed gift. *Treas. Reg.* § 25.2511-2(c)

A transfer *from* a revocable trust, however, shall be treated as a transfer directly by the grantor and will be treated as a completed gift. § 2035(e). This was clarified by the Taxpayer Relief Act of 1997. Prior to the Act, there was confusion as to whether a transfer from a revocable trust could be brought back into the grantor's estate a la §2035 since the transfer came from a trust in which the grantor reserved a § 2038 power to amend or revoke.

Income Tax There is also no substantive income tax advantages to using a revocable trust. The creator of an revocable trust is treated as the owner of the trust for income tax purposes, and must report all trust income on his or her personal return under the "grantor trust" income tax rules. The trust creator would report on his or her personal return all items of

ordinary income, capital gain and loss recognized in the trust. There is no need to acquire a separate Tax Identification Number for the trust. The grantor's social security number can be used. If the trust is to continue after the grantor's death, however, a separate Tax Identification Number should be obtained.

Practice Note: You can apply for a Tax Identification Number online. Visit www.irs.gov for more information.

The Taxpayer Relief Act of 1997 also created § 645 which allows the trustee of a revocable trust and executor of grantor's estate elect to treat the trust as part of the estate for income tax purposes. Probably the biggest benefit to the new section was the availability of the trust to report income on a fiscal year.

The 1997 Act also opened the door for revocable trusts to use the "65-day rule" allowing distributions in the first 65 days of the following year to be treated as made from the preceding year's income. § 663(b)

2. The Revocable Trust Will Likely Not Save in Legal Fees. The legal fees involved in utilizing a Will or a revocable trust to dispose of the client's assets will be about the same. Both planning tools require thoughtful drafting, careful tax planning, and administration of assets. A revocable trust does, however, avoid filing fees associated with the probate of a will. Compare the settlement of a $600,000 estate to the settlement of a $600,000 trust. The estate generates a filing fee of $ 1,250.00 (SCPA §2402(7)) whereas the trust generates a filing fee of $210 (SCPA §2402(3) (b)).

3. The Revocable Trust Will Not Preserve Assets from Medicaid. There is a misconception by the public that if an individual transfers assets to a revocable trust, she is somehow protecting those assets from exposure to Medicaid in the event she enters a nursing home. This could not be further from the truth. First of all, since the trust is revocable, and the

assets in the trust are readily available to the Grantor, the trust assets continue to be owned by, and therefore, are considered a "resource" of the Grantor in determining Medicaid eligibility. Furthermore, OBRA 1993 introduced the five (5) year (60 month) "look-back" for determining transfers of assets to and from a trust that would incur a penalty period for purposes of Medicaid eligibility. The Deficit Reduction Act of 2005 (DRA) affirmed the 5 year look back period for transfers to trusts and extended it to transfers to individuals.

If the client is seeking advice with regard to long term care planning and Medicaid eligibility, the revocable trust is probably not the best choice. The more appropriate choice is the irrevocable income only trust which serves a much different role in the estate plan.

Right of Recovery There is an apparent advantage to the use of a trust, however, when determining Medicaid *recovery* by DSS. There is a federally mandated right of recovery for medical assistance correctly paid to or on behalf of an individual who was fifty-five (55) years of age or older while receiving assistance. This right of recovery, contained in Social Services Law § 369, is against the estate of the recipient or the estate of the recipient's spouse. What is the definition of "estate"? In Social Services Law § 369(6), estate is defined as "all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy". In other words, "estate" means "probate estate" and does not appear to include testamentary substitutes such as revocable trusts or joint tenancies.

> ***Caution:*** A recent change in regulations which would have made trust assets available for purposes of Medicaid lien recovery was repealed. On September 9, 2011, New York State expanded the definition of *estate* to the mean the probate or intestate estate, as well as any property in which the decedent has any legal title or interest at the time of death, "including such assets conveyed to a survivor, heir, or assign of the decedent through joint tenancy, tenancy-in-common, survivorship, life estate, living trust or other arrangement, to the extent of the decedent's interest in the property immediately prior to death". (18 NYCRR

§360-7.11; NYSDOH 11 ADM-8). Those regulations expired, however, and were eventually repealed by the passage of the New York State Health Budget Bill for 2012-2013 on March 27, 2012. (See also GIS 11 MA/028)

4. **Still Need a Will** The creation and funding of a revocable trust does not eliminate the need for a valid last Will and Testament. The client must sign a corresponding pour-over Will with the trust. There will inevitably be some asset that was not transferred to the trust, making the requirement for the pour over Will necessary. Furthermore, the Will should contain dispositive provisions in the event that the trust does not exist at the client's death.

5. **Beware of the Joint Revocable Trust** It seems like a simple solution. A couple comes to your office to discuss estate planning. You decide that their needs and wishes can be accomplished by a revocable trust. As you discuss the provisions of the trusts with the husband and wife, you realize their wishes are similar. If you were to draft two separate trust documents for the couple, they would be very similar. Plus, the couple owns a lot of assets jointly and it would be a lot of work to sever joint tenancies and create separate property for each. It seems a lot less work to draft one trust - a joint revocable trust.

PROCEED WITH CAUTION

While joint ownership is easy to create and simple to maintain, it can create undesirable estate and gift tax consequences and is virtually useless in the context of Medicaid planning. Furthermore, it is usually not appropriate for a second marriage situation. A joint revocable trust is nothing more than joint property held in trust.

For a couple with a taxable estate, a joint revocable trust could result in higher estate tax. A joint revocable trust with no credit shelter trust provisions will result in the waste of the credit dollars in the first spouse's estate. The result would be a higher gross estate in the surviving spouse's estate. A joint revocable trust *with* credit shelter provisions may have the same result if it cannot be determined whose assets funded the credit shelter trust. If it were deemed that the

surviving spouse's assets funded the first spouse's credit shelter trust, wouldn't those assets be included in surviving spouse's estate if she had a right to income and /or principal of the credit trust?

It is not just estate tax that must be considered. If the joint revocable trust provides for a continuing supplemental needs trust for the surviving spouse, extreme care should be taken to not fund this trust with the surviving spouse's own assets. This may cause the supplemental needs trust to be an available resource if the surviving spouse needs care in the future.

If a joint revocable trust is used, it should be carefully drafted to create separate funds for each spouse. Each spouse's right to amend or revoke should be limited to that spouse's separate share of the trust property. Essentially, a properly drafted joint revocable trust would be two separate revocable trusts within one trust document. Perhaps, it would be easier to draft two (2) separate documents after all.

II. THE CASE FOR THE REVOCABLE TRUST

Revocable trusts have their place in estate planning. Just like any estate planning tool, however, they are not appropriate for every client. Unfortunately, the revocable trust is often the subject of careless estate planning by those relying on pre-printed commercial forms. For a rather critical view of these "loose-leaf" trusts, see *Matter of Pozarny*, 77 Misc.2d 752, 677 N.Y.S.2d 714 (1998).

Drafted carefully, with the client's best interests and objectives in mind, a revocable trust can be just as effective as a Will. Attached is a sample of a revocable trust, with annotated footnotes.

DECLARATION OF TRUST [1]

JOHN CLIENT TRUST [2]

THIS DECLARATION, made the _____ day of November, 2013 by **JOHN H. CLIENT**, of 123 Main St., Syracuse, NY 13202 (hereinafter referred to as "Grantor" and "Trustee");

W I T N E S S E T H :

1. TRUST PROPERTY. The Grantor has this day delivered the property described in Schedule "A", attached hereto, to the Trustee and does hereby transfer ownership of such property.[3] The Trustee agrees to act as Trustee of such assets and to hold, administer and distribute the property, together with all additions thereto and all reinvestments thereof, as the principal of a trust estate for the benefit of Grantor in accordance with the terms and provisions hereinafter set out. Grantor or his attorney-in-fact may add property to the principal of this Trust at any time. It is anticipated that upon the incapacity of the Grantor to handle his financial affairs, the attorney-in-fact will transfer substantially all of the Grantor's remaining assets to this Trust.

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1 Since the abolishment of the merger doctrine, an individual may create a trust with his own assets and act as sole Trustee. If the document establishing such an entity involves only one party, it would not be an agreement, but a declaration. If any other party is acting as Trustee other than the Grantor, then the trust would be created by agreement.

2 It is possible to structure a trust so that it will hold the property of both husband and wife (joint trust). Such an approach has a number of problems. See Section I(B)(5) of the outline.

If the assets of two individuals are both contributed to the trust, what part belongs to each? In the event of the divorce of the couple, wouldn't the concept of separate property be lost?

3 EPTL §3-3.7 authorizes a standby trust to be created, which would be funded in the first instance at the death of the Grantor. EPTL §7-1.18 addresses the funding requirements for a trust. While a standby trust can be created if there is a second party Trustee, it cannot be unfunded if the Grantor acts as sole Trustee. In that case, some funding must occur.

The assets making up the trust should be actually transferred to it. Simply a statement of assets to make up the trust is not sufficient.

2. GRANTOR'S RIGHTS. The Grantor expressly reserves the right at any time upon written notice to the Trustee:

(A) To withdraw all or any part of the principal free and discharged of the terms and conditions of this Declaration and of the Trust except as to terminating commissions if due; such right of withdrawal being personal to Grantor and not exercisable by any court, attorney-in-fact, guardian, conservator or committee; and [4]

(B) To revoke or amend this Declaration,[5] and to alter or terminate the Trust created; provided however that the duties, responsibilities and rate of compensation of a Trustee shall not be altered or modified by such amendment without the written consent of the Trustee. A Trustee may be replaced, however, by an amendment, without cause. At Grantor's death, this trust shall become irrevocable.

3. DISPOSITION.

(A) The Trustee may accumulate, or pay or apply the income of the trust to or for the use of Grantor during his life, or to such persons and in such proportions as the Grantor may from time to time direct.[6] In addition, the Trustee may at any time, in the exercise of absolute discretion, pay from the principal of the trust such amounts as the Trustee may deem advisable to provide adequately for the support, maintenance, education and comfort of the Grantor.

(B) Unless sooner terminated as provided in this Declaration, the trust shall terminate upon the death of the Grantor, and upon his death the remainder shall be paid to those of Grantor's nieces and nephews who survive Grantor, per capita. If no nieces or nephews survive Grantor, then the remainder shall pass to Syracuse University, to be added to its Scholarship Endowment Fund.

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4 Consider limiting the ability to withdraw trust property to the grantor and the trustee. Providing a withdrawal right to an attorney in fact or guardian may result in abuse and unwanted estate tax consequences.

5 If a Trust does not specifically state that it is revocable, then it irrevocable. EPTL §7-1.16.

6 In furtherance of planning for nursing home admission or for other reasons, it may become appropriate for the Grantor to make gifts to his beneficiaries. Since the property in the trust is not in the hands of the agent under a power of attorney, the power cannot be used to carry out the gifting. Some authority should be given to the Trustee, either to carry out the gifting directly, or in the alternative, to transfer property back to the agent, so that gifting can be made through the power of attorney. Make sure the client's durable power of attorney contains gifting provisions and a duly executed and comprehensive statutory gift rider.

(C) If any beneficiary under this Declaration dies within thirty (30) days after Grantor's death, the bequest to that beneficiary shall be divested by his or her death, and that property shall be disposed of pursuant to the provisions of this Declaration as if the beneficiary had not survived.

4. INVESTMENT AND MANAGEMENT.

In addition to the powers conferred upon Trustees by law, the Grantor authorizes the Trustee, in the exercise of absolute discretion, with respect to any property, real or personal, at any time held under any provision of this Declaration, including accumulated income and any stock of any bank or trust company acting in any fiduciary capacity hereunder (or any stock of any corporation which owns any stock of any such bank or trust company), and without authorization by any court:

(A) Retain Trust Estate. To retain for such time as the Trustee may deem advisable, without liability for loss resulting from such retention, the original assets and all additional trust property, although the property so held may not be of the character, type, quality, or diversity prescribed by law or by the terms of this instrument as proper for investment of trust assets, and although such property represents a large percentage or all of the trust estate;

(B) Hold Uninvested Cash and Unproductive Property. For any periods deemed advisable, to hold cash uninvested, even though the total amount so held is disproportionate under trust investment law or would not be permitted without this provision, and to retain or acquire and hold unproductive realty or personalty, except as may be otherwise provided by this Declaration.

(C) Acquire and Allow Use of Unproductive Property. To acquire real property or tangible personal property, such as homes, art work, jewelry, furniture and vehicles, and to allow any beneficiary hereunder the use of such property free of any rental payment, and for so long as the Trustee shall deem appropriate, in the exercise of absolute discretion.

(D) Invest and Acquire. To invest and reinvest trust assets in any type of property or security, including stock market margin accounts, without regard to the proportion that investments of the type selected may bear to the entire trust estate, without limitation to the classes of trust investments authorized by law, and without regard to the possibility that the investment may be in new issues or in new or foreign enterprises. The property acquired may be realty or personalty and may include life insurance, bonds, debentures, leaseholds, options, easements, mortgages, notes, mutual funds, investment trusts, common trust funds, voting trust certificates, and any class of stock or rights to subscribe for stock, regardless of whether the yield rate is high or low or whether or not the new asset produces any income at all. It is intended that the Trustee shall have the authority to act in any manner deemed in the best interest of the trust involved, regarding it as a whole, even though certain investments considered alone might not otherwise be proper.

(E) Exercise Options and Conversion Privileges. To exercise any options, rights and conversion privileges pertaining to any securities held by the Trustee and trust assets.

(F) Sell and Lease. To sell, convey, grant options to purchase, lease, mortgage, transfer, exchange or otherwise dispose of for any purposes and at any time prior to making final distribution, any or all assets of the trust including real property, for prices, upon terms and conditions and in a manner as may be deemed advisable; to execute and deliver deeds, leases, bills of sale, and other instruments of whatever character, and to take or cause to be taken all action deemed necessary or proper in connection therewith.

(G) Lend. On any terms deemed advisable, to lend trust funds to any borrower including, but not limited to, the executor or administrator of Grantor's estate or a beneficiary of any trust, hereunder, and to change the terms of such loans. This authorization includes the power to extend such loans beyond maturity, with or without renewal, and without regard to the existence or value of any security, to facilitate payment of such loans, to change the interest rate thereof, and to consent to the modification of any guaranty relating thereto. Notwithstanding the above, no loan shall be made to the Grantor, except if each such loan is adequately secured and bears interest at prevailing commercial rates.

(H) Borrow. To borrow whatever money the Trustee may deem desirable for any trust on any terms from any lender, including the Trustee and the personal representative of Grantor's estate, and the Trustee or beneficiary of any other trust, by whomsoever created, and to mortgage, pledge or otherwise encumber as security any assets of the borrowing trust.

(I) Change Term or Duration of Obligation. Incident to the exercise of any power, to initiate or change the terms of collection, or of payment of, any debt, security or other obligation of or due to the trust estate, upon any terms and for any period, including a period beyond the duration or termination of any or all trusts.

(J) Compromise or Abandon Claims. Upon whatever terms the Trustee deems advisable, to compromise, adjust, arbitrate, sue, defend, or otherwise deal with any claims, including tax claims, against or in favor of any trust; to abandon any asset the Trustee shall deem of no value or of insufficient value to warrant keeping or protecting; to refrain from paying taxes, assessments or rents, and from repairing or maintaining any asset; and to permit any asset to be lost by tax sale or other proceeding.

(K) Distribute in Cash or in Kind. To distribute any shares in cash or in kind, or partly in each, whether or not pro rata among the beneficiaries and without regard to the income tax basis of specific property allocated to any beneficiary. The Trustee's valuations of assets upon making distribution, if made in good faith, shall be final and binding on all beneficiaries.

(L) Use Nominees. To hold any or all of the trust assets, real or personal, in a Trustee's own name, or in the name of any corporation, partnership or other person as the Trustee nominates for holding the assets, with or without disclosing the fiduciary relationship.

(M) Bid In or Take Over Without Foreclosure. To foreclose any mortgage, to bid in the mortgaged property at the foreclosure sale or acquire it from the mortgagor without foreclosure, and to retain it or dispose of it upon any terms deemed advisable.

(N) Vote Stock. To vote stock for any purpose in person or by proxy, to enter into a voting trust and to participate in corporate activities related to any trust in any capacity permitted by law, including service as an officer or director.

(O) Participate in Reorganizations. To unite with other owners of property similar to any held in trust in carrying out any plan for the consolidation, merger, dissolution, liquidation, foreclosure, lease, sale, incorporation, reincorporation, reorganization or readjustment of the capital or financial structure of any association or corporation in which any trust has a financial structure of any association or corporation in which any trust has financial interest; to serve as a member of any protective committee; to deposit trust securities in accordance with any plan agreed upon; to pay any assessments, expenses or other sums deemed expedient for the protection or furtherance of the interests of the beneficiaries hereunder; and to receive and retain as trust investments any new securities issued pursuant to the plan, even though these securities would not constitute authorized trust investments without this provision.

(P) Purchase Property From Estate. To purchase property, real or personal, from a Grantor's or any other person's estate upon such terms and conditions as to price and terms of payment as the Trustee and the respective representatives shall agree upon; to hold the property so purchased in trust although it may not qualify as an authorized trust investment except for this provision, and to dispose of such property as and when the Trustee may deem advisable.

(Q) Employ Assistants and Agents. To any extent reasonably necessary, to employ attorneys-at-law, accountants, tax specialists, brokers, investment counselors, realtors, managers for business, farms, ranches, groves and forests, technical consultants, attorneys-in-fact, agents and any other consultants and assistants the Trustee deem advisable for the proper administration of the trust estate and to make such payments therefor from income or principal as the Trustee may determine.

(R) Establish and Maintain Reserves. Out of the rents, profits or other gross income received, to set aside and maintain reserves to the extent deemed advisable to meet present or future expenses, including taxes, assessments, insurance premiums, debt amortization, repairs, improvements, depreciation, obsolescence, general maintenance and reasonable compensation for services, including services of professional and other employees or agents, as well as to provide for fluctuations in gross income and to equal or apportion payments for the benefit of beneficiaries entitled to receive income.

(S) Carry Several Trusts as One Estate. To the extent that division of the trust estate is directed by this instrument, to administer the Trust estate physically undivided until actual division becomes necessary to make distributions; to hold, manage, invest and account for whole or fractional trust shares as a single estate, making the division by appropriate entries in the books of account only; and to allocate to each whole or fractional trust share its proportionate part of all receipts and expenses; provided, however, this carrying of several trusts as a single estate shall not defer the vesting in possession of any whole or fractional share of a trust for a beneficiary at the time specified in this Declaration.

(T) Divide Trust. The Trustee may divide the property administered into two or more separate trusts for any reason, using absolute discretion, including the allocation of Grantor's generation skipping tax exemption.

(U) Continuation of Powers. All of the rights, powers, duties, authority, privileges and immunities given to the Trustee by this Declaration shall continue after termination of the trust and until the Trustee shall have made actual payment of distribution of all trust property.

(V) Allocation to Principal/Income. The Trustee, other than a Trustee interested in the trust, shall be authorized to allocate receipts and disbursements of the trust to principal or income as the Trustee shall designate.

(W) Renunciation of Powers. The Trustee, or any single Trustee if there are more than one acting, may renounce or otherwise surrender any power granted such Trustee in this Declaration, including a power to make discretionary distributions to any beneficiary. Such renunciation shall apply only to the Trustee making it. The renunciation must be in writing and delivered to all other acting Trustees and the Grantor (if living). When such a renunciation has been made, the power so surrendered shall not be available to any successor to the Trustee so renouncing. The renunciation shall be effective immediately upon execution by the Trustee.

(X) Termination of Trust. The Trustee may terminate any trust hereunder when its fair market value has declined to the extent that it becomes uneconomical, imprudent or unwise to continue. In such event, the remainder shall be paid to or applied for the benefit of the then income beneficiaries, equally.

5. PROVISIONS FOR MINORS AND INCOMPETENTS

(A) Notwithstanding any of the other provisions of this Declaration, if any trust principal shall at any time be or become payable under any provision of this Declaration to a minor, an incompetent, or person under disability, such property shall vest in absolute ownership in such person, but the Trustee shall be authorized, in the exercise of absolute discretion and without authorization by any court:

(1) To defer payment or distribution of the whole or any part of such property and to hold and invest the whole or the undistributed portion thereof as a separate share for such minor or incompetent with all the powers and authority set forth in this Declaration and to accumulate and invest the whole or any part of any income therefrom with the same powers and authority; and

(2) To pay, distribute or apply the whole or any part of such property or any income therefrom for the care, comfort, maintenance, support (except as otherwise provided herein) education, use or other benefit of such minor or incompetent, or to pay any amount to such person (other than the Grantor) as the Trustee shall designate as custodian for such minor under the Uniform Transfers to Minors Act or Uniform Gifts to Minors Act of any jurisdiction, all without regard to whether or not the same is currently needed, used or applied for the benefit of such minor or incompetent, any balance thereof to be paid or distributed to such minor when such minor reaches the age of twenty-one (21) years or to such incompetent at any time or, the receipt of the person or persons to whom any such payment is so made being a sufficient discharge therefor even though the Trustee may be such person.

(B) Notwithstanding any of the other provisions of this Declaration in which the Grantor authorizes the Trustee to pay or distribute any income to any beneficiary (whether or not a minor or incompetent), the Trustee shall nevertheless be authorized, in the exercise of absolute discretion, to apply the whole or any part of such distribution for the care, comfort, maintenance, support (except as otherwise provided herein), education, use or other benefit of such beneficiary instead of distributing the same to such beneficiary, by making payment or distribution of such income in the manner provided in subparagraph (2) of paragraph "A" of this Article.

(C) Notwithstanding any other provision of this Declaration, no payments, distributions or applications of income or principal shall be made (directly or indirectly) to any beneficiary in satisfaction of any person's legal obligation to support such beneficiary.

(D) The authority conferred upon the Trustee by paragraph "A" of this Article shall be construed as a power only and shall not operate to suspend the power of alienation or the absolute ownership of any property by a minor or incompetent or prevent the absolute vesting thereof in a minor or incompetent.

(E) The Trustee shall be entitled to receive compensation with respect to any property held pursuant to the provisions of paragraph "A" of this Article at the same rates as though the Trustee held such property as a testamentary Trustee.

6. ESTATE TAXES. [7] All estate, inheritance, succession, transfer and other death taxes, including any interest and penalties thereon, but excluding any additional tax imposed by

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7 Consistency is critical in regard to the source of funds from which estate tax would be paid. If this provision is contained in the Grantor's Will, and there is no probate property, the Will might

Chapter 13 (Generation Skipping Transfer Tax) or Section 2032A (Special Use Valuation) of the Internal Revenue Code or corresponding provisions of state law, paid to any domestic or foreign taxing authority, with respect to all property taxable by reason of Grantor's death, whether such taxes be payable by Grantor's estate or any recipient of any such property and whether or not such property passes under this Declaration or Grantor's Will, shall be charged against and paid without apportionment out of the general trust estate; provided, however, that any non-probate property which is included in Grantor's estate for estate tax purposes and which does not pass under this Declaration shall bear its proportionate share of all such taxes to the extent any such property generates a tax by reason of Grantor's death**.** [8]

Any tax (including any interest and penalties thereon) imposed by reason of Chapter 13 or Section 2032A of the Internal Revenue Code or corresponding provisions of state law, with respect to property passing under this Declaration or otherwise, shall be paid out of the property to which such chapter or section applies.

7. CONCERNING THE TRUSTEE.

(A) Alternate Trustee.

(1) BERTHA P. SUBSTITUTE is hereby designated as alternate Trustee, to take office upon a vacancy, or to become Co-Trustee upon determination of the acting Trustee or upon one of the events described below in subparagraph (2). If at any time the office of Trustee is vacant, or if there is no alternate designated and able to act, the current Trustee or Trustees may appoint, in the exercise of absolute discretion, such one or more individuals and/or a bank or trust company to act as Trustee or Trustees.

(2) Upon the happening of whichever of the following events shall first occur, all of the powers and duties, discretionary or otherwise, of the primary Trustee shall vest in and be exercised by the alternate Trustee, without the necessity of judicial intervention:

(a) The voluntary resignation of a Trustee as the primary Trustee, either by personal election or by the election of his agent under a valid power of attorney; or

(b) The determination of a physician, who has primary responsibility for the medical care of the primary Trustee, that the Trustee is unable to handle his financial affairs for any reason; or

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need to be probated in order to trigger the provision. Even if it does, the direction would be better placed in the revocable trust agreement or declaration.

8 In the larger estate, beware of the consequence of charging estate tax attributable to non-probate assets to a general probate estate, or to the assets in the pour-over revocable trust. This language forces the non-probate property to bear its own proportionate estate tax.

(c) A judicial determination that the Trustee is unable to manage his financial affairs; or

(d) Upon the death of the Trustee.

(3) No Trustee, nor alternate Trustee shall be under any duty to institute any inquiry into the possible incapacity of a primary Trustee, but the expense of any such inquiry reasonably instituted may be paid from trust assets.

(4) Any Trustee, or alternate or successor Trustee hereunder, shall possess the presently effective power to receive the Grantor's protected health information and to authorize the disclosure and use of Grantor's protected health information as provided in 45 CFR Part 164 as a Personal Representative of the Grantor, under the Health Insurance Portability and Accountability Act of 1996. [9]

(B) Acceptance. The acceptance of trusteeship by any Trustee not a party to this document shall be evidenced by an instrument in writing delivered to the Grantor, or if deceased, to the legal representatives of Grantor's estate.

(C) Bond. No bond or security of any kind shall be required of any Trustee acting hereunder.

(D) Account. No Trustee acting hereunder shall be under a duty to render a judicial account periodically, or upon resignation, or otherwise, provided, however, that the expenses of any accounting for a resigning Trustee shall be a proper charge against the trust estate.

(E) Charges. The separate trust hereunder shall be chargeable with and may pay without application to any court:

(1) The reasonable expenses of the Trustee in the administration of such trust, including the fees and expenses of such agents, attorneys, accountants and advisors as the Trustee may employ in the administration of such trust; and

(2) Reasonable compensation for the services rendered and responsibilities assumed by each of the Trustees in the administration of such trust.

(F) Resignation. Any Trustee may resign from office without leave of court at any time and for any reason. Such resignation shall be made by instrument in writing, duly

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9 If the Trustee needs to access medical information to determine the Grantor's capacity or to pay the Grantor's medical bills, the Trustee will need authority under HIPAA to act as the Grantor's Personal Representative. See also separate HIPAA release attached to trust.

acknowledged, and delivered in person or by registered mail to the Trustee, or, if there is no Trustee then in office, to each Grantor, if then living, or, if not then living, to the legal representative of the Grantor's estate.

(G) Singular/Plural. Wherever the term "Trustee" is used in this Declaration, it shall be deemed to refer to the Trustee or Trustees acting hereunder from time to time.

8. ALIENATION. No disposition of, or charge or encumbrance on, the income or principal of the trust or any part thereof by any beneficiary under this Declaration, by way of anticipation, shall be valid or in any way binding upon the Trustee, and no beneficiary shall have the right to assign, transfer, encumber or otherwise dispose of such income or principal or any part thereof until the same shall be paid or distributed to such beneficiary by the Trustee. No income or principal or any part thereof shall in any way be liable to any claim of any creditor of any such beneficiary. No court shall order payment of trust property pursuant to New York Estate Powers and Trust Law (EPTL) § 7-1.6 or otherwise. It is the intent of this Declaration that only the Trustee shall determine when, and in what amounts principal or income shall be paid.

9. CHANGES BY WILL. This trust may not be amended or revoked by the provisions of any will or codicil of Grantor pursuant to EPTL § 7-1.17(b).

10. LAWS OF NEW YORK TO CONTROL.

(A) The Grantor is currently a resident of the State of New York, and all questions pertaining to the validity, construction, effect and administration of this Declaration shall be determined by and in accordance with the laws of the State of New York.

(B) The situs of any trust created hereunder may be maintained in any jurisdiction, in the absolute discretion of the Trustee, and thereafter transferred at any time to any other jurisdiction selected by the Trustee. Upon any such transfer of situs, the trust estate may thereafter, at the election of the 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 of any trust created hereunder elects to change the situs of any such trust, the Trustee shall hereby be relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

11. MISCELLANEOUS

(A) Paragraph Headings. The paragraph headings used are for convenience only and shall not be resorted to for interpretation of this trust. Whenever the context so requires, the masculine shall include the feminine or neuter, and vice versa, and the singular shall include the plural and vice versa.

(B) Validity of Provisions. If any portion of this trust is held to be void or unenforceable, the balance of the trust shall nevertheless be carried into effect.

(C) Effective Date. This Declaration and the trust hereby created shall become effective upon the execution of this Declaration by Grantor and a Trustee.

(D) Waiver. The Grantor specifically waives the right to revoke or amend the terms of this Declaration by the terms of Grantor's will, as provided in Estates Powers & Trusts Law Section 7-1.16.

IN WITNESS WHEREOF, the Grantor has executed this Declaration as of the day and year first above written.[10]

_____

John H. Client, Grantor and Trustee

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

On the _____ day of November, 2013 before me, the undersigned, a Notary Public in and for said State, personally appeared JOHN H. CLIENT, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____

Notary Public

10 Effective December 25, 1997 and applicable to lifetime trusts created on or after that date, §7-1.17 sets forth the execution requirement for lifetime trusts. They must be in writing and executed and acknowledged by the grantor and at least one trustee (unless the grantor is the sole trustee) in the manner required for the recording of a conveyance of real property. In lieu thereof, the trust can be witnessed by two witnesses.

[THE FOLLOWING RELEASE MIGHT BE EXECUTED BY THE INITIAL TRUSTEE TO AUTHORIZE MEDICAL PROVIDERS TO COOPERATE IN THE DETERMINATION OF THE TRUSTEES LATER ABILITY TO CONTINUE ACTING]

AUTHORIZATION FOR THE RELEASE OF HEALTH INFORMATION

This authorization form is designed to meet the requirements of federal privacy regulations issued by the Department of Health and Human Services at 42 CFR § 164.508.

All items on this authorization must be completed in full, or the request will not be honored.

I hereby authorize any health plan, physician, health care professional, hospital, clinic, laboratory, pharmacy, medical facility or other health care provider that has provided treatment, payment or services to John H. Client to release the protected health information of:

PATIENT: **JOHN H. CLIENT**

DATE OF BIRTH: **March 18, 1933** PHONE #: **315-456-9643**

ADDRESS: **123 Main St.. Syracuse, NY 13202**

The information is to be released to:

NAME: **KARIN SLOAN DELANEY, ESQ**.

ADDRESS: **100 Madison Street, Syracuse, NY 13202** PHONE #: **315-565-4500**

The information I wish to have released is (include dates of service):

My entire medical file

[NY required information below]
I do X I do not __ wish to have information about HIV/AIDS released under this authorization.

I do X I do not __ wish to have information about drug/alcohol abuse treatment released under this authorization.

If the authorized releasor is in possession of records from another provider, I do X I do not wish to have those records released under this authorization.

The purpose for such disclosure is:

☐ At my request (only patient may check) ☐ Payment/insurance
☐ Healthcare ☐ Employment
☒Other To obtain supporting information, reports and testimony to establish ability of Trustee/Patient to continue acting as Trustee

This authorization will expire: December 31, 2054

I understand:

- This authorization is voluntary.
- My treatment, payment for it and/or eligibility for enrollment or benefits cannot be conditioned on my signing this authorization form.
- I may receive a copy of this form.
- I may inspect my protected health information without signing this form.
- This authorization to disclose information may be revoked by me at any time. except to the extent that action has been taken prior to receipt of revocation.
- To revoke this authorization, I understand that I must notify the release in writing.
- I understand that once information covered by this authorization has been disclosed, redisclosure of the information by that recipient is possible and the information may no longer be protected by the federal regulations referenced above but may be protected by state or other federal law.

_____ November, _____, 2013
John H. Client

If signature is other than patient, explain your authority to act for the patient:

_____ November, _____, 2013
Witness

PROBLEMS/BENEFITS OF THE NEW POWER OF ATTORNEY STATUTE: THREE YEARS LATER

by

JULIEANN CALARESO, ESQ.

Burke & Casserly, P.C.
Albany

Problems/Benefits of the New Power of Attorney Statute: Three Years Later

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New York State's Power of Attorney statute is codified at General Obligations Law, Article 5, Title 15. This law has been in effect since 1964. The New York State Law Revision Commission analyzed law, made recommendations, and proposed and had passed amendments to the law. Effective, September 1, 2009, the new Power of Attorney law was in effect. While the original amendment to the General Obligations Law Article 15 was passed in late January 2009 with an effective date of March 1, 2009, strong lobbying efforts were undertaken to delay effective date. However, even with a delayed effective date pushed from March to September, there remained technical glitches in the law and so technical amendments to the law took effect as of September 12, 2010.

A thorough reading of General Obligations Law, Article 5 is always advisable for any practitioner seeking to familiarize himself or herself with the law before commencing drafting. Then, a terrific place to begin is to download the statutory short form Power of Attorney from the New York State Bar Association website. www.nysba.org. Members can download the form free of charge; non-members have a nominal $20 charge. From these templates, customization of the statutory short form Power of Attorney form and its sibling document, the Statutory Gifts Rider, must be made carefully and with due consideration to the objectives of each particular client.

This customization is specifically permitted under New York law. However, the provisions of General Obligations Law, Article 5 specifies the ways in which this customization this can happen. Before delving into the customization of a statutory short form Power of Attorney and the Statutory Gifts Rider, a practitioner should familiarize oneself with the seminal case that many believe spurred the overhaul of New York's Power of Attorney law, *Matter of Ferrara*, 7 NY3d 244 (2008). A reading of the lower court decisions in *Ferrara* is also instructive as one endeavors to begin customizing a statutory short form Power of Attorney and Statutory Gifts Rider.

Most Notable Change

The most notable change in the "new" Power of Attorney law is the separation of traditional authority designations and the ability of the Agent to make gifts. Formerly referred to as the Statutory Major Gifts Rider under the 2009 law, the Statutory Gifts Rider amended effective September 12, 2010 is a standalone document that, when read together with the Power of Attorney, comprises one document. A Statutory Gifts Rider and the statutory short form Power of Attorney that it supplements must be read together as a single instrument. See General Obligations Law §5-1514(9)(c)-(d). The easiest way for a practitioner who might be reviewing a client's Power of Attorney to see if the Statutory Gifts Rider was executed is to look for two (2) signatures of the Principal – one at the end of the statutory short form Power of Attorney, and another at the end of the Statutory Gifts Rider. This second full signature must be notarized, and two witnesses must have signed. Assuming both signatures are there, the practitioner must then

ensure that initials have been placed earlier in the statutory short form Power of Attorney in Paragraph (h), indicating that the Statutory Gifts Rider will be signed. Absent these strict execution protocols, the Statutory Gifts Rider is not a valid document and the authority of the Agent to engage in gifting or transfers on behalf of the Principal is severely limited. The extent of that limitation can have a dramatically chilling effect on the Agent's ability to engage in estate and long term care planning on the Principal's behalf.

Advantages to Using Statutory Short Form Power of Attorney

General Obligations Law, Article 5 contains the statutory short form Power of Attorney. See General Obligations Law 5-1513. The recommended download from the New York State Bar Association is a statutory short form. While General Obligations Law, Article 5 permits the use of any writing that complies with statutory requirements to serve as a Power of Attorney, there are benefits to using the statutory short form. For example, General Obligations Law §5-1504, which relates to acceptance by third parties, states that there is nothing that requires the acceptance of a form that is not a statutory short form. Practically speaking, a financial institution will be accustomed to seeing and reviewing a statutory short form, so proffering a document that is not a statutory short form may just result in delay or frustration in having to demonstrate to the legal department that it is an acceptable document.

Universal Application of the 2010 Law to All Powers of Attorney Used in New York

Acceptance

The September 12, 2010 law encompasses some provisions that are applicable to **all** Powers of Attorney, regardless of the date the document was executed. For example, General Obligations Law §5-1504 contains the provisions mandating acceptance of a Power of Attorney by third parties. The law states that "No third party located in this state shall refuse without reasonable cause to honor a statutory short form power of attorney properly executed in accordance [with this law] or [one that was] properly executed in accordance with the laws in effect at the time of execution."

Reasonable cause "shall include, but not be limited to: (1) the refusal by the agent to provide an original power of attorney or a copy certified by an attorney…; (2) the third party's good faith referral of the principal and the agent to the local adult protective services unit; (3) actual knowledge of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent; (4) actual knowledge of the principal's death or a reasonable basis for believing the principal has died; (5) actual knowledge of the incapacity of the principal or a reasonable basis for believing that the principal is incapacitated where the power of attorney tendered is a nondurable power of attorney; (6) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed; (7) actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence; (8) actual notice, pursuant to subdivision three of this section, of the termination or revocation of the power of attorney; or (9) the refusal by a title insurance company to underwrite title insurance for a transfer of real property made pursuant to a major gifts rider or non-statutory power of attorney that does not contain express instructions or purposes of the principal." See General Obligations Law §5-1504(1)(a).

Even with this definition of reasonable cause for refusing to honor a Power of Attorney, it is still perfectly acceptable for third parties to require the agent to sign an acknowledged affidavit stating that the power of attorney is still in full force and effect. See General Obligations Law §5-1504(5).

Fiduciary Duties

Another provision of the law now applicable to all Powers of Attorney concerns the Agent's fiduciary duties. General Obligations Law §5-1505 contains the Agent's fiduciary duties. It may be good practice, when a practitioner assists a principal in executing a Power of Attorney, to discuss with the principal whether the Principal intends to have the Agent sign immediately. Regardless of whether the Agent is signing contemporaneously with the Principal, it is important that the Principal and the practitioner discuss who is going to be highlighting to the Agent his or her duties under the document and advise the Agent of the right to seek counsel to explain those rights and obligations.

If a practitioner is counseling an Agent, the Agent must be made aware that the Agent must act with the standard of care "of a prudent person dealing with the property of another." The Agent owes the Principal a fiduciary duty, including the obligation to act according to the Principal's instructions, or in the absence of those instructions, in the best interest of the Principal. The Agent must avoid conflicts of interest. The Agent must keep assets separate. The Agent must keep a record of all receipts, disbursements, and transactions entered into by the Agent on behalf of the Principal and to make such record available at the request of the Principal. In addition, another class of persons may request the records kept by the Agent, including the Monitor (if any), a co-agent or successor agent under the power of attorney; court-appointed person, or the Executor of deceased Principal's estate.

The definition of "best interests" was first embodied in the *Ferrara* case that played in integral part in the new law. *Matter of Ferrara*, 7 NY3d 244 (2008). That case held that "[General Obligations Law] unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal. Nothing in [General Obligations Law] indicates that the best interest requirement is waived when additional language increases the gift amount or expands the potential beneficiaries pursuant to [the law]." *Id*. at 142-143.

Best interests, in the statute as highlighted in this case, were defined to include "minimization of income, estate, inheritance, generation-skipping transfer or gift taxes…In short, the Legislature sought to empower individuals to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives—not to create gift-giving authority generally, and certainly not to supplant a will." *Id*. It is clear that the Agent's mere statement that 'this is what the Principal wanted' or 'I have the authority in the Power of Attorney to do this' is not sufficient to rise to the level of acting in the Principal's best interests.

A recent case highlighted this and further offered support for the need for the amended Power of Attorney law. *Matter of Absolut Care of Three Rivers v. Shah*, 101 AD3d 1327 (3d Dept. 2012), was decided under the prior Power of Attorney law, but demonstrates the abuses sought to be prevented by the enactment of the modified General Obligations Law Article 5. In this case, a woman had executed a Power of Attorney naming her daughter as Agent. The Power of

Attorney permitted the Agent to engage in banking transactions. The Power of Attorney did not authorize gifting. The daughter opened a joint bank account for herself and the principal, her Mother. When the Principal's Mother died, a trust made distributions to Principal. Those distributions went into that newly created joint bank account. The Agent then utilized the authority afforded a joint account holder under the Banking Law and withdrew money. The Court found that the Power of Attorney did grant the Agent/Daughter authority to open the bank account, and that the Agent/Daughter's actions in withdrawing money from that account were done under the authority of the Banking Law and not under the Power of Attorney. In other words, the Agent/Daughter acted as a joint account owner and not as an Agent in making the withdrawals. The Court, in a footnote, does indicate that this type of step transaction would now be impermissible under the September 12, 2010 General Obligations Law, since the establishment of a joint account is a gift for which specific authority under the Statutory Gifts Rider must be granted. [Interestingly, this case was related to Medicaid, in that the local Department of Social Services denied chronic care Medicaid benefits on the Mother's behalf after the nursing home in which the Mother was residing submitted a Medicaid application. DSS deemed those actions of the Agent/Daughter to be transfers of assets. Upon a fair hearing, the denial was upheld and despite the nursing home arguing that the transfers were made for purposes other than to qualify for Medicaid, the determination was upheld through an Article 78.]

While the *Absolut Care* case highlights the potential for misuse and abuse of a fiduciary's authority, it is important to remember that a 6 year statute of limitations applies for violations of one's fiduciary duties. *Matter of Liosis (Hiletzaris)*, 2011 NY Slip Op 51924, 105 AD3d 740 (2d Dept. 2011) investigates whether such statute of limitations can be tolled. In this case, the Agent under a Power of Attorney was also the estate fiduciary. Allegations were raised that the fiduciary lied on the estate accounting. The Court denied summary judgment because triable issues of fact existed as to whether the statute of limitations was tolled.

Notably, there is no requirement that allegations of wrongdoing by the Agent exist prior to the request for an accounting from such Agent. *Kaufman v Kaufman*, 2011 NY Slip Op 32159(U), (Sup. Ct., NY Cty, 2011) stated that "an allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief" (internal citations omitted). "Fundamental to the fiduciary relationship is the duty to account. Such duty extends to an attorney-in-fact acting pursuant to a power of attorney" (internal citations omitted).

HIPAA

In addition to the third party acceptance provisions and the fiduciary duty provisions discussed above, the new law also contains a new expansion and inclusion of HIPAA language expansion and military benefits expansion. The prior law gave an Agent authority with respect to "records, reports and statements." The new law now gives "health care billing and payment matters, records, reports and statements." This new language include access to all records pertaining to health care, in effect serving as a general HIPAA release to the Agent as it relates to health care billing records. See General Obligations Law §5-1502K. Even documents containing the old language now have this expanded coverage included in them.

Litigation and Proceedings Related to Powers of Attorney

Finally, the new law contains provisions concerning litigation that may be commenced about all Powers of Attorneys. General Obligations Law §5-1510 authorizes a special proceeding for the following reasons: if agent fails to turn over a power of attorney or records to an authorized person (see General Obligations Law §5-1510(1)); to determine whether the power of attorney is valid (see General Obligations Law §5-1510(2)(a)); to determine whether the principal had capacity at the time the power of attorney was executed (Uee General Obligations Law §5-1510(2)(b)); to determine whether the power of attorney was procured through duress, fraud or undue influence (see General Obligations Law §5-1510(2)(c)); to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed (see General Obligations Law §5-1510(2)(d)); to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal (see General Obligations Law §5-1510(2)(e)); to remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney (see General Obligations Law §5-1510(2)(f)); to determine how multiple agents must act (see General Obligations Law §5-1510(2)(g)); to construe any provision of a power of attorney (see General Obligations Law §5-1510(2)(h)); and to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance (see General Obligations Law §5-1510(2)(i)).

A special proceeding may also be commenced by an agent who wishes to obtain court approval of his or her resignation. See General Obligations Law §5-1510(2). An Agent (including co-agents and successor agents), the spouse, child or parent of the Principal, the Principal's successor in interest, any third party who may be required to accept a power of attorney, the Monitor, the government entity or official who investigates report of abuse or neglect, a Court Evaluator, *guardian ad litem*, guardian, or personal representative of estate are all permitted to commence the special proceeding. See General Obligations Law §5-1510(3). Notably absent is the principal himself or herself.

The use of this statutory permission for the commencement of lawsuit should not be ignored or disfavored. *Matter of Imre B.R. (I.B.R.),* 40 Misc. 3d 464 (Sup. Ct. Dutchess County 2013), highlighted that the use of the statutory provisions must be pursued before returning to a Court under other provisions of law for relief. In *Imre*, a statutory Power of Attorney was in place for a now-incapacitated Principal. Merrill Lynch refused to honor the Power of Attorney, and so the Agent commenced a limited guardianship under Mental Hygiene Law Article 81. The Court in *Imre* determined that guardianship under Mental Hygiene Law Article 81 is a remedy of last resort. Where an individual, even if incapacitated individual, has a Power of Attorney in place, the law provides mechanisms for compelling the acceptance of that Power of Attorney. "The General Obligations Law provides a remedy to compel Merrill Lynch to accept the power of attorney (§§5-1504[2] and 5-1510([2][i]). Mental Hygiene Law Article 81 requires treating a guardianship as a last resort. In light of the remedy available under the GOL, it would be an inappropriate use of judicial resources to appoint a guardian in this case." *Id*.

Preparation and Execution of the Power of Attorney

These provisions of the 2010 law graft onto **all** Powers of Attorneys these rights, obligations, protections, and duties. And while there are grandfathering provisions protecting the validity of

previously executed Powers of Attorney, the 2010 law makes changes to how a new Power of Attorney must be prepared and executed.

A Power of Attorney prepared after the enactment of the new law must be signed by Principal **and** the Agent(s). See General Obligations Law §5-1501B(1)(b)-(c). If multiple Agents are required to act together (which is the default under the law), both Agents must sign the document in order for it to be effective. In addition, if the Statutory Gifts Rider is to be signed, it must be signed and notarized in front of two (2) witnesses, who are persons over the age of 18 who are not named in the document as agents or alternate agents. It is also advisable that the Monitor not serve as a witness, although the notary of the Principal's signature on the Statutory Gifts Rider may be a witness as well.

Because the Power of Attorney must now have the Agent sign as well as the Principal, the effective date of the Agent's authority to act under the Power of Attorney is the date on which the named Agent signs in front of a notary. The mere lapse in time between the Principal's signing and the Agent's signing does not affect the validity of the document. See General Obligations Law §5-1501B(1)(c). From a practitioner's standpoint, query whether you, as a practitioner, are comfortable assisting the Principal in preparing and executing a Power of Attorney and then holding the original until such time as the Agent will sign. Some dialogues have concluded that this is a means for creating a type of "springing" document. However, from a practical point of view, does the practitioner who holds an original document without an Agent's signature and who later is asked by the Agent for permission to sign take on an additional duty to the Principal to investigate and/or determine whether the Principal might want the Agent to sign?

Powers of Attorney, whether the statutory short form or otherwise, must be typed or printed in at least 12 point font. See General Obligations Law §5-1501B(a). Furthermore, to be considered a statutory short form Power of Attorney, the only changes are permitted to the form are allowed in the modifications section, Part G.

General Obligations Law §5-1501 contains numerous definitions that are help to a practitioner and a Principal in understanding the Power of Attorney. Notably, General Obligations Law §5-1501(2)(c) defines capacity as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney." Similarly, incapacitated is defined "to be without capacity." See General Obligations Law §5-1501(2)(f).

During the duration of the 2009 law, General Obligations Law §5-1501 defined a Statutory Short Form Power of Attorney to mean "a power of attorney that meets the requirements of paragraphs (a), (b) and (c) of subdivision one of section 5-1501B of this title, and that contains the exact wording of the form set forth in section 5-1513 of this title." This requirement of precision meant that even typographical or spacing errors must be carried forward; it resulted in ambiguity as to whether inserting page numbers was a modification of the form, thereby resulting in not having a Statutory Short Form. The modified provision, and the current law under General Obligations Law §5-1501 contains a clarifying phrase, "A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a power of attorney from being deemed a statutory short form power of attorney, but the wording of the

form set forth in section 5-1513 of this title shall govern." See General Obligations Law §5-1501(2)(o).

Any practitioner reviewing the statutory short form Power of Attorney sees that the form now requires the Principal to place his or her initials in multiple places and to sign at the end of both the statutory short form Power of Attorney and supplementing Statutory Gifts Rider, if that document is to be signed. The law does contain, however, some relief for persons of limited physical capabilities. Specifically, General Obligations Law § 5-1501(2)(m), defines what it means to 'sign' a Power of Attorney. Sign "means to place any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise upon an instrument or writing, or to use an electronic signature as that term is defined in subdivision three of section three hundred two of the state technology law, with the intent to execute the instrument, writing or electronic record. In accordance with the requirements of section three hundred seven of the state technology law, a power of attorney or any other instrument executed by the principal or agent that is recordable under the real property law shall not be executed with an electronic signature." Therefore, in situations where it is difficult for the Principal to sign the document using his or her full signature, a mark may be sufficient.

Caution, however, must be taken that, where the Principal can sign a Power of Attorney, that true compliance with the General Obligations Law occur. In *Matter of Marriott*, 86 A.D.3d 943 (4t Dept. 2011), the Principal had signed a valid Power of Attorney but, instead of initialing in the box granting the scope of authority, placed an "X" in the box. Such Power of Attorney was then used by the Agent to convey real property. The Court found that the Power of Attorney itself was void, and hence the real property transaction stemming from its use was void. The statutory short form Power of Attorney in General Obligations Law 5-1513 specifically requires "initialing" the box(es) granting authority, and not marking or checking.

Designation of Authority Given to Agent

In preparing and/or reviewing a Power of Attorney, it is important to understand the scope and extent of the powers that can be granted in the Statutory Short Form document, without the inclusion of a Statutory Gifts Rider. While the Power of Attorney carries forward the letter structure, with the option of initialing only the last letter (Letter P) to select all the powers, it is important to understand that the line following Letter P must have all the letters typed out (A, B, C, D. for example) and not abbreviated (A-D). In addition, initials must be placed in the brackets, and not simply an "X" or check mark. See discussion above and *Matter of Marriott*, supra. Furthermore, while the provision for "banking transactions" might lead one to believe that the addition or removal of a joint owner would be covered under this provision, pursuant to General Obligations Law §5-1502D, that power must now be granted in the Statutory Gift Rider, as it is considered a gift under New York law. Similarly, General Obligations Law §5-1502F deals with insurance transactions, but does not allow the agent to change beneficiary designations. General Obligations Law §5-1502G, dealing with estate transactions, does not include the ability to create or fund trusts, another power that must be granted in the statutory gifts rider.

General Obligations Law §5-1502G is entitled "estate transactions." A recent case, *Matter of Perosi v. LiGreci*, 98 A.D.3d 230 (2d Dept. 2012), evaluated this provision and explored the issue of whether a properly drafted Power of Attorney with Statutory Gifts Rider could be

utilized in an Estates Powers and Trusts Law Section 7-1.9 situation. This provision of law permits an irrevocable trust to be amended or revoked in whole or in part by the creator of the trust with the written consent of all the trust beneficiaries. This case examined whether the Agent under a Power of Attorney can stand in the stead of the Principal to exercise this authority. The Supreme Court held that the creator intended for the Trust to be irrevocable and that the Trust's language did not permit the creator, or his agent, to amend the Trust. Acknowledging that the creator could have amended the Trust pursuant to *EPTL 7-1.9*, the Supreme Court determined that the power of attorney granted the attorney-in-fact no power to amend estate planning devices that were created prior to the execution of a power of attorney. The Supreme Court reasoned that the power of attorney language grants "forward looking" powers, and it is silent as to the restructuring of past estate planning devices (*Perosi v LiGreci, 31 Misc 3d 594, 599, 918 NYS2d 294 [2011]).* The Supreme Court further concluded that the statutory right to amend or revoke an irrevocable trust is a personal right, which, unless the trust or power of attorney states otherwise, may only be exercised by the creator. The Second Department, on appeal, disagreed.

The Appellate Division investigated whether the Power of Attorney, which, in this case, was executed subsequent to the creation of the Trust, empowered the Agent to amend the trust. The Appellate Division rejected the notion that "estate transactions" pursuant to General Obligations Law §5-1502G and "all other matters" pursuant to General Obligations Law §5-1502N vests the Agent with enough power to amend the trust. The Court held that "the amendment of the Trust by the attorney-in-fact, with the consent of all the beneficiaries, was not an act which 'by [its] nature, by public policy, or by contract,' required the creator's personal performance." Consequently, because the creator was alive and had not revoked the Power of Attorney at the time the amendment was executed, the actions of the Agent were within the bounds of her authority.

From a practitioner's perspective, this case requires that the Power of Attorney with Statutory Gifts Rider be drafted very carefully to ensure that the Agent does not rewrite the Principal's estate plan, and that the Principal and Agent understand the extent of the authority. In situations where the trustees of a trust may be different fiduciaries than the Agent, careful consideration must be given to whether vesting the Agent under a Power of Attorney with this modification authority is advisable.

General Obligations Law §5-1502I is entitled "personal and family maintenance" and is a change from the prior law, where it was "Personal relationships and affairs." Included within this provision is the authority to hire and fire attorneys, accountants, and any other assistants needed by agent to help him carry out his duties, and to continue gifts that the principal customarily made to individuals and to charitable organizations prior to the creation of the agency, provided that no person or charitable organization may be the recipient of gifts in any one calendar year which, in the aggregate, exceed $500.

General Obligations Law §5-1502J used to read "benefits from military service" but now reads "benefits from governmental programs or civil or military benefits." This is a very broad authority, allowing the agent to pursue and act on behalf of principal with regard to any payment or claim against a government agency: Medicaid, Medicare, veteran's benefits, federal pension, etc. Therefore, this provision, if initialed, grants authority to the Agent to submit the Medicaid application and re-certification on behalf of the Principal. It does not, however, grant the Agent authority to engage in planning to secure those benefits if the planning encompasses gifting,

retitling of assets, or transfer of assets, even if the transfers are to a spouse. The Statutory Gifts Rider is the document required to grant that gifting authority.

General Obligations Law §5-1502L governs retirement benefits transactions, but does not give the Agent the power to change beneficiary designations, as that authority would need to be granted in the statutory major gifts rider.

Remember, that even though General Obligations Law §5-1502N covers "all other matters," that still does not include health care decisions and does not include the ability to gift beyond the $500 encompassed by General Obligations Law §5-1502I.

Interestingly, despite the Statutory Short Form Power of Attorney containing a Letter "O" permitting delegation of the Agent's authority, there is no statutory section or subsection authorizing the delegation of authority held by an agent to another agent.

In preparing a Power of Attorney, consider inserting some modifications, as appropriate for each client. Some possible modifications include:

Changing the document from durable into nondurable;
Insert provision stating that this new Power of Attorney does revoke all prior powers of attorney, or specify which prior Power of Attorneys are revoked by this document
Define "reasonable compensation," if the client intends to permit Agent to be compensated
Any other provisions that are not otherwise restricted to the statutory gifts rider
Consider a provision stating that authority in modifications section prevails if the authority is in conflict with the authority provided in another section of the power of attorney (only for permissible modifications to the power of attorney)
Consider a provision acknowledging that the agent may have a conflict of interest when acting, and the principal waives the conflict
Additional language for agent to conduct insurance transactions
Ability of agent to act with regard to IRAs, retirement plans, trusts, etc., such as putting it into payout status (remembering that certain actions on the retirement plans, trusts, etc., are considered gifts and therefore authority must also be given in the Statutory Gifts Rider)
Access to safe deposit boxes
Ability to make decisions regarding long term care, residency, maintain/change place of abode, etc.
Additional reimbursement language for expenses advanced by agent on principal's behalf (*i.e.*, mileage, etc.)

The Monitor

Another change in the new Power of Attorney law is the ability to designate a Monitor. This provision allows the principal to appoint a "watchdog" of the Agent. Monitors are permitted to demand an accounting from the Agent and are permitted to have documents/records released to them. They are also a class of persons entitled to commence a lawsuit against the Agent. Interestingly, the statute does not contain a requirement that the Monitor be notified of his or her appointment, nor does the Monitor have to accept such position. See General Obligations Law

§5-1509.

Compensation of the Agent

Compensation of the Agent was not permitted under the prior provisions of the law unless explicitly stated. General Obligations Law §5-1506 contains that restriction, reciting that, absent an express statement affirmatively allowing compensation, the Agent may not be compensated. The Statutory Short Form document now contains, on its face, a provision for allowing for "reasonable compensation." The Principal must initial the box to allow reasonable compensation and while there is no obligation to define it, the Principal may choose to do so in the modifications section of the statutory short form Power of Attorney.

Termination, Revocation, and Resignation

Termination of a Power of Attorney is governed by General Obligations Law §5-1511. A power of attorney terminates when the Principal dies; the Principal becomes incapacitated, if the power of attorney is not durable; the Principal revokes the power of attorney; the Principal revokes the Agent's authority and there is no co-Agent or successor Agent, or no co-Agent or successor Agent who is willing or able to serve; the Agent dies, becomes incapacitated or resigns and there is no co-Agent or successor Agent or no co-Agent or successor Agent who is willing or able to serve; the authority of the Agent terminates and there is no co-Agent or successor Agent or no co-Agent or successor Agent who is willing or able to serve; the purpose of the power of attorney is accomplished; or a court order revokes the power of attorney as provided in section 5-1510 of this title or in section 81.29 of the mental hygiene law.

Pursuant to General Obligations Law §5-1511(2), an Agent's authority terminates when the Principal revokes the Agent's authority; when the Agent dies, becomes incapacitated or resigns; when the Agent's marriage to the Principal is terminated by divorce, annulment or declaration of nullity, unless the power of attorney expressly provides otherwise, but the authority of an Agent is revoked solely by this subdivision, it shall be revived by the Principal's remarriage to the former spouse; or when the power of attorney terminates.

Notice of revocation is accomplished, as it was under the old law, by delivering a written instrument to both the Agent and any third party who may have relied on the document. See General Obligations Law §5-1511(3). A Principal is permitted to revoke a power of attorney in any manner so recited in a Power of Attorney, or by delivering a revocation to the Agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's law known address. See General Obligations Law §5-1511(3). A recorded Power of Attorney must have its revocation also recorded. See General Obligations Law §5-1511(4).

Resignation is governed by General Obligations Law §5-1505(3), and is an affirmative act on the part of the Agent. While the Power of Attorney itself may call for a different mechanism for resignation (see General Obligations Law §5-1505(3)(b)), the standard method for resignation is for an Agent who has signed a power of attorney to give written notice to the Principal and the Agent's co-Agent, Successor Agent or the Monitor if one has been named, or the Principal's Guardian if one has been appointed. See General Obligations Law §5-1505(3)(a).

Compliance with these provisions is vital. *Matter of Fitzsimmons (Hill)*, NY Slip Op 51693, 32 Misc. 3d 1243(A) (N.Y. Sur. Ct. 2011) addressed, as part of a larger case involving use of a Power of Attorney. In that case, the Court held that "in order to establish an effective resignation, however, there must be evidence that [the Agent] gave notice of her resignation to [the Principal] or, if [the Principal] was incapacitated at that time, to a government agency authorized to protect her welfare. Since there is no evidence submitted that [the Agent] did this, the letter dated March 26, 2004 cannot be deemed a resignation of the power of attorney. In addition, there is no evidence in these papers that the power of attorney was otherwise terminated in a manner proscribed by General Obligations Law § 5-1511 prior to decedent's death."

While under the law in effect from 2009 through September 2010, General Obligations Law §5-1511(6), provided that the execution of a new Power of Attorney revoked all prior Powers of Attorney. However, the amendment effective September 12, 2010 provides that "the execution of a power of attorney does not revoke any power of attorney previously executed by the principal." Consider including provisions within the modifications section addressing intended revocation. Whether specifically mentioning the dates of Powers of Attorney previous executed (if known), or a blanket statement revoking prior Powers of Attorney, give due consideration to the specialized powers of attorneys that are often signed at banks and for agencies. Suggested language includes, "This Power of Attorney revokes all general powers of attorney previously executed by me but does not revoke powers of attorney executed for a specific purpose, for a specific financial institution or agency, or for a specific transaction."

The Statutory Gifts Rider

In addition to the need to have two witnesses and the notary of the Principal's signature, and understanding that a Statutory Gifts Rider must be signed simultaneously with a Power of Attorney and is read in conjunction with the Power of Attorney is supplements, the Statutory Gifts Rider has other requirements that must be carefully evaluated and drafted for each individual client.

Understanding that the purpose of the Statutory Gifts Rider is to permit gift giving authority, the preamble to the document clearly warns of the extent and severity of the authority being given by executing the document. The gift giving is divided into three categories: federal gift tax exclusion gifts to a defined class of beneficiaries (not including the Agent), expanded or specified gifts, and gifts of any amount to Agent.

The first portion of the Statutory Gift Rider is Part A, which allows the Agent to make gifts up to the federal annual gift tax exclusion amount ($14,000 for 2013). See General Obligations Law §5-1514(2). This class of persons includes "the Principal's spouse, children and more remote descendents, and parents."

Part B of the Statutory Gifts Rider is actually blank, but permits modifications and insertion of customized gifting language. General Obligations Law §5-1514(3) permits this section of the Statutory Gifts Rider to be modified to permit the Agent to make any gifts over $500 (and gifts under $500 for which there has not been a pattern of gifting) to any person of any amount and to make unlimited gifts (or gifts of a specific amount) to any person or charity.

At a bare minimum, a practitioner should consider inserting the verbatim language contained in

General Obligations Law §5-1514(3)(c), which is the statutory language that defines what is considered a gift under New York law. This language includes:

> opening, modifying or terminating a deposit account in the name of the principal and other joint tenants;
> opening, modifying or terminating any other joint account in the name of the principal and other joint tenants;
> opening, modifying or terminating a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
> opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
> changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
> procuring new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract;
> designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan;
> creating, amending, revoking or terminating an inter vivos trust; and
> opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

Many times, simply by inserting this statutory language in the Power of Attorney, Principals who are carefully reviewing their draft documents will ask questions and be concerned that these actions are considered gifts. Additional modifications can lead to further discussion and dialogue, which can, in turn, ensure that the Principal fully understands the scope of the authority being delegated. Consider some additional modifying language:

> Gifts that are to be made by Agent must be made in my best interest, which includes gift, estate, tax or Medicaid or long term care planning purposes;
> The authority given to my Agent to make gifts in my best interest must be made in conformity with my estate plan as known to my Agent; to enable my Agent to understand my estate plan, I hereby authorize any attorney or law firm in possession of my estate planning documents to release to my Agent, upon written request, copies of any known Last Will & Testament and/or testamentary substitutes;
> A gift or other transfer to an authorized individual may be made outright, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian), or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).

In addition, joinder of a Principal to a Pooled Trust by the Agent through the use of a Power of Attorney requires that the Power of Attorney document contain language specifically permitting the creation and funding of irrevocable trusts. Therefore, consider an explicit provision in both the modifications of the Statutory Short Form Power of Attorney and the Statutory Gifts Rider.

While the participation in a Pooled Trust does not, most often, give the right to designate beneficiaries of the remainder as the funds in a pooled trust subaccount remain in the Pooled Trust upon the death of the applicant, there may be circumstances where the use of a pooled trust or other supplemental needs trust would require the designation of beneficiaries or remaindermen. Therefore, inclusion of provisions authorizing the Agent to enroll the Principal to enroll in a pooled trust or to establish a supplemental needs trust should be granted in both the Power of Attorney and the Gifts Rider.

> My Agent shall have the authority to enroll me in any Pooled Trust for my benefit, or to create and fund any supplemental needs trust, including the designation of beneficiaries or ultimate remaindermen of such trusts

It is also very important that the practitioner discuss with the Principal whether the Principal intends for the Agent to have the authority to self-gift. If so, the Agent is only permitted to make gifts to himself or herself ***only*** if Section (c) of the Statutory Gifts Rider is completed and initialed. Notably, it is required that this section be completed and initialed even if the Agent is only permitted to make annual gift tax exclusion gifts.

Gifting through the Statutory Gifts Rider is only valid if the Statutory Gifts Rider is properly executed. The Statutory Gifts Rider must be dated and signed by the Principal, and acknowledged. Two witnesses must see the signature be affixed. The witness must be two people who are not named as possible recipients of gifts under the document. The form itself includes a statement indicating that these witnesses saw the Principal sign it in front of them and in front of the other witness, meaning that all witnesses must be in one place at one time. Further, the Statutory Gifts Rider must contain the requisite statement of who prepared the document on Principal's behalf. This will provide additional clues as to the parties involved in the document if litigation arises as to capacity or fraud or duress issues arise.

Using a Power of Attorney to Engage in Estate and Long Term Care Planning

Once the power of attorney and statutory major gifts rider are properly signed, consider presenting them to all third parties holding assets of the principal so that the principal/agent can ensure that the third party will accept the documents. Waiting until a crisis arises and the Principal needs the Agent to act before having financial institutions and brokerage houses accept the document adds additional stress to an already difficult situation. Because at a time of crisis, access to funds to pay for Principal's long term care is often necessary, this extra step will enable the Agent and the attorney to ensure that the statutory short form document with Statutory Gifts Rider is accepted.

If you are preparing a Power of Attorney with Statutory Gifts Rider, or if you as a practitioner are presented with a Power of Attorney with Statutory Gifts Rider prepared by another practitioner, take a moment and read it thoroughly, asking yourself whether this document would grant the authority to do all the acts that you would now advise the Agent to do. If not, ascertain whether a new document can be signed. If that is not possible, consider whether the actions you would recommend warrant the commencement of a limited guardianship under Article 81 of the Mental Hygiene Law in order to accomplish those objectives.

Remember, that estate planning and long term care planning often involves the creation of trusts,

the transfer of assets outright to another person or into an existing or newly created trust, severance of joint tenancy, acquisition of a life estate interest in real property, sale of real property, investment in annuity or promissory note, modification of life insurance beneficiary designation or other transfer of death account designation. These are all actions that require explicit permission be granted within the Power of Attorney and/or Statutory Gifts Rider, if applicable. The Power of Attorney and Statutory Gifts Rider must be carefully drafted to ensure that the Agent has the authority needed, so that the Agent can act appropriately.

Another important facet of the Power of Attorney law is what happens when two Agents are named and the Principal either elects to require them to act jointly or the Principal fails to initial the option permitting them to act separately, thereby triggering the statute's default provision that when more than one Agent is named to serve at a given time, all Agents must act together. General Obligations Law §5-1508(1) provides an exception. "[I]f prompt action is required to accomplish a purpose of the power of attorney and to avoid irreparable injury to the Principal's interest and a co-agent is unavailable because of absence, illness or other temporary incapacity, the other co-agent or co-agents may act for the Principal." *Id*. Query what "a purpose of the power of attorney" is, as that is not defined in the statute or case law. While best interests include estate, tax, gift and other planning, it could be argued that those are the purposes of the power of attorney. Therefore, if one of those purposes is needed and a co-agent is not available, a sole co-agent may be able to act under this exception. As of this writing, there are no reported cases addressing this issue. However, it may be wise, if counseling an Agent, to avoid the suspicion that will arise if a co-agent seeks to invoke this provision in acting.

Prior to the 2009 law, the General Obligations Law permitted the preparation of a "springing" Power of Attorney. This power of attorney would come into effect at a later time, as specified in the document. The 2009 law and the September 12, 2010 effective law currently in place, provides that all Powers of Attorney are durable (General Obligations Law §5-1501A), and provides that the authority under a Power of attorney comes into effect the moment the Agent signs the document (General Obligations Law §5-1501B(c)). The mere lapse of time between when the Principal affixes his or her signature and when the Agent affixes his or her signature does not affect the validity of the document. *Id*. However, pursuant to the modifications that can be drafted into the statutory short form Power of Attorney, it is still possible for practitioners to create springing powers of attorney for a Principal. See General Obligations Law §5-1501B(3)(b). As *Matter of Moon v Darrow*, 30 Misc. 3d 187 (Sup. Ct. Delaware Cty, 2010) tells us, the language contained in the document that triggers the authority must be carefully drafted and the compliance with such trigger must be strict.

Finally, even with all the possible powers that a Principal may bestow upon an Agent, an Agent under a properly executed Power of Attorney cannot represent the Principal *pro se* in any matter. Such representation would be considered the Unauthorized Practice of Law in New York. See *Parkchester Preserv. Co., LP v Feldeine, L & T*, 31 Misc. 3d 859 (NY Civ. Ct., Bronx Cty, 2011).

DRAFTING IRREVOCABLE MEDICAID TRUSTS

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DRAFTING IRREVOCABLE MEDICAID TRUSTS

Irrevocable Medicaid Trusts are a valuable tool in the estate and elder law planning arsenal. When properly drafted and administered, these trusts protect the assets while permitting the beneficiary to obtain and maintain qualification for public benefits.

Frequently, seniors will want to protect certain assets for their children or other intended beneficiaries through the use of an irrevocable trust, which would remove the assets placed into the trust from consideration as part of the senior's assets for Medicaid purposes, and would permit the senior to obtain public benefits after any disqualification period has passed.

If the trust provides the Trustee with the discretion or authority to provide principal for the Settlor, then the trust would be available for Medicaid purposes. To avoid having the principal of the trust fund being deemed an available resource, the basic Irrevocable Medicaid Trust usually contains a provision prohibiting the invasion of principal for the Settlor and stating that E.P.T.L. Section 7-1.6 shall not be applicable to the trust.

The advantage of the Irrevocable Medicaid Trust over an outright transfer of the underlying assets is that the funds are segregated and, during the lifetime of the Settlor, protected against the remainderperson's creditors. Moreover, the trust remains in effect during the Settlor's lifetime even if the

remainderperson dies before the Settlor. Furthermore, if the trust provides that the income of the trust must be paid to the Settlor, the Settlor could receive a stream of income during his or her life, and the income would be taxable to the Settlor at the Settlor's income tax rates. Also, if assets in the trust, such as a home, are sold, the proceeds are placed back in the trust and do not revert back to the Settlor. If the Settlor retains the right to income for life, the beneficiaries could receive a step up in basis upon the Settlor's death. Income that is required to be payable to the Settlor or that could be paid to the Settlor, in the Trustee's discretion, is counted as available income for purposes of Medicaid eligibility.

Sometimes the transfer of the home for asset protection purposes is handled by transfer of the property to one's beneficiaries, for example, the children, while keeping a life estate. If a home in which there is a life estate is sold during the life tenant's lifetime, part of the proceeds (based on the life tenant's interest) go back to the life tenant, which could affect any Medicaid planning. Moreover, the children's interest in the home could be subject to claims by their creditors.

Section 369(6) of the Social Services Law was amended in 2011 to expand the list of assets which are considered to be in an individual's estate and upon which Medicaid could make a claim of recovery, to include, inter alia, retained life estates and interests in trusts. That amendment was later repealed.

A. Trust Requirements

There are only a few basic requirements for a trust. The trust must be in writing, executed and acknowledged by the Settlor in the same manner as required for the conveyance of realty or in the presence of two witnesses, who must also sign. (See, EPTL Section 7-1.17[a]). The transfer of assets capable of registration, such as real estate, stocks and bonds, should be actually transferred to the trust by deed (in the case of real estate) and by change of ownership by registration (in the case of stocks and bonds).

If a Settlor establishes an inter vivos trust in favor of the Settlor or his or her spouse, which trust provides for certain payments or interests which would later cease if the Settlor or his or her spouse applies for medical assistance or requires medical, hospital or nursing care or long term custodial, nursing or medical care, that type of "trigger trust" would be considered void as against public policy under E.P.T.L. Section 7-3.1(c). However, this does not preclude the use of a testamentary trigger trust established for the benefit of the Settlor's spouse.

EPTL Section 7-3.1 (c) provides:

> (c) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of

> either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

When drafting an Irrevocable Medicaid Trust, the attorney draftsperson must consider several issues, including Medicaid eligibility rules, income tax, gift tax and estate tax.

B. Medicaid Eligibility Rules

Eligibility for Medicaid benefits is based upon the Medicaid applicant's income and resources. Non-exempt transfers of assets which are without consideration are presumed to have been made for the purpose of qualifying for Medicaid benefits. Transfers are subject to a look-back period, which prior to February of 2006, had been thirty six (36) months for outright transfers and sixty (60) months for transfers to a trust. This was changed by the Deficit Reduction Act of 2005 ("DRA") to sixty (60) months for transfers made on or after February 8, 2006, as described below. The Department of Social Services or Human Resource Administration investigates the applicant's records for the "look-back" period, and the Medicaid case worker reviews the gift history in order to determine the penalty period.

Although there is currently no penalty period for regular Medicaid home care, there is a penalty period for non-exempt transfers when applying for

nursing home care. The penalty period is determined by a mathematical calculation. The penalty period is determined by dividing the value of the assets transferred without consideration by the average monthly regional cost of a nursing home.

The present average monthly regional cost of nursing home care on Long Island (Nassau County and Suffolk County) in 2013 is $12,034.00 per month and for New York City it is $11,350.00 per month. The Department of Social Services or Human Resource Administration calculates the amount of non-exempt transfers made within the look-back period and divides that by the regional cost of a nursing home in order to calculate the disqualification period. Although prior to DRA the penalty period had begun on the first day of the first month following the transfer, DRA changed the start of the penalty period: The commencement of the penalty period is as follows:

> "In the case of a transfer of assets made on or after February 8, 2006, the begin date of the period of ineligibility is the first day of the month after which assets have been transferred for less than fair market value, or the date on which the otherwise eligible individual is receiving nursing facility services for which Medicaid coverage would be available but for the imposition of a transfer penalty, **whichever is later**, and which does not occur during any other penalty period.
>
> Multiple transfers made during the look-back period, including transfers that would otherwise result in a fractional penalty, are accumulated into one total amount to determine the penalty period.
>
> The exceptions to the transfer rules that apply under the OBRA '93 transfer provisions continue to apply to transfers made on or after February 8, 2006, in accordance with the DRA."

See, 06 OMM/ADM-5.

It is imperative that the attorney draftsperson consider the disqualification period when discussing with the client the amount to be placed into the Irrevocable Medicaid Trust, and how the Settlor is to manage financially during any disqualification period.

C. Income Tax

The trustee may obtain a taxpayer identification number through the use of form SS-4, which may be processed over the web at www.irs.gov, through the mail or by fax.

An Irrevocable Medicaid Trust that requires distribution of all income to or for the benefit of the beneficiary each year is considered a "simple trust" for purposes of the federal income tax. The income of a simple trust is taxed to the beneficiary.

Even where the trust provisions do not require that the income be distributed to the grantor, all of the trust income can still be taxed to the grantor if the trust is structured as a "grantor trust."

Although reporting the trust income on the beneficiary's return seems as though it increases income taxes, and although it appears to be counterintuitive, reporting the trust income on the beneficiary's return often reduces the amount of income tax because the maximum income tax rates for

trusts may be reached at a much lower income level than the maximum rates for individuals. Therefore, depending on the income levels, having the trust income reported at the rates applicable to the individual taxpayer may lead to lower taxes.

Any income distributed to a beneficiary flows through the trust for tax purposes and is reported by the beneficiary on his or her own income tax return. The trust's income tax return would show that the income was distributed, and the trust would issue a K-1 form to the beneficiary, who would then report the income.

In 2013, the federal income tax rate of 39.6% is applicable at $11,950.00 for trusts, whereas for a single taxpayer, such income would be taxed at a federal income tax rate of only 15%. The 39.6% tax rate would not apply to a single individual until the single taxpayer reached over $400,000.00 of income.

Single	
Taxable Income (federal tax)	**Tax Rate**
$0 - $8,925	10% of the amount over $0
Over $8,925 - $36,250	$893 plus 15% of the amount over $8,925
Over $36,250 - $87,850	$4,991 plus 25% of the amount over $36,250
Over $87,850 - $183,250	$17,891 plus 28% of the amount over $87,850

Over $183,250 - $398,350	$44,603 plus 33% of the amount over $183,250
Over $398,350 - $400,000	$115,586 plus 35% of the amount over $398,350
Over $400,000	$116,164 plus 39.6% of the amount over $400,000

Estates and Trusts	
Taxable Income (federal tax)	**Tax Rate**
$0 - $2,450	15% of the taxable income
Over $2,450 - $5,700	$367.50 plus 25% of the excess over $2,450
Over $5,700 - $8,750	$1,180 plus 28% of the excess over $5,700
Over $8,750 - $11,950	$2,034 plus 33% of the excess over $8,750
Over $11,950	$3,090 plus 39.6% of the excess over $11,950

If income is retained by a trust and if the trust is not a grantor trust, the trust is taxed at the above rates.

Section 1411 of the Internal Revenue Code imposes an additional 3.8% tax on certain net investment income of individuals, estates and trusts that have income above a statutory amount for tax years beginning in 2013. As of 2013, estates and trusts are also subject to the Net Investment Income Tax if they have undistributed Net Investment Income and also have adjusted gross income over the dollar amount at which the highest tax bracket for an estate or

trust begins for such taxable year. There are special rules for certain types of trusts such as charitable remainder trusts.

Structuring Grantor Trusts

A grantor trust is a type of trust under which the grantor keeps or retains a level of control in the trust which causes him or her to be considered the owner of the trust property for income tax purposes, so that the income would be taxed to the grantor. A list of the grantor trust provisions may be found in Internal Revenue Code Sections 673, 674, 675, 676 and 677. Some of these provisions, such as the power to revoke the trust under Section 675, would not be appropriate for a trust established for Medicaid planning. Some provisions that cause trusts to be considered grantor trusts are as follows:

a. The power to reacquire the trust corpus by substituting property of an equivalent value (Internal Revenue Code Section 675[4]);

b. Where income is distributed to the grantor or the grantor's spouse or held or accumulated for future distributions to the grantor or the grantor's spouse without the approval or consent of an adverse party. (Internal Revenue Code Section 677[a]); or

c. An unrestricted power to remove or substitute trustees and to designate any person, even one related to or subordinate to the grantor, as a replacement trustee. (Internal Revenue Code Section 1.674[d]-[2]).

Capital Gains Exclusion

IRC Section 121 provides that a single taxpayer may exclude up to $250,000.00, or in the case of a married couple, up to $500,000.00 of capital gain from the sale of a personal residence, provided that the taxpayer resided in the home as his or her personal residence for at least two of the preceding five years.

A trust can be structured to preserve the capital gains tax exclusion on the sale of the principal residence. Specifically, if a trust is treated as a grantor trust as to its income and principal under IRC Sections 671 through 679, the grantor will be treated as the continued owner of the residence for purposes of the capital gains tax exclusion.

IRC Regulation 1.121-1c (3) (ii) provides:

> If a residence is owned by a trust, for the period that a taxpayer is treated under sections 671 through 679 (relating to the treatment of grantors and others as substantial owners) as the owner of the trust or the portion of the trust that includes the residence, the taxpayer will be treated as owning the residence for purposes of satisfying the 2-year ownership requirement of section 121, and the sale or exchange by the trust will be treated as if made by the taxpayer.

One way for the grantor to be treated as the owner of the principal is for the grantor to retain certain administrative powers, such as the power to acquire the trust corpus by substituting other property of an equivalent value, as described in IRC Section 675 (4):

> A power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers:
>
> (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control;
>
> (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of stocks or securities of corporations in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; or
>
> (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.

The Net Investment Income Tax will not apply to any amount of gain that is excluded from gross income for regular income tax purposes, such as under Section 121.

D. Gift Tax Consequences

A transfer to the trust that is a completed gift is a transfer of assets for gift tax purposes, and a gift tax return would be filed. However, if the Settlor reserves certain powers to change the disposition, the gift may be incomplete for gift tax purposes.

Internal Revenue Code Regulation 25.2511-2 (c) provides:

> "A gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the

> extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. Thus, if an estate for life is transferred but, by an exercise of power, the estate may be terminated or cut down by the donor to one of less value, and without restriction upon the extent to which the estate may be so cut down, the transfer constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete."

Chief Counsel Memorandum 201208026, released on February 24, 2012, dealt with the retention of a testamentary limited power of appointment by the Settlor of an irrevocable trust. The Settlor of that trust did not retain an inter vivos limited power of appointment. The Chief Counsel Memorandum concluded that the retention of the testamentary limited power of appointment did not render the gift incomplete as the trustees had the discretion to distribute all of the property during the trust term.

Prior to this Chief Counsel Memorandum, the IRS had ruled in Private Letter Ruling 9535008 that the donor's retention of a limited power of appointment made the entire transfer to the trust an incomplete gift.

For the treatment of special powers in the Medicaid context, see, *Verdow v. Sutkowsky*, 209 F.R.D. 309 (N.D. N.Y., 2002); *Ferrugia v. N.Y. State Dept. of Health*, 192 Misc. 2d 709, 747 N.Y.S. 2d 314 (Sup. Ct., Chautauqua County, 2002), appealed, 5 A.D. 3d 1116, 773 N.Y.S. 2d 628 (4th Dep't 2004); reversed, 3 N.Y. 3d 683, 785 N.Y.S. 2d 6 (2004); *Spetz v. New*

York State Dep't. of Health, 190 Misc. 2d 297, 737 N.Y.S. 2d 524 (Sup. Ct., Chautauqua County, 2002), app dism. 302 A.D. 2d 1019, 755 N.Y.S. 2d 674 (App Div 4th Dept 2003).

E. Estate Tax

Under Internal Revenue Code Sections 2036 and 1014, a decedent's gross estate includes the value of property or an interest in property transferred by the decedent, whether in trust or otherwise, if the decedent reserved or retained for his or her life the use, possession, right to income or other enjoyment of the property or the right alone to designate the people who shall possess or enjoy the transferred property or the income. With an Income Only Medicaid Trust, if the Settlor retained the right to income for life, the assets of the trust would be includable in the Settlor's estate for estate tax purposes, leading to the beneficiaries receiving a basis step up.

F. Senior Citizen Tax Exemption

The School Tax Relief (STAR) exemption is pursuant to Real Property Tax Law 425. The Basic STAR exemption provides a partial exemption from school taxes and is available for owner-occupied, primary residences where the combined income of the resident owner and spouse is $500,000.00 or less.

For the 2013-14 school year, the Enhanced STAR exemption is available to seniors, age 65 and older whose combined earnings were less than $79,050 in 2012.

If a Settlor transferred her property into a trust in which the Settlor homeowner retains the right to reside in the property, eligibility for the STAR exemption should not be impacted as long as all other requirements are also met. For STAR purposes, the trust beneficiary, is treated as the property owner and retains STAR eligibility [See, RPT § 425(3)(c)].

Similarly, a transfer of property to a trust in which the Settlor retains the right to reside in the property should not affect Veteran's property tax exemptions.

G. Veteran's Benefits

If the client is or may be entitled to means-tested veteran's benefits, or Improved Pension, whether as a veteran or spouse of a veteran, then consideration as to veteran's benefits may also be applicable when drafting a trust.

A home in which an applicant resides is not counted in determining net worth [38 CFR § 3.275(b)]. A home in which an applicant has retained a life estate and actually resides also is not counted in determining the applicant's net worth for purposes of Improved Pension. [See, VAOPGCPREC 15 – 92, (O.G.C. Prec. 15 – 92)]. However, if the applicant owns a home and does not

reside in such home, the value would be countable in determining the applicant's net worth.

If an applicant for Improved Pension is a beneficiary of an irrevocable trust, if no part of the principal can be used for the applicant, it is not considered available for purposes of determining the applicant's net worth for VA purposes. Notwithstanding that definition, there are General Counsel Opinions such as 72-90, (VAOPGCPREC 72 – 90) 1990, that have been ambiguous regarding the meaning of "funds allocated for the claimant's use." Therefore, one should consider making any distribution of income from an irrevocable trust discretionary, so that the income would not be countable unless actually distributed.

Where an applicant for Improved Pension places assets into a valid irrevocable trust for the benefit of a third party, for example, grandchildren, and where the applicant is not entitled to income or principal, the Veteran's Administration may still take the position that the assets should be considered in determining net worth if the assets indirectly benefit the veteran. The VA Counsel opined that where the veteran is trustee of an irrevocable trust for grandchildren who reside in the veteran's household, if the veteran may benefit from the trust expenditures indirectly, such as if the trust funds are used toward groceries or housing or other items that would be shared by the veteran (even if made on behalf of the grandchildren) a determination would have to be made

as to whether those trust assets would be considered in determining net worth. [See, VAOPGCPREC 73 – 91 (Opinion of General Counsel Prec. 73 – 91)]

The VA also takes the position that assets transferred by an applicant to a supplemental needs trust for his or her benefit could be used for the applicant's care and therefore may be considered in determining net worth. See, VAOPGCPREC 33 – 97, which held:

> Assets transferred by a legally competent claimant, or by the fiduciary of a legally incompetent one, to an irrevocable "living trust" or an estate-planning vehicle of the same nature designed to preserve estate assets by restricting trust expenditures to the claimant's "special needs" which maximizing the use of governmental resources in the care and maintenance of the claimant, should be considered in calculating the claimant's net worth . . ."

If the veteran makes a transfer to supplemental needs trusts created for the benefit of household members, such as disabled children, the VA may take the position that such assets would be counted as part of the veteran's net worth.

Although there is currently no penalty period for transfers with regard to veterans who apply for Improved Pension, there is talk about imposing a penalty period, so any planning should keep that in mind.

E.P.T.L. Section 7-1.9 Revocation of Trusts

E.P.T.L. Section 7-1.9 Revocation of trusts

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustee ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded.

(b) For the purposes of this Section, a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class or persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

IRS Technical Advice Memorandum 9535008 (9/1/95)

IRS Technical Advice Memorandum 9535008 (9/1/95)

The Service has ruled in technical advice that the transfers made by an individual and his spouse to an irrevocable trust are not completed gifts under section 2501.

Date: May 8, 1995

Control No.: TR-32-55-95

ISSUE 1:

Were Taxpayer's and Spouse's transfers to the Trust completed gifts for purposes of section 2501 of the Internal Revenue Code?

ISSUE 2:

Is the Trust a grantor trust for purposes of sections 673 through 679?

FACTS:

In 1991, Taxpayer and Spouse created and funded the Trust. A and B (two individuals) and Foreign Trust Company were designated as the trustees. The Trust is irrevocable.

Article III, Paragraph A of the Trust provides that the trustees are to pay to Taxpayer and Spouse (and the survivor of them) so much of the income and principal of the Trust as the trustees, in their discretion, “think fit.”

During his lifetime, Taxpayer has the power to appoint the property transferred by him to the Trust. The power is exercisable in favor of members of the “Appointed Class,” which consists of family members. Taxpayer cannot appoint the property to himself, his creditors, his estate, or the creditors of his estate. Spouse has an identical lifetime power of appointment over the property transferred by her to the Trust.

Taxpayer also has a testamentary power to appoint the property transferred by him to the Trust. As with the lifetime power of appointment, Taxpayer can exercise the power in favor of anyone in the “Appointed Class.” He cannot appoint the property to himself, his creditors, his estate, or the creditors of his estate. Spouse has an identical testamentary power of appointment over the property transferred by her to the Trust.

THE TRUSTEES' POWERS

The Trust provides the trustees with certain powers pursuant to which the trustees may change virtually every beneficial and administrative provision of the Trust. For example, these powers would permit the trustees to i) revise or terminate any and all of the beneficial interests in the Trust; ii) add new beneficiaries; iii) create new trusts and transfer the Trust property to the new trusts; and iv) form partnerships and companies and transfer the Trust property to those partnerships and companies.

Thus, the trustees' exercise of discretionary powers in administering the trust is virtually unrestricted. (The Trust instrument provides that the trustees are to ignore any court decree relating to the administration of the Trust.) Further, the trustees' discretionary powers extend to the investment of Trust assets and the determination of the country in which the Trust is to be administered.

The trustees are to give reasonable notice to Taxpayer and Spouse before exercising the above trustee powers. Upon exercise of a power by the trustees, Taxpayer and Spouse may each exercise a veto right. Taxpayer and Spouse will possess the veto rights until death, legal disability, or resignation.

LAW AND ANALYSIS:

ISSUE 1:

Section 2501 provides that a tax is imposed for on the transfer of property by gift.

Section 2511 provides that the gift tax shall apply whether the property is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2514(b) provides that the exercise or release of a general power of appointment shall be deemed a transfer of property by the individual possessing such power.

Section 2514(c) provides that the term “general power of appointment” means a power exercisable in favor of the individual possessing the power, the individual's estate, the individual's creditors, or the creditors of the individual's estate.

Section 25.2511-2(c) of the Gift Tax Regulations provides that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title in himself or herself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

Section 25.2511-2(f) provides that the relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by death of the donor, is regarded as the event which completes the gift and causes the gift tax to apply.

Section 25.2514-3(c)(1) provides that the general principles set forth in section 25.2511-2 for determining whether a donor of property (or of a property right or interest) has divested himself or herself of all or any portion of an interest therein to the extent necessary to effect a completed gift are applicable in determining whether the release or exercise of a power of appointment is subject to the gift tax. Thus, if a general power of appointment is partially released so that thereafter the donor may still appoint among a limited class of persons not including himself or herself, the partial release does not effect a

completed gift. Under these circumstances, the possessor of the power has retained the right to designate the ultimate beneficiaries of the property over which he or she holds the power. Since it is only the termination of such control which completes the gift under section 25.2511-2, the partial release is not subject to gift tax under section 2514.

In Estate of Sanford v. Commissioner, 308 U.S. 39 (1939), the taxpayer created a trust for the benefit of named beneficiaries and reserved the power to revoke the trust in whole or in part, and to designate new beneficiaries other than himself. Six years later, in 1919, the taxpayer relinguished his power to revoke the trust. However, the taxpayer continued to retain his right to change the beneficiaries. In 1924, the taxpayer relinquished his right to change the beneficiaries.

In Estate of Sanford, the issue presented to the Court was whether the taxpayer's gift was complete upon i) his creation of the trust, ii) his relinquishment, in 1919, of the right of revocation, or iii) his later relinquishment, in 1924, of the right to change the beneficiaries. The Court held that a donor's gift is not complete, for purposes of the gift tax, when the donor has reserved the power to determine those who would ultimately receive the property. Accordingly, the Court concluded that the taxpayer's gift was complete in 1924, when he relinquished his right to change the beneficiaries of the trust.

Thus, in Estate of Sanford, the Court inferentially found that, even though the taxpayer could not change the terms of the trust for his own benefit, the taxpayer nevertheless continued to possess dominion and control over the trust property by reason of his retained right to change the beneficiaries of the trust. See also, section 25.2511-2(c).

Under section 2514, only the exercise or release of a general power of appointment (rather than a limited power of appointment) is subject to gift tax. However, when a person transfers property and retains a limited power to

appoint the property to others, the person's retention of the limited power of appointment is a retention of dominion and control over the transferred property, for purposes of the gift tax. Consequently, under those circumstances, the person's exercise or relinquishment of the limited power of appointment is subject to the gift tax under section 2511. Section 25.2511-2(f).

In the present case, Taxpayer and Spouse irrevocably transferred property to the Trust. Because all distributions of income and principle are discretionary, Taxpayer and Spouse have not retained a RIGHT to receive the Trust income or principle, (assuming the property is not subject to the rights of their creditors). However, Taxpayer and Spouse have retained limited powers to appoint the Trust property (and accumulated income) to other family members.

By reason of their limited powers of appointment, Taxpayer and Spouse have retained the power to change the beneficiaries of the Trust. Therefore, for purposes of the gift tax, Taxpayer and Spouse continue to possess dominion and control over the property transferred to the Trust, and their irrevocable transfers to the Trust were not completed gifts. Estate of Sanford v. Commissioner, supra; section 25.2511-2(f). Compare, Commissioner v. Vander Weele, 254 F.2d 895 (6th Cir. 1958) and Outwin v. Commissioner, 76 T.C. 153 (1981), in which taxpayers transferred property in trust and, as in the present case, retained the right to discretionary distributions of income and principal. Because, in Vander Weele and Outwin, the taxpayers' creditors could reach the transferred property, the respective courts found that the taxpayers had retained dominion and control over the property and, therefore, the transfers to the trusts were not completed gifts.

Consequently, in the present case, as in Estate of Sanford, a taxable gift will occur at the moment that Taxpayer's power or Spouse's power to change the Trust interests is released or extinguished. For this purpose, it is not necessary for us to determine whether the retained veto rights are viable in light of the Trust requirement that the trustees ignore any court decree. As soon as

Taxpayer or Spouse exercise, relinquish, or otherwise lose the power to change the beneficiaries, there will be a completed gift.

For example, the gift will be complete (and hence taxable) upon the occurrence of any one of the following events: 1) Taxpayer's or Spouse's exercise (to any extent) or relinquishment of (to any extent) his or her power of appointment; 2) any action by the trustees that would effectively terminate Taxpayer's or Spouse's power of appointment with respect to any part of the Trust property (including the trustees' distribution of income or principle to anyone other than Taxpayer and Spouse); and 3) any action or failure to act by the trustees with respect to any part of the Trust property whereupon it is no longer accounted for in the Trust. [1]

CONCLUSION ISSUE 1:

Taxpayer's and Spouse's transfers to the Trust were not completed gifts, for purposes of section 2501, at the time of the transfers to the Trust.

ISSUE 2:

Sections 673 through 679 specify the circumstances under which a grantor of a trust is the owner of a portion of the trust, which may include the entire trust, for federal income tax purposes. When a grantor is the owner of an entire trust, section 1.671-3(a)(1) of the Income Tax Regulations includes in the grantor's income those items of income, deduction, and credits to which the grantor would have been entitled had the trust not been in existence during the period the grantor is the owner of the trust.

Section 677(a) provides that a grantor is the owner of any portion of a trust whose income without the approval or consent of any adverse party is or, in the discretion of the grantor or a nonadverse party, or both, may be (1) distributed to the grantor or the grantor's spouse, (2) held or accumulated for future distribution to the grantor or the grantor's spouse, or (3) applied to the payment

of premiums of policies of insurance on the life of the grantor or the grantor's spouse.

The income distribution power of the trustees in Article III, Paragraph A of the Trust falls within the scope of section 677(a)(1) because the trustees may distribute the Trust income and principal to the grantors (i.e., Taxpayer and Spouse). The exception in section 677(b) does not apply to the Trust because the trustees' power to distribute the Trust income is not limited to satisfying the grantors' legal obligations of support. Further, although either grantor spouse has a veto power over a distribution of the trust income or principal by the trustees, the grantor's spouse is not an “adverse party” under section 677. Section 1.677(a)-1(b)(2) provides:

> [T]he grantor is treated, under section 677, in any taxable year as the owner (whether or not he is treated as an owner under section 674) of a portion of a trust of which the income for the taxable year or for a period not within the exception described in paragraph (e) of this section is, or in the discretion of the grantor, or [the grantor's] spouse, or a nonadverse party, or any combination thereof (without the approval or consent of any adverse party OTHER THAN THE GRANTOR'S SPOUSE), may be:
>
> (i) Distributed to the grantor or the grantor's spouse ... [Emphasis added.]

Therefore, neither grantor spouse is an adverse party when applying section 677(a) to the Trust provision that allows the distribution of the income and principal of the Trust to a spouse of the grantor. Moreover, under section 1.672(a)-1(a), neither the trustees nor the beneficiaries other than the grantors are adverse parties.

Because Article III, Paragraph A of the trust allows the trustees to distribute, without the approval or consent of any adverse party, the trust income and

capital to the grantors, the grantors are the owners of the Trust under section 677.

CONCLUSION ISSUE 2:

The Trust is a grantor trust for income tax purposes.

A copy of this Technical Advice Memorandum should be given to the taxpayer. Section 6110(j) provides that it may not be used or cited as precedent.

[1]

We note that this is NOT intended to be an exclusive list of the occurrences that will result in a completed gift.

IRS Chief Counsel Memorandum 201208026
(9/28/11 released 2/24/12)

IRS Chief Counsel Memorandum 201208026 (9/28/11 released 2/24/12)

Reference(s): IRC Sec(s). 2511 IRC Sec(s). 2503

Number: **201208026**

ISSUES

1. Whether the Donors made completed gifts on transferring property to the Trust.

2. Whether annual exclusions are allowable under I.R.C. § 2503(b) for the withdrawal rights provided in the Trust.

CONCLUSIONS

1. On transferring the property to the Trust, the Donors made completed gifts of the beneficial term interests.

2. The withdrawal rights are unenforceable and illusory. No annual exclusion is allowable under I.R.C. § 2503(b) for the purported withdrawal rights.

FACTS

Donor A and Donor B (Donors) gratuitously transferred property to a trust (Trust) on Date and designated their adult child, Child A, as the sole trustee. The Trust beneficiaries are the Donors' children, other lineal descendants, and their spouses. The Trust will terminate when both Donors have died.

The Trust provisions

The Trust states that it is irrevocable, and that the Donors renounce any power to determine or control the beneficial enjoyment of Trust income or principal. However, the Trust provides the Donors with testamentary limited powers of appointment. If the Donors do not exercise their testamentary powers, the

property remaining in the Trust at termination will be distributed to Child A and Child B.

The trustee, Child A, has absolute and unreviewable discretion in administering the Trust for the benefit of the Donors' children, other lineal descendants, and their spouses (beneficial term interests). Income and principal may be distributed at any time for a beneficiary's health, education, maintenance, support, wedding costs, purchase of a primary residence or business, or for any other purpose. Income and principal may also be distributed to a charitable organization.

Each beneficiary may withdraw an amount of property (based on the § 2503(b) annual exclusion amount) in any year in which a transfer is made to the Trust. However, this may be voided by the trustee for additions made to the Trust.

The Trust provides that the construction, validity, and administration of the Trust are to be determined by State law, but provision is made for Other Forum Rules. Specifically, all questions and disputes concerning the Trust must be submitted to the Other Forum that is charged with enforcing the Trust. A beneficiary filing or participating in a civil proceeding to enforce the Trust will be excluded from any further participation in the Trust.

LAW AND ANALYSIS

ISSUE 1:

The Donors' representative contends that, because the Donors retained testamentary limited powers of appointment over the Trust, they retained dominion and control over the transferred property. Therefore, they did not make any completed gifts.

Section 2501 of the Internal Revenue Code imposes a tax on the transfer of property by gift by any individual. Under § 2502(c), the gift tax imposed under § 2501 is the liability of the donor.

Section 2511 provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(a) provides, in part, that the gift tax is an excise upon the donor's act of making the transfer and is measured by the value of the property passing from the donor.

Section 25.2511-2(b) provides, in part, that as to any property or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, the gift is complete.

Section 25.2511-2(b) further provides, in part, that, if upon a transfer of property the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-2(c) provides, in part, that a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves (unless the power is a fiduciary power limited by a fixed or ascertainable standard). The relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event that completes the gift and causes the tax to apply.

In Chanler v. Kelsey, 205 U.S. 466 (1907), the Supreme Court considered, in part, the legal interest that is subject to a testamentary power of appointment. In that case, a grantor created a trust providing a lifetime income interest for his daughter. The trust also provided the daughter with a testamentary limited power to appoint the trust property. If she failed to exercise the power when she died, the trust property was to be distributed to designated persons. The

Court held that, for New York inheritance tax purposes, the daughter's execution of her testamentary power was considered “the source of title” to the remainder. As the holder of a testamentary power of appointment, she controlled the remainder passing at her death. See 205 U.S. at 474.

Though it predates the enactment of the gift tax, the Chanler opinion supports the proposition that a testamentary power of appointment relates to the remainder of a trust, not the preceding beneficial term interests. The testamentary power does not (and cannot) affect the trust beneficiaries' rights and interests in the property during the trust term. Rather, a trustee with complete discretion to distribute income and principal to the term beneficiaries may, in exercising his discretion, distribute some or all of the trust property during the trust term. The holder of a testamentary power has no authority to control or alter these distributions because his power relates only to the remainder, i.e., the property that will still be in the trust when the beneficial term interests are terminated. See Bowe-Parker, Page on the Law of Wills § 45.12 (1962). See also Bittker and Lokken, Federal Taxation of Income, Estate and Gifts ¶ 226.6.7 (2011); Howard M. Zaritsky, Tax Planning for Family Wealth Transfers (4 ed. 2011 Cum. Supp. No. 2) ¶ 3.03[1].

From the time the gift tax was enacted, taxpayers have contested the issue of when a donor parts with dominion and control so as to make a completed gift. For example, in Sanford's Estate v. Commissioner, 308 U.S. 39 (1939), the grantor, in 1913, transferred property to a trust for others. He reserved (i) a revocation power exercisable at any time during his life to retrieve the property and thereby terminate every beneficial interest; and (ii) a modification power exercisable at any time during his life to terminate or change every beneficial interest. In 1919, the grantor relinquished his revocation power, but he retained his modification power. In 1924, he relinquished his modification power. The Court held that notwithstanding the grantor's creation of the trust and relinquishment of his revocation power, he retained dominion and control over the disposition of the trust property until he renounced his power to modify the trust. Consequently, the grantor made a taxable gift in 1924 when he

relinquished his modification power. See Burnett v. Guggenheim, 288 U.S. 280 (1933).

Following Sanford's Estate, the Supreme Court considered various situations in which a trust instrument purported to divest the respective grantor of all dominion and control over property to the extent that the property could not be returned to the grantor except by reason of contingencies beyond his control. In these cases, the Court noted that the respective grantor lost all economic control upon making the transfer, which he would not regain unless certain contingencies occurred. The Court concluded that the respective gifts were complete except for the value of the retained rights. Smith v. Shaughnessy, 318 U.S. 176 (1943); Robinette v. Helvering, 318 U.S. 184 (1943); Estate of Kolb v. Commissioner, 5 T.C. 588 (1945). See § 25.2511-2(c).

Consistent with Chanler v. Kelsey, the Service has maintained in litigation that a power holder's testamentary limited power of appointment relates only to the remainder of the respective trust. See Poinier v. Commissioner, 858 F.2d 917 (3d Cir. 1988) (testamentary power holder's renunciation of her power relates to the remainder), aff'g 86 T.C. 478 (1986). See also Robinson v. Commissioner, 675 F.2d 774 (5 Cir. 1982) (grantor's power to change the beneficiaries who would receive trust property when her lifetime income interest terminated constituted a gift of the remainder), aff'g 75 T.C. 346 (1980). See Smith v. Shaughnessy, supra (right to receive income during the trust term and testamentary power to appoint the remainder are separate and severable interests).

In the case at hand, when each Donor transferred property to the Trust on Date, he or she retained a testamentary limited power to appoint so much of it as would still be in the Trust at his or her death.[1] The Trust emphasizes that the Donors do not retain any powers or rights to affect the beneficial term interests of their children, other issue, and their spouses (and charities) during the Trust term. With respect to those interests, the Donors fully divested themselves of dominion and control of the property when they transferred the property to the

Trust on Date. Indeed, during the period extending from the creation of the Trust until the Donors' deaths, the trustee, Child A, has sole and unquestionable discretion to distribute income and principal to the beneficial term interests. He may even terminate the Trust by distributing all of the property.

Accordingly, for gift tax purposes, the Donors' transfers to the Trust constituted a completed gift of the beneficial term interests. The Donors' testamentary limited powers of appointment relate only to the Trust remainder. Their relinquishment of their testamentary powers during the Trust term would affect only the ultimate disposition of the remainder and, as such, would constitute a transfer of the remainder. Bittker and Lokken, Federal Taxation of Income, Estates and Gifts ¶ 126.6.7 (2011).

ISSUE 2:

The Donors' representative contends that, if the Donors made completed gifts on Date, the gifts were of minority interests to the beneficiaries equal in value to their respective withdrawal rights (Crummey Powers). Therefore, the gift tax exclusions allowable under § 2503(b) effectively reduced the amount of taxable gifts to zero.

The withdrawal rights are not legally enforceable and thus are not present interests

Section 2503(a) provides, in part, that the term “taxable gifts” means the total amount of gifts made during the calendar year.

Section 2503(b) provides, in part, that in the case of gifts (other than gifts of future interests in property) made to any person during the calendar year, the first $10,000 of such gifts to such person shall not, for purposes of § 2503(a), be included in the total amount of gifts made during such year.

Section 25.2503-3(a) provides, in part, that no part of the value of a gift of a future interest may be excluded in determining the total amount of gifts. An unrestricted right to the immediate use, possession, or enjoyment of property or the income from property is a present interest in property.

To be a present interest, a withdrawal right must be legally enforceable. For example, if a trust provides for withdrawal rights, and the trustee refuses to comply with a beneficiary's withdrawal demand, the beneficiary must be able to go before a state court to enforce it. See Cristofani v. Commissioner, 97 T.C. 74 (1991); Restatement of the Law of Trusts § 197 (Nature of Remedies of Beneficiary); Bogert, Trusts and Trustees Vol. 41, § 861 (Remedies of the Beneficiary and Trustee).

As a matter of public policy, the federal courts are the proper venue for determining an individual's federal tax status, and the federal courts are not bound by the determinations of a private forum (such as Other Forum) concerning such status. Alford v. United States, 116 F.3d 334 (8 Cir. 1997). Likewise, as a matter of public policy, a State court will not take judicial notice of a private forum's (or group's or sect's) construction and determination of State law pertaining to a trust agreement, such as the Trust in this case. Cite 2. These determinations are strictly within the purview of the State courts. Cite 3; Cite 4.

Under State law, a trust clause may prohibit a beneficiary from seeking civil redress. Cite 5. Although the State legislature made a public policy decision to allow a beneficiary to make certain inquiries without fear of risking forfeiture, these “safe harbors” are not relevant here. Cite 6.

Under the terms of the Trust in this case, a beneficiary cannot enforce his withdrawal right in a State court. He may only press his demand before an Other Forum and be subject to the Other Forum's Rules. Notwithstanding any provisions in the Trust to the contrary, the Other Forum will not recognize State or federal law. If the beneficiary proceeds to a State court, his existing

right to income and/or principal for his health, education, maintenance and support will immediately terminate. He will not receive any income or principal for his marriage, to buy a home or business, to enter a trade, or for any other purpose. He will not have withdrawal rights in the future, and his contingent inheritance rights will be extinguished. Thus, a beneficiary faces dire consequences if he seeks legal redress. As a practical matter, a beneficiary is foreclosed from enforcing his withdrawal right in a State court of law or equity.

Withdrawal rights such as these are not the legally enforceable rights necessary to constitute a present interest. Because the threat of severe economic punishment looms over any beneficiary contemplating a civil enforcement suit, the withdrawal rights are illusory. Consequently, no annual exclusion under § 2503(b) is allowable for any of the withdrawal rights. See Rev. Rul. 85-24, 1985-1 C.B. 329; Rev. Rul. 81-7, 1981-1 C.B. 474.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

It is our belief that § 2702 applies in valuing the gifts in this case. Section 2702 provides special valuation rules with respect to transfers of interests in trusts. Generally, under § 2702(a)(2), the value of any retained interest which is not a qualified interest shall be treated as being zero. Section 25.2702-2(a)(4) provides that an interest in trust includes a power with respect to a trust if the existence of the power would cause any portion of a transfer to be treated as an incomplete gift. Accordingly, under § 25.2702-2(a)(4), the Donors' retained testamentary powers are interests, and the value of their retained interests is zero. Therefore, the value of the Donors' gift is the full value of the transferred property.

If additions were made to the Trust, annual exclusions are not allowable for withdrawal rights relating to the additions because the trustee can void those rights after an addition is made. Section 25.2503-3(c), Example (1) and Example (3).

Please note, however, that our belief in this regard carries certain hazards to the extent further study is required. Should you wish to pursue this argument, please coordinate with the National Office.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Deborah S. Ryan at (202) 622-4045 if you have any further questions.

Sincerely,

Associate Chief Counsel

(Passthroughs & Special Industries)

By: Leslie H. Finlow

Senior Technician Reviewer, Branch 4

Office of Associate Chief Counsel

(Passthroughs & Special Industries)

[1]

We note that the Trust has conflicting provisions. In one provision, the Donors emphatically renounce any power to determine or control the beneficial enjoyment of the Trust, but other provisions state that the Donors have testamentary limited powers of appointment. Under State law, generally, if two provisions conflict and cannot be reconciled, the latter provision is considered to indicate the grantor's subsequent intention, and that provision prevails. That is the rule unless the general scope of the trust leads to a contrary conclusion.

Cite 1. We believe that the highest court of State would conclude that the Donors intended to retain the testamentary limited powers and, thus, did so.

Insurance

Insurance

If property is transferred to a trust, or to anyone for that matter, the homeowner's insurance should be updated to reflect the new ownership. Also, consideration should be given to updating title insurance as well. Moreover, if the home is to be unoccupied, the insurance policy should be updated to reflect that.

Some Sample Trust Clauses

Some Sample Trust Clauses

Distributions of Income to Settlor.

(a) The Trustees shall pay the Settlor the net income of the trust at least annually during the Settlor's lifetime. Moreover, the Settlor shall retain the right to live in any residential property, condominium or cooperative apartment while it is owned by the trust without the payment of any rent. In the event that any interest in residential property (and contents thereof), whether real property, a condominium or a cooperative apartment, shall form a part of the principal of this Trust, then in addition to the other powers and authorities given the Trustees hereunder, including the power to sell, the Settlor authorizes and empowers the Trustees to continue to hold the same for such period of time as the Trustees, exercising absolute discretion, may deem same necessary or desirable.

(b) The Trustees are further authorized and empowered to sell any such residential property and to purchase other suitable residential property, whether a house, cooperative apartment, condominium apartment or otherwise, for equivalent use by the Settlor and this provision shall not be limited by the repeated exercise thereof. In all matters regarding continued use of such residential property, it is the Settlor's intention that the Trustees shall give great weight to the wishes and needs of the Settlor.

(c) Notwithstanding the provisions of EPTL 7-1.6, no distributions of principal shall be made to the Settlor.

Consider: permitting distribution of principal to children;

Disposition Upon The Settlor's Death.

Upon the death of the Settlor, the balance of the trust, including the remaining principal and undistributed income shall be distributed to the Settlor's children, DARCY DAUGHTER, KEVIN CLIENT, CLAIRE CLIENT, and KENT CLIENT, per capita.

Consider: Per capita rather than per stirpes
Consider: special power of appointment

Consider: E.P.T.L. Section 7-1.9

Consider adding to your general powers.

The situs of the property of this trust may be maintained in any jurisdiction. The Trustees may transfer the situs of this trust at any time to any jurisdiction. Upon any such transfer of situs, the Trustees may elect to have the trust be administered under the laws of the jurisdiction to which it is transferred.

Considering adding:

Right of Substitution.

The Settlor retains the right to reacquire the principal of this trust by substituting property of an equivalent value therefor.

Consider a Trust Protector:

My Trust Protector may remove any Trustee of a trust created under this agreement.

If the office of Trustee of a trust is vacant and no successor Trustee is designated, my Trust Protector may appoint an individual or a corporate fiduciary to serve as Trustee.

A Trust Protector may not appoint itself as a Trustee and a Trust Protector may not simultaneously serve as both Trust Protector and Trustee. Moreover, the Trust Protector may not appoint the Settlor as Trustee. Under no circumstances shall the Settlor serve as Trustee hereunder.

My Trust Protector may, at any time, change the governing law of the trust, remove all or any part of the property or the situs of administration of the trust from one jurisdiction to another, or both. My Trust Protector may elect, by filing an instrument with the trust records, that the trust will thereafter be construed, regulated and governed as to administration by the laws of the new jurisdiction. If necessary, or if deemed advisable by my Trust Protector, my Trust Protector may appoint an Independent Trustee to serve as trustee in the new situs.

The above sample trust clauses are not intended to be a sample form trust for the use of any particular individual or individuals and should not be relied upon for estate planning, gift tax planning, estate tax planning or Medicaid planning purposes. The rules and laws pertaining to estate tax, gift tax and Medicaid eligibility are complicated and are often changing, and each individual's particular situation is unique. When a trust is prepared, it should be tailored for the individual's unique situation.

STAR EXEMPTION

Special STAR Eligibility Rules for Seniors, Residents of Cooperative Apartments, Manufactured Home Parks, Surviving spouses, Nursing Homes, Trusts and Life Estates

Seniors - If you're an Enhanced STAR recipient and your local government or school district offer a partial property tax exemption for seniors with limited incomes, you may be eligible for both exemptions. Seniors who receive the Senior Citizens Exemption automatically qualify for Enhanced STAR. As a result, they only need to submit the RP-467 Application for Partial Tax Exemption for Real Property of Senior Citizens to the assessor, and if qualified they will receive both the Senior Citizens and Enhanced STAR exemptions.

Cooperative apartments and manufactured home parks - If you reside in this type of property, file a STAR application with your local assessor.

Administering STAR in Cooperative Apartments
Administering STAR in Manufactured Housing Communities

Surviving spouses - You can retain an existing Enhanced STAR exemption if you're at least 62 years old as of December 31 in the year the exemption will continue. Otherwise, you may receive the Basic STAR exemption.

Nursing home residents - If you own your home, you're eligible for Basic or Enhanced STAR, as long as no one other than the co-owner(s) or spouse resides there.

Trusts - If you're a trust beneficiary who conveyed your home to trustees but continue to live in it, you get the STAR benefit. For example, a senior creates a trust and conveys her home to her children as trustees. If she remains in the home as the beneficiary of the trust, she is considered the homeowner and gets the STAR benefit.

Life estates - Under a life estate, one party has a "life tenancy" (ownership for the rest of his or her life) and another party will become the owner after the life tenant dies. For exemption purposes, the life tenant is deemed to own the property; so STAR eligibility is based on the life tenant's qualifications.

***The New York State* Department of Taxation and Finance**
Updated: January 04, 2012

SHARON KOVACS GRUER, P.C.

ATTORNEYS AT LAW

Sharon Kovacs Gruer, Esq. focuses her practice in the areas of elder law, special needs, tax, estate planning and asset protection. Ms. Gruer holds a masters of law in taxation (LL.M.) from New York University, is certified as an elder law attorney by the American Bar Association's accredited National Elder Law Foundation*, is a past Chair of the Elder Law Section of the New York State Bar Association and is on the Board of Directors of the National Academy of Elder Law Attorneys. Ms. Gruer is the past president of the Great Neck Lawyers Association and is the past chairperson of the Nassau County Bar Association Taxation Committee. Ms. Gruer has practiced law for twenty-seven years and is certified as a mediator by the New York State Supreme Court Commercial Division.

*Certified by the American Bar Association approved National Elder Law Foundation. The National Elder Law Foundation is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.

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MISCELLANEOUS DRAFTING ISSUES: PROMISSORY NOTES, ANNUITIES, CARE GIVER CONTRACTS

by

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New York City

and

JOSEPH A. ROSENBERG, ESQ.

ADVANCED DOCUMENT DRAFTING FOR ELDER LAW PRACTITIONERS

Miscellaneous Drafting Issues:

Promissory Notes, Annuities, Care Giver Contracts

New York Elder Law by David Goldfarb and Joseph A. Rosenberg, (Lexis/Matthew Bender 2013)

Excerpts from: CHAPTER 8 Medicaid: Transfer of Assets, Liens and Estate Recovery

§ 8.02 Medicaid Eligibility and Outright Transfers of Assets

[1] Federal and New York Law Governing Transfer of Assets

[a] Imposition of a Penalty Period

***

No penalty period is imposed on transfers made for full and adequate consideration (e.g., sale of an asset for fair market value).[19]

Under DRA '05, the purchase of an annuity is treated as a transfer for less than fair market value, unless the annuity meets the following criteria: (1) it names the State as the first remainder beneficiary for at least the total amount of medical assistance paid on behalf of the institutionalized individual or the second remainder beneficiary after a community spouse or minor or disabled child;[20] (2) it is irrevocable and nonassignable; (3) is actuarially sound; (4) it provides for equal payments during the term with no deferral or balloon payment.[21] For a sample annuity see Form 8.206, *below*. The provisions (2) through (4) do not apply to annuitizing certain qualified retirement plans, an IRA or a Roth IRA.[22]

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[19] SSL § 366(5)(d)(3).

[20] 42 USC § 1396p(c)(1)(F); SSL § 366(5)(e)(3)(i). The state statute does not reflect the technical correction in the federal law and still references only "medical assistance paid on behalf of the annuitant" rather than "medical assistance paid on behalf of the institutionalized individual."

[21] 42 USC § 1396p(c)(1)(G). Actuarially sound will be determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration. SSL § 366(5)(e)(3)(i). Tables are attached to GIS 12 MA/025 (10/01/2012).

[22] 42 USC § 1396p(c)(1)(G)(i)(I) and (c)(1)(G)(i)(II); SSL § 366(5)(e)(3)(i).

Caution:

If annuitizing a retirement plan, make sure that it falls under the Internal Revenue Code sections listed in the statute. Even so, the restrictions in (1) above—naming the state as a remainder beneficiary—may apply, if under the plan there are remainder beneficiaries after the annuitant or his spouse.[23]

New York implementing legislation provides that for nursing facility services an application or recertification shall disclose any interest the individual or community spouse has in an annuity or similar financial instrument and include a statement that the state becomes a remainder beneficiary.[24]

The transfer of assets under DRA '05 includes funds used to purchase a promissory note, loan or mortgage unless the note, loan or mortgage: (1) has a repayment term that is actuarially sound; (2) has equal repayments during the term of the loan, with no deferral or balloon payments; (3) prohibits cancellation upon death of the lender.[25] For a sample promissory note see Form 8.208, *below*. However, a promissory note may not be considered to be for fair market value where there is no reasonable expectation that it will be paid back.[26]

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[2] Exempt Transfers

[d] Personal Service Contracts

Funds paid to a care provider, including a friend or relative, may be considered "a transfer for fair market value or other valuable consideration" if the compensation is reasonable and in accord with the fair market value of the services. The parties should take into consideration in arriving at this compensation the cost in the community of the services to be provided including the average compensation for court-appointed guardians, geriatric care managers, and for providers of personal needs services. The parties should considered the average number of hours for each type of service to be provided. Consider which services will be provided and which services the care provider will merely arrange to provide (such as home attendant services) with the recipient's funds. Retain the basis for the compensation calculation in case the Medicaid agency challenges the contract as an uncompensated transfer of assets.

The local Medicaid agency is more likely to treat the funds as a compensated transfer if the payments were done for services provided on a weekly or monthly basis. However, a lump sum payment for an actuarially sound lifetime contract based on the life expectancy of the person receiving the care, may also be considered "for fair market value or other valuable consideration." The parties should take into consideration in arriving at this lump sum compensation the age and life expectancy of the care

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[23] *But see* Matter of Entz, Index No. 2009-10454 (Sup. Ct Monroe County March 9, 2010) (court found that there is no requirement that an IRA owned annuity must name the state as a beneficiary).

[24] SSL § 366-a(10), *added by* 2006 N.Y. Laws 57 § 50-b.

[25] 42 USC § 1396p(c)(1)(I). Actuarially sound will be determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration. SSL § 366(5)(e)(3)(iii). Tables are attached to GIS 12 MA/025 (10/01/2012).

[26] Matter of G.F., FH # 5013919Q (Suffolk County, 10/28/2008) (penalty upheld where son gave promissory note that otherwise met the criteria under DRA '05 in return for joint interest in homestead, but no payments were ever made, there was no evidence of payment demand, no litigation was commenced, and applicant/recipient entered a nursing home and applied for Medicaid based on hardship due to his inability to receive income from the note).

recipient. However, a personal service contract that does not provide for the return of any lump sum payment if the care provider becomes unable to fulfill her duties under the contract, or if the applicant/recipient dies before her calculated life expectancy, will be treated as a transfer of assets for less than fair market value.[59] Also, no credit is allowed for services that are provided as part of the Medicaid nursing home rate.[60] The district will evaluate services based on credible documentation, such as a log book. Credit is given for services actually provided, based on the fair market value of the services performed.[61]

For a sample Personal Services Care Contract see Form 8.207, *below*.

In *Delaware County Department of Social Services v. Pontonero*,[62] a niece and attorney-in-fact for an applicant/recipient claimed the transfer of a mortgage to herself six months before applicant/recipient entered a nursing home was not a transfer of assets, but for in consideration of the past care and housing that she had provided to the applicant/recipient and her husband. In allowing the local agency to reopen the Medicaid acceptance the court found that there were questions of fact as to whether the mortgage transfer effectuated by the niece was fraudulent.

In *Matter of Barbato v. New York State Dep't of Health*,[63] the court found Personal Service Contracts to be transfers for less than fair market value because (1) where services were to be provided "as needed" there is no basis to determine the fair value of the services; (2) the absence of a refund provision if the applicant/recipient fails to meet her life expectancy renders the services not for fair market value; and (3) services provided by caregivers that are duplicative of services afforded by a nursing facility in which the applicant/recipient resides are non-compensable. However the court did allow calculation of the fair market value of the non-duplicative services which were performed. *Stern v. Daines*[64] followed *Barbato*, and remanded the case to the local agency solely for the purpose of re-evaluating the value of any services actually received from the date of the Personal Services until the Medicaid eligibility determination. Likewise in *Matter of Kerner v Monroe County Dept. of Human Servs.*,[65] the court remanded for an opportunity to identify with reasonable specificity the services rendered and the number of hours spent rendering those services, as well as the fair market value of those services.

Matter of Swartz v. New York State Dept. of Health[66] involved a dispute between an applicant's estate and the local agency regarding the value of services provided under a personal care contract before the applicant entered a nursing home. The Appellate Division held that the agency could disallowed credit for services rendered during nighttime where there was just a general plan of care and no detailed

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[59] GIS 07 MA/019 (9/24/07). Matter of Gitter v. State of New York Dept. of Health, 2009 N.Y. Misc. LEXIS 6345 (Sup. Ct. New York County 2009) (court found the interpretation in the GIS to be reasonable and SSI POMS are not dispositive since separate transfer-of-assets rules were enacted for the Medicaid program).

[60] GIS 07 MA/019 (9/24/07); Matter of M.G., F.H. # 473952M, (Oneida County, 5/3/2007); Matter of Basil E, F.H. # 4832282L (Albany County 11/12/2007).

[61] GIS 07 MA/019 (9/24/07).

[62] Delaware County Dept. of Social Servs. v. Pontonero, 31 A.D.3d 999, 820 N.Y.S.2d 151 (3d Dep't 2006).

[63] Matter of Barbato v. New York State Dep't of Health, 65 A.D.3d 821, 884 N.Y.S.2d 525 (4th Dep't 2009)

[64] Stern v. Daines, 2009 N.Y. Misc. LEXIS 3670 (Sup. Ct. Queens County 2009).

[65] Matter of Kerner v. Monroe County Dept. of Human Servs., 75 A.D.3d 1085, 1087, 904 N.Y.S.2d 616 (3d Dep't 2010)

[66] Matter of Swartz v. New York State Dept. of Health, 946 N.Y.S.2d 698 (3d Dep't 2012).

contemporaneously-prepared records documenting the services allegedly provided each night and that the agency could use the U.S. Department of Labor mean hourly wage rate for a personal home healthcare aide in this state rather than the rate provided in the contract.

Practice Note

As an Alternative, Have Relatives Consider Paying for Medical or Nursing Home Care and Taking an Income Tax Deduction. A relative can include medical expenses he paid for his dependent. Deductions are limited to the extent the expenses exceed 7.5% of adjusted gross income of the taxpayer and for alternative minimum tax only to the extent they exceed 10% of adjusted gross income. The person must have been a dependent either at the time the medical services were provided or at the time the relative paid the expenses. A person generally qualifies as a dependent for purposes of the medical expense deduction if the person was a qualifying child or a qualifying relative including a father, mother, grandmother, grandfather, aunt, or uncle and for whom he provided over half of the support. See IRC Section 213 and Internal Revenue Service Publication 502.

To the extent these expenses are paid with funds recently received from the dependent relative, this might be considered a step transaction and disallowed.

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[5] Managing the Penalty Period: Rule of Halves

For transfers made prior to February 8, 2006, the formula used to calculate the penalty period and the effective date of the penalty period are structured in such a way that a person who follows the "rule of halves" may transfer approximately half of her assets, using the remainder to pay for the cost of nursing home care during the period of ineligibility that results from the transfer. In order to maximize the benefits of this strategy, both the penalty period and the length of time it will take to spend down the retained assets must be calculated.

Comment:

The relative amount of the assets to transfer and the amount to be retained to pay for the cost of care during the penalty period would vary, depending on the factors involved in each case (e.g., the actual cost of the nursing home, the amount of monthly income available to pay for care).

Caution:

This planning technique would no longer apply after the implementation of DRA '05 to transfers on or after the enactment date. Under DRA '05, the effective date of the penalty period will be the first day of the month after which assets have been transferred, **or** the date on which the individual is eligible for Medicaid and would otherwise be receiving institutional care based on an approved application but for the application of the penalty period, **whichever is later**.[122] See § 8.02[3][b], *above*. In other words, an individual can no longer transfer assets and use other funds to wait out a penalty period because he would not be "otherwise" eligible, by virtue of the retained funds.

Some practitioners anticipated that a "rule of halves" strategy could still be undertaken, by transferring assets then after part of the penalty period ran, making a partial return of assets and having

[122] 42 USC § 1396p(c)(1)(D)(ii).

the initial penalty period recalculated. However, although a partial return of assets is allowed, the recalculated penalty period will not begin to run on the original transfer date, because the returned assets will not render the individual as "otherwise eligible."[123]

A similar planning technique is available under DRA 2005, by combining a transfer with an actuarially sound annuity or loan. See discussion of annuities and loans at 8.02[1], *above*. At the time of the transfer the institutionalized person would have to make a loan or purchase an annuity, so that funds are not retained and she is otherwise eligible for Medicaid. The institutionalized person's monthly income, including the annuity or loan repayment, would have to render her Medicaid eligible, but she could not actually receive Medicaid during the penalty period from the transfer. The shortfall for the nursing home payment could be made by an in-kind voluntary contribution from a non-legally responsible relative; see income exemptions discussed at § 6.05[3], *above*; or alternatively the individual's income could be between the Medicaid rate and the private pay rate at the facility, rendering her a "certain medicaid-eligible individual" (individuals who are otherwise entitled to Medicaid in the facility but such benefits are not being paid because, their income exceeds the Medicaid level).[124] For a sample annuity see Form 8.206, *below*. For a sample promissory note see Form 8.208, *below*. For a sample Medicaid Application based on a gift and loan see Form 9.210A, *below*.

A number of fair hearings have upheld that an actuarially sound promissory note is not a transfer of assets.[125] In *Matter of DeGroat*,[126] the Department of Health found that the prepayment clause which allowed borrower to prepay but with a penalty, did not violate the DRA criteria. Another issue is that although under the DRA the purchase of an annuity, or making a loan or mortgage may not be considered a transfer; nevertheless the annuity or promissory note may be given a value as a resource even though they are drafted as "nonassignable." There is some question whether a note or annuity can be made nonassignable under New York law.[127] Thus the applicant would not be otherwise eligible and no penalty period would be triggered.[128] However, a number of fair hearings have concluded that the promissory notes were non-negotiable because they did not have quantifiable value on the open market. In those cases experts established that the notes were worthless due to the fact there is no secondary market.[129]

In *Matter of M.L.*,[130] the court approved medicaid planning by a guardian in the form of a gift and loan provided the promissory note met the criteria of DRA '05.

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[123] 06 OMM/ADM-5 at 19.

[124] 42 USC § 1396r(c)(7)(A); 42 CFR § 447.20. However, it is not clear if that person is "receiving nursing facility services for which Medicaid would otherwise be available but for the transfer penalty."

[125] Matter of Rose M. F.H. # 346495 (Albany County, 5/18/2007) (upholding the agency finding that there was a transfer because the promissory note did not state it was non-assignable and a modification did not cure the defect because there was no return of the funds); Matter of Mary K. F.H. # 4733465H (Albany County, 8/29/2007); Matter of A.G. F.H. # 4733471N (Albany County 8/29/2007); Matter of G.A. F.H. # 4733466Z (Albany County, 8/29/2007); Matter of A.A. F.H. # 4733476H (Albany County, 9/7/2007); Matter of Edward H., F.H. # 4819798M (Albany County, 11/21/2007); Matter of Else F.H. # 5313861K (Nassau County, 11/20/2009)(upholding note even when signed when individual resided in nursing home).

[126] Matter of DeGroat, 1 F.H. #5061459Y (Rockland County, 10/01/08).

[127] UCC §§ 9-406, 9-408; Ins. Law § 3212.

[128] *But see* James v. Richman, 547 F.3d 214 (3d Cir. 2008) which finds nonassignable annuity purchased by community spouse to have no value as a resource.

[129] Matter of Mary K. F.H. # 4733465H (Albany County 8/29/2007); Matter of A.G. F.H. # 4733471N (Albany County 8/29/2007); Matter of G.A. F.H. # 4733466Z (Albany County 8/29/2007); Matter of A.A. F.H. # 4733476H (Albany County 9/7/2007).

[130] Matter of M.L., 25 Misc. 3d 1217A, 901 N.Y.S.2d 907 (Sup. Ct. Bronx County 2009).

Caution:

Another suggestion for creating an annuity with no value as a resource is to use a Grantor Retained Annuity Trust (GRAT). However, the Medicaid rules for the treatment of a trust will also deem this an available resource since the periodic payments from the GRAT will be treated as a restriction as to when distributions may be made, which would be ignored in deeming the trust resource available.[131]

A planning technique may be available under DRA 2005, to a disabled person under age 65 in need of nursing home care by combining an outright transfer and a transfer to a self-settled Supplemental Needs Trust. See § 8.03[1][a], *below*. There would be a penalty based on the outright transfer and the funds in the trust would be used to pay for nursing home care during the penalty period.

[131] 42 USC § 1396p(d)(3)(B)(i) states, "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, … payment to the individual could be made shall be considered resources available to the individual … ." And 42 USC § 1396p(d)(2)(C) states that "this subsection shall apply without regard to—… (iii) any restrictions on when or whether distributions may be made from the trust … ." The periodic payments from the annuity may be treated as a restriction as to when distributions may be made, which would be ignored in deeming the resource available. *See* Matter of Lillian M. F.H. # 4908178H (Erie County 3/21/2008) (finding the GRAT an available resource under the Medicaid trust rules) and Matter of Lillian R. F.H. # M248653 (Albany County 10/31/2007) (finding the Trustee's close relationship to the applicant made the GRAT an available resource). In Matter of Joan S. F.H. # 4813356Q (Onondaga County 12/19/2007) and Matter of V.D. F.H. # 4811493M (Onondaga County 19/21/2007) the Department of Health initially found that the GRATS were not available resources, however the Department of Health has reversed its approval in both these fair hearings and declared that a Medicaid GRAT would be treated as a Medicaid qualifying trust; thus, any portion of the income or principal of the trust that can be paid to or for the benefit of the Medicaid applicant must be deemed an available resource.

Form 8.206 Private Annuity Agreement

THIS AGREEMENT is made _____[*date*], by and between _____[*Obligor*], "Obligor" residing at _____[*address*], and _____[*Annuitant*], "Annuitant" residing at _____[*address*].

1. Annuitant agrees to transfer and convey _____[*describe property*], the "Property," absolutely to Obligor.

2. In consideration Obligor agrees to pay the Annuitant _____[*amount*] each month; such payments shall commence on _____[*commencement date*]; payments shall be made no later than the _____[*date*] day of each month. Such payments shall end on [*termination date*].

3. Obligor shall be personally and absolutely liable for the payments due hereunder, and such payments are not contingent upon Obligor's future earnings from or ownership of the Property.

4. Obligor's obligation hereunder shall not terminate upon the death of Annuitant, but payments shall continue to be paid to the [surviving spouse/minor child/disabled child] of the Annuitant. Any surplus remaining shall be paid to the state of New York in an amount not to exceed the total medical assistance paid on behalf of the Annuitant.

5. Annuitant has no security interest, mortgage, or lien with respect to the Property transferred hereunder.

6. Annuitant shall not sell, transfer or assign his rights under this agreement, nor shall Annuitant sell, transfer or assign his rights to the income stream payable to him. Any such sale, transfer or assignment shall render this annuity unenforceable.

7. This agreement is binding on the heirs, successors, and assigns of Obligor.

8. This agreement shall be governed and construed in accordance with the laws of the state of New York.

IN WITNESS WHEREOF, this agreement is signed, and delivered on _____[*date*].

_____
Annuitant

_____
Obligor

Form 8.207 Personal Services Care Contract

THIS AGREEMENT is made _____[*date*], between _____[*Name of Care Provider*], "Care Provider" residing at _____[*address*], and _____[*Name of Care Recipient*], "Care Recipient" residing at _____[*address*].

1. Care Recipient agrees to pay _____[*amount*] to Care Provider. This compensation is based on the fair market value of the services to be provided. The parties have taken into consideration in arriving at this compensation, the age and life expectancy of the Care Recipient; the cost in the community of the services to be provided including the average compensation for court-appointed guardians, geriatric care managers, and for providers of personal needs services. The parties have considered the average number of hours for each type of service to be provided. This compensation is less than the fair market value of the services to be provided [optional: and has been discounted in that the Care Recipient does not have sufficient funds to pay the fair market value of the services to be provided].

2. The term of this agreement shall be the life of the Care Recipient. However, certain services shall be provided while the Care Recipient resides in the community and shall not be provided if the Care Recipient resides in a long term care health facility.

3. Care provider will provide the following personal care services to the Care Recipient during the life of the Care Recipient:
a. Handle finances including banking, check writing, bill paying; handling insurance matters including health care coverage;
b. Monitor physical and mental condition and nutritional needs on a regular basis in cooperation with health care providers;
c. Shop for clothing, toiletries, and other personal items;
d. Arrange transportation including but not limited to transportation for shopping, entertainment, and to health care providers;
e. Arrange for health care including but not limited to physical and mental assessment, services and treatment by appropriate health care providers, such as physicians, nurses, health aids, physical therapists, and mental health specialists;
f. Assist in carrying out health care instructions and directives including but not limited to medications and treatments; and
g. Arrange for social services by social service personnel.

4. Care provider will provide the following personal care services to the Care Recipient for as long as the Care Recipient resides in the community and not in a long term health care facility:
a. Arrange for assistance with household chores including laundry, house cleaning, and meal preparation;

b. Arrange for assistance with the activities of daily living including grooming, bathing, dressing, transferring out of bed or chair, ambulating inside and outside, and toileting; and
c. Shop for food.

5. Care Provider shall not be liable for the cost of Care Recipient's care including but not limited to health care, food, clothing, personal aids, and transportation. Care Recipient shall pay the cost of home attendants, home health aids, and household chore service providers. Care Provider shall solely be responsible for arranging for these services. Care Recipient agrees to reimburse Care Provider for any expenses incurred.

6. Care Provider shall return of any prepaid monies based on the remaining calculated life expectancy of the Care Recipient if the Care Provider becomes unable to fulfill his/her duties under this agreement, or if the Care Recipient dies before his/her calculated life expectancy.

7. Care Provider shall maintain and preserve the privacy of Care Recipient with respect to visitors, telephone conversations and mail. Family members and friends shall be permitted to visit Care Recipient.

8. This Agreement shall take effect on _____[*effective date*].

9. This Agreement contains the entire Agreement and understanding between the parties. This Agreement may be changed only by a written instrument executed by both parties.

10. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

_____
Care Recipient

_____
Care Provider

Form 8.208 Promissory Note

THIS AGREEMENT is made _____[*date*], between _____[*Name Borrower*], "Borrower" residing at _____[*address*], and _____[*Name of Payee*], "Payee" also called "Lender" residing at _____[*address*].

1. In consideration of _____[*principal Amount*] paid on this day to Borrower, the Borrower agrees to pay the Payee as follows:

2. Annual interest rate shall be 5.75%.

3. Borrower promises to pay Payee at _____[*place for payment*] and according to the terms for payment set forth below the principal amount plus interest at the rates stated above. Any unpaid amount shall be due by the final scheduled payment date.

4. This Note is due and payable as follows: _____[*Number of payments*] equal monthly payments of $_____[*Amount of Payments*], which includes principal and interest. The first payment is due and payable on _____[*date of first payment*], and a like payment shall be due and payable on the same day of each month thereafter until the total principal of $ [*principal amount*] is paid in full. If each payment is not paid on time, the remaining balance will be subject to the maximum amount of interest permitted by the Laws of the State of New York.

5. Borrower reserves the right to prepay this Note in whole or in part, prior to maturity, without penalty.

6. All past due payments of principal and/or interest and/or all other past-due incurred charges shall bear interest after maturity at the maximum amount of interest permitted by the Laws of the State of New York until paid.

7. Payee's forbearance in enforcing a right or remedy as set forth herein shall not be deemed a waiver of said right or remedy for a subsequent cause, breach or default of the Borrowers' obligations herein.

8. Interest on this debt shall not under any circumstances exceed the maximum amount of interest that may be contracted for and charged or received under law; any interest in excess of the maximum shall be credited on the principal of the debt and refunded.

9. Any check, draft, Money Order, or other instrument given in payment of all or any portion hereof may be accepted by the Payee and handled in collection in the customary manner, but the same shall not constitute payment hereunder or diminish any rights of the Payee except to the extent that actual cash proceeds of such instruments are unconditionally received by the payee and applied to this indebtedness in the manner herein provided.

10. If this Note is given to an attorney for collection or enforcement, or if suit is brought for collection or enforcement, or if it is collected or enforced through

probate, bankruptcy, or other judicial proceeding, then Borrower shall pay Payee all costs of collection and enforcement, including reasonable attorney's fees and court costs in addition to other amounts due.

11. If any provision of this Note or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Note nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

12. This Note is intended to and shall be construed to comply with the requirements of the Deficit Reduction Act of 2005 [42 USC 1396p(c)(1)(I)], so that it is not a transfer of assets under Medicaid law and therefore will not create a transfer of asset penalty for Payee. In addition, this Note provides for equal payments and does not allow deferrals and/or balloon payments.

13. The cancellation of this debt, or any balance due of this debt, upon the payee's death is prohibited. This agreement shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.

14. This Note is irrevocable and unassignable. Payee shall not sell, transfer or assign Payee's rights under this agreement, nor shall Payee sell, transfer or assign his rights to the income stream payable to him. Any such sale, transfer or assignment shall render this promissory note unenforceable.

15. This Note shall be governed, construed and interpreted by, through and under the Laws of the State of New York.

16. Borrower is responsible for all obligations represented by this Note.

DATE: [Date].

_____
Signature of Borrower

_____
Witness

_____
Print Name

_____
Sign Name

_____

_____
Address

STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 06 OMM/ADM-5

TO: Commissioners of Social Services

DIVISION: Office of Medicaid Management

DATE: July 20, 2006

SUBJECT: Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility Changes

SUGGESTED DISTRIBUTION:
Medicaid Staff
Fair Hearing Staff
Legal Staff
Audit Staff
Staff Development Coordinators

CONTACT PERSON:
Local District Liaison
Upstate: (518) 474-8887
New York City: (212) 417-4500

ATTACHMENTS: See Appendix I for Listing of Attachments

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
06 OMM/ADM-2 04 OMM/ADM-6 96 OMM/ADM-8		360-2.3 360-4.4 360-4.6	SSL 366-a(2), 366 & 366-c SSA 1917 & 1919 Ch. 109 of Laws of 2006 Sec. 6011, 6012, 6014, 6015 & 6016 of DRA 2005	MRG pp. 353-363	

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I. PURPOSE

This Administrative Directive (OMM/ADM) advises social services districts of the long-term care Medicaid eligibility provisions of the Deficit Reduction Act (DRA) of 2005. The DRA amends Section 1917 of the Social Security Act (the Act) to change asset transfer rules, require the disclosure of annuities and count as an available resource certain entrance fees for continuing care retirement communities. The DRA also amends Section 1919 of the Act to impose a home equity limitation for nursing facility services and community-based long-term care services.

II. BACKGROUND

A. ASSET TRANSFER CHANGES AND ANNUITIES

In 1993, the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) amended Section 1917(c) of the Act to require that a transfer penalty be imposed for individuals who transfer assets for less than fair market value. Specifically, the rules require a period of ineligibility for nursing facility services when a Medicaid applicant/recipient (A/R), or the A/R's spouse, transfers assets for less than fair market value on or after a "look-back date." The "look-back date" is 36 months prior to application for Medicaid coverage of nursing facility services, and 60 months in the case of certain transfers to or from trusts.

Ineligibility for Medicaid coverage is limited to only certain long-term care services, not all services covered under the program. The services for which the penalty applies include nursing facility care, services provided in an institution in which the level of care is equivalent to that provided by a nursing facility, and home and community-based waiver services provided for under Section 1915(c) or (d) of the Act. The period of ineligibility, or penalty period, begins on the first day of the first month after which assets have been transferred and which does not occur in any other period of ineligibility. There is no limit to the length of the penalty period.

Under these OBRA '93 transfer provisions, penalties imposed for A/Rs who made uncompensated transfers within the look-back period could expire before the date of Medicaid application for nursing facility services. For example, an uncompensated transfer of $100,000 made two years prior to application could result in a 20-month penalty period ($100,000 divided by the average private pay rate for nursing home care in the region of $5,000). Since the individual does not apply for Medicaid until two years, or 24 months, after having made the transfer, the penalty expired before the individual applies for Medicaid.

To address this eligibility loophole, the DRA amended Section 1917(c) of the Act to lengthen the look-back date for all transfers of assets made on or after February 8, 2006, to five years, or 60 months, and change the begin date for the penalty period to the month after which assets have been transferred for less than fair market value, or the date the institutionalized individual is otherwise eligible for and receiving nursing facility services, whichever is later.

The DRA also addresses the growing use of annuities to shelter resources in excess of the allowable Medicaid resource limit. The purchase of an annuity was effectively used by individuals to convert excess resources into an income stream. The annuity was required to be actuarially sound, meaning the anticipated return on the annuity's principal and interest must not exceed the annuitant's life expectancy. Upon the death of the annuitant, any remaining monies in the annuity pass to the named beneficiary rather than to the individual's estate. The DRA requires, as a condition of eligibility for nursing facility services, that the State be named the remainder beneficiary of an A/R's and community spouse's annuity. The DRA also made several amendments to Section 1917(c) of the Act to address the issue of annuities as a potential transfer of assets for less than fair market value. These changes include imposing a transfer penalty unless an annuity meets certain criteria as further explained in this directive.

Additional changes to the Medicaid asset transfer rules include making additional assets subject to the look-back period and imposition of a penalty if established or transferred for less than fair market value. These assets include funds used to purchase a promissory note, loan, mortgage or life estate interest unless the purchase meets certain criteria.

B. HOME EQUITY AND CONTINUING CARE RETIREMENT COMMUNITY CONTRACTS

To further help combat the rapidly increasing costs of Medicaid long-term care, the DRA amends Section 1919 of the Act to exclude individuals from qualifying for Medicaid coverage of nursing facility services and community-based long-term care services if the individual's equity interest in his or her home exceeds a certain value, barring certain exceptions.

The DRA also amends Section 1917 of the Act to treat certain entrance fees for continuing care retirement communities and life care communities as countable resources to the applicant for purposes of determining Medicaid eligibility.

III. PROGRAM IMPLICATIONS

As a result of the enactment of the Deficit Reduction Act of 2005 and corresponding changes to State statute (Chapter 109 of the Laws of 2006), a number of changes are being made to the Medicaid rules concerning asset transfers and the treatment of other resources for individuals applying for long-term care services. Unless otherwise stated in this directive, the policies contained in 96 ADM-8, "OBRA '93 Transfer and Trust Provisions," continue to apply.

A. TRANSFER OF ASSETS PROVISIONS

The following changes apply to individuals who apply for Medicaid coverage of nursing facility services on or after August 1, 2006.

1. Change in Look-Back and Penalty Period Begin Date

The look-back period for transfers made on or after February 8, 2006, is increased from 36 to 60 months for individuals applying for Medicaid coverage of nursing facility services. Previously, only trust related transfers were subject to a 60-month look-back date. For transfers made on or after February 8, 2006, the look-back period is 60 months for all transfers.

In the case of a transfer of assets made on or after February 8, 2006, the begin date of the period of ineligibility is the first day of the month after which assets have been transferred for less than fair market value, or the date on which the otherwise eligible individual is receiving nursing facility services for which Medicaid coverage would be available but for the imposition of a transfer penalty, **whichever is later,** and which does not occur during any other penalty period.

Multiple transfers made during the look-back period, including transfers that would otherwise result in a fractional penalty, are accumulated into one total amount to determine the penalty period. In the event that the imposition of a transfer penalty would create an undue hardship for the A/R, an exception may be made to the application of the penalty. There are no substantive changes to the definition of undue hardship as described in 96 ADM-8; however, the procedural requirements for undue hardship, as required by the DRA, have changed and are described in the Required Action Section of this directive.

The exceptions to the transfer rules that apply under the OBRA ’93 transfer provisions continue to apply to transfers made on or after February 8, 2006, in accordance with the DRA.

2. Annuities

Section 366-a of the SSL is amended to require as a condition of Medicaid eligibility for nursing facility services, that the A/R disclose a description of any interest the A/R or the A/R’s spouse has in an annuity regardless of whether the annuity is irrevocable or treated as an asset. For annuities purchased on or after February 8, 2006, the A/R must be informed of the right of the State to be named remainder beneficiary by virtue of the provision of Medicaid.

In addition, effective August 1, 2006, if an A/R or the A/R's spouse purchased an annuity on or after February 8, 2006, and the A/R is seeking Medicaid coverage for nursing facility services, the State must be named as a remainder beneficiary in the first position or the purchase of the annuity will be considered an uncompensated transfer of assets. In cases where there is a community spouse or minor or disabled child, the State must be named the remainder beneficiary in the second position, and named in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value. The Medicaid application is being revised to inform applicants with annuities that the State becomes the remainder beneficiary under an annuity by virtue of the provision of Medicaid.

If the A/R or the A/R's spouse fails or refuses to name the State as the remainder beneficiary of an annuity purchased on or after February 8, 2006, the purchase will be considered a transfer of assets for less than fair market value. In addition, if an annuity is purchased by or on behalf of an A/R, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is:

- an annuity described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986; or

- purchased with the proceeds from an account described in subsection (a),(c),(p) of Section 408 of such Code; a simplified employee pension (within the meaning of Section 408(k) of such Code); or a Roth IRA described in Section 408A of such Code; or

the annuity is:

- irrevocable and non-assignable;

- is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

The annuity provisions apply to transactions, including purchases, which occur on or after February 8, 2006. Transactions subject to these provisions include any action by the individual that changes the course of payment from the annuity or that changes the treatment of the income or principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions.

3. Treatment of Transfers to Purchase Loans, Notes, Mortgages and Life Estate Interest

In accordance with the DRA, the transfer of assets provisions in Section 1917(c) of the Act are amended to require that funds used to purchase a promissory note, loan or mortgage on or after February 8, 2006, will be treated as an uncompensated transfer of assets unless the note, loan or mortgage meets the following criteria:

- has a repayment term that is actuarially sound;
- provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- prohibits the cancellation of the balance upon the death of the A/R.

The purchase of a life estate interest in another individual's home is treated as an uncompensated transfer of assets unless the purchaser resided in the home for a period of at least one year after the date of purchase.

B. HOME EQUITY VALUE

Section 366.2(a)(1) of the SSL is amended to require that for applications for nursing facility services and community-based long-term care services made on or after January 1, 2006, an individual will not be eligible for such care and services if the individual's equity interest in his or her home exceeds $750,000. This is the maximum amount allowed under the DRA. Individuals cannot spend down excess equity with the use of medical bills. The home equity limitation does not apply if one or more of the following persons are lawfully residing in the individual's home:

- the spouse of the individual; or
- the individual's child who is under age 21, or certified blind or certified disabled.

An otherwise eligible A/R will be provided Medicaid coverage of long-term care services if the A/R meets an undue hardship. Undue hardship exists when the denial of Medicaid coverage would:

- deprive the A/R of medical care such that the individual's health or life would be endangered; or
- deprive the A/R of food, clothing, shelter, or other necessities of life;

and there is a legal impediment that prevents the A/R from being able to access his or her equity interest in the property.

C. CONTINUING CARE RETIREMENT COMMUNITY CONTRACTS AND LIFE CARE COMMUNITY ADMISSION CONTRACTS

Continuing Care Retirement Communities (CCRCs) offer a range of housing and health care services to serve older individuals as they age and as their health care needs change over time. CCRCs generally offer independent living units, assisted living, and nursing facility care for individuals who can afford to pay entrance fees and who often reside in such CCRCs throughout their older years. The services generally offered include meals, transportation, emergency response systems, and on-site nursing and physician services. Many also offer home care, housekeeping, and laundry services.

Individuals with contracts for admission to a State licensed, registered, certified or equivalent continuing care retirement or life care community may be required to spend on their care resources declared for purposes of admission before applying for Medicaid. Under certain circumstances an individual's paid entrance fee to a CCRC or life care community will be considered a resource when determining Medicaid eligibility.

IV. REQUIRED ACTION

A. DEFINITIONS

1. Assets

"Assets" means all income and resources of an individual and of the individual's spouse, including income or resources to which the individual or the individual's spouse is entitled but which are not received because of action by: the individual or the individual's spouse; a person with legal authority to act in place of or on behalf of the individual or the individual's spouse; a person acting at the direction or upon the request of the individual or the individual's spouse; or by a court or administrative body with legal authority to act in place of or on behalf of the individual or the individual's spouse or at the direction or upon the request of the individual or the individual's spouse.

2. Blind

"Blind" has the same definition given to such term in Section 1614(a)(2) of the Social Security Act.

3. Disabled

"Disabled" has the same meaning given to such term in Section 1614(a)(3) of the Social Security Act, which states that an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

4. Fair Market Value

"Fair market value" (FMV) means the estimate of the value of an asset if sold at the prevailing price at the time it was actually transferred. Fair market value of real property or other assets may be established by means of an appraisal by a real estate broker or other qualified dealer or appraiser.

5. Income

"Income" has the same meaning given to such term in Section 1612 of the Social Security Act, and includes both earned and unearned income, with certain exceptions, as defined in such section.

6. Resources

"Resources" has the same meaning given to such term in Section 1613 of the Social Security Act, without regard, in the case of an institutionalized individual, to the homestead exclusion provided for in subsection (a)(1) of such Section.

7. Look-Back Period

For transfers made on or after February 8, 2006, the "look-back period" means the sixty-month period immediately preceding the date that an institutionalized individual is both institutionalized and has applied for Medicaid.

8. Institutionalized Individual

"Institutionalized individual" means any individual who is an in-patient in a nursing facility, including an intermediate care facility for the mentally retarded, or who is an in-patient in a medical facility and is receiving a level of care provided in a nursing facility, or who is receiving care, services or supplies pursuant to a waiver under subsection (c) or (d) of Section 1915 of the Social Security Act.

9. Intermediate Care Facility for the Mentally Retarded

"Intermediate care facility for the mentally retarded" means a facility certified under Article Sixteen of the Mental Hygiene Law and which has a valid agreement with the Department for providing intermediate care facility services and receiving payment therefore under Title XIX of the Social Security Act.

10. Nursing Facility

"Nursing facility" means a nursing home as defined by Section 2801 of the Public Health Law and an intermediate care facility for the mentally retarded.

11. Nursing Facility Services

"Nursing facility services" means nursing care and health related services provided in a nursing facility; a level of care provided in a hospital which is equivalent to the care which is provided in a nursing facility; and care, services or supplies provided pursuant to a waiver under subsection (c) or (d) of Section 1915 of the Social Security Act.

12. Uncompensated Value

"Uncompensated value" means the difference between the fair market value at the time of transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset. If the client's resources are below the appropriate Medicaid resource level, the amount by which the Medicaid resource level exceeds the client's resources must be deducted from the uncompensated value of the transfer. Likewise, amounts specified in Department regulations for burial funds, but not for burial space items, also must be deducted.

13. Non-Assignable

"Non-assignable" is a term that applies to a plan, annuity, or other arrangement (whether qualified or not qualified under Part I of Subchapter D of Chapter 1 of Subtitle A of the Internal Revenue Code) that qualifies for the marital deduction but for Section 2056(d)(1)(A), and that does not allow the policyholder to assign or transfer the policy to a third party.

14. Community-Based Long-Term Care Services

Community–based long-term care services include: adult day health care (medical model); limited licensed home care; certified home health agency services; hospice in the community; hospice residence program; personal care services; personal emergency response services; private duty nursing; Consumer Directed Personal Assistance Program; Assisted Living Program; managed long-term care in the community; residential treatment facility; and non-waiver services in a home and community-based waiver program.

B. TRANSFER OF ASSETS

1. Asset Transfer Changes

a. New Cases

For applications filed on or after August 1, 2006 for Medicaid coverage of nursing facility services, social services districts must require resource documentation for the A/R and the A/R's spouse, for the past 36-month period (60 months for transfers to or from a trust). Resource documentation for the past 36 months is also required for recipients who request an increase in

coverage for nursing facility services on or after August 1, 2006. The 36-month period is determined from the date that an institutionalized individual is both institutionalized and requesting coverage to be established for nursing facility services. Districts will continue to request resource documentation for the past 36 months (60 months for trusts) until February 1, 2009. Beginning February 1, 2009, districts will require resource documentation for the past 37 months (60 months for trusts). The look-back will increase by one-month increments until February, 2011. Effective February 1, 2011, the full 60-month look-back period will be in place for all transfers of assets.

Effective for applications filed on or after August 1, 2006, individuals will no longer have eligibility determined for nursing facility services unless the applicant is in need of such services. Applicants who are in need of nursing facility services must complete the LDSS-2921, "Application for Public Assistance/Medical Assistance/Food Stamps/Services." If a recipient requests an increase in coverage for nursing facility services and is in need of such services, the district must send the recipient the revised DOH-4319 (Rev. 8/06): "Long-Term Care Change In Need Resource Checklist" (Attachment I) with the revised cover letter (Attachment II). The attachments have been revised to request documentation for undue hardship due to a transfer penalty and to address the new home equity limitation for long term care services.

Note: Attachments I and II must also be used when a recipient requests an increase in coverage for community-based long-term care services due to the new home equity limitation.

b. Undercare Cases

Individuals who have been determined eligible for full coverage, including nursing facility services prior to requiring such care and services, should continue to receive Medicaid coverage for all covered care and services if resource documentation is provided at each renewal. No new cases will be allowed this option but undercare cases may continue. Pregnant women and children, who have no resource test, may also continue to be authorized with full Medicaid coverage, if otherwise eligible.

2. Financial Eligibility

The first step, after receiving an application for Medicaid coverage of nursing facility services, or a request for an increase in coverage, along with the requested documentation, is to determine the individual's financial eligibility for Medicaid. Eligibility for institutionalized individuals is to be calculated as follows:

a. Resource Eligibility

For single individuals, after applying any applicable resource disregards based on community budgeting rules and the individual's category of assistance, the remaining countable resources are compared to the Medicaid resource level for one. For institutionalized spouses, the resources are to be calculated in accordance with the spousal impoverishment provisions; subtract from the couple's total countable resources, the maximum community spouse resource allowance and the Medicaid resource level for one for the institutionalized spouse. If there are resources in excess of the Medicaid resource level for one, social services districts must determine whether the institutionalized individual has medical expenses, not covered by a third party, that offset the amount of the excess resources for the month coverage is sought. Bills incurred for nursing facility services may be used to offset excess resources. Individuals may also spend excess resources on an irrevocable pre-need funeral agreement.

If the institutionalized individual has medical bills that offset the amount of the individual's excess resources, the individual is resource eligible. The next step is for the district to determine the individual's income eligibility for the month coverage is sought.

If the individual does not have medical bills to offset excess resources, the individual is not resource eligible and the district must review the individual's income eligibility for client notice purposes.

b. Income Eligibility

For single individuals and couples where there is an institutionalized spouse, to calculate income eligibility, the following deductions are to be applied

to the institutionalized individual's gross monthly income (after deducting any categorical disregards such as interest income):

- From the individual's gross monthly income, deduct the applicable income disregards under community budgeting rules based on the individual's category of assistance (e.g., for SSI-related A/Rs, deduct the $20 income disregard and any health insurance premiums).

- Deduct from the remaining net income, the Medicaid income level for one.

- Compare the remaining income to the amount of the individual's unpaid medical bills that are not subject to payment by a third party other than a public program of the State or any of its political subdivisions. Any portion of unpaid bills, including bills incurred for nursing facility services, not used to offset any excess resources, may be used to establish income eligibility.

- If the individual has medical bills that equal or exceed the individual's net monthly income, the individual is income eligible. If the individual does not have medical bills that at least equal the amount of the individual's net monthly income, the individual is not income eligible.

Note: A community spouse's income is not counted when determining an institutionalized spouse's financial eligibility for nursing facility services.

The required income calculation can be made using Budget Type 04 (SSI-related) or 01 (ADC-related), as applicable. Social services districts should only enter the income of the institutionalized individual.

c. Eligibility Outcome

(1) Financially Ineligible

A notice of denial/discontinuance must be sent to institutionalized individuals who are determined to be ineligible for Medicaid due to excess income and/or excess resources. A review of potential transfers during the look-back period is not required for individuals who are not otherwise eligible for Medicaid. Ineligible individuals include applicants who do not have medical bills to offset any excess income or resources. Upon reapplication at a later date, the district may need to review the resource documentation that was submitted. Until that event occurs, the district should maintain the resource documentation in a case folder.

(2) Financially Eligible

For institutionalized individuals who are financially eligible for Medicaid, social services districts must review resource documentation for the past 36-month look-back period (or 60 months for trusts) immediately preceding the date the individual requests Medicaid coverage to begin. As noted on page 10 of this directive, the 36-month look-back period will increase to 60 months in one month increments starting February 1, 2009.

If an A/R who needs nursing facility services does not provide documentation of his/her resources for the look-back period, but does document or attests to the amount of his/her current resources and is otherwise eligible, the district must deny the request for Medicaid coverage of all covered care and services and authorize Community Coverage Without Long-Term Care or Community Coverage With Community-Based Long-Term Care, as applicable (see Attachments V and VI to 04 OMM/ADM-06, Resource Documentation Requirements for Applicants/Recipients [Attestation of Resources]).

A person with a spouse who does not qualify for Medicaid coverage of a waiver service due to the A/R's failure or refusal to provide adequate resource documentation is not entitled to spousal impoverishment budgeting since there is no expectation that the individual will be in receipt of a waiver service for at least 30 days. Regular community budgeting rules apply. If a community spouse fails or refuses to provide documentation about his/her resources, and the institutionalized spouse executes an assignment of his/her right to pursue support from the community spouse in favor of the social services district and this department, or is unable to execute such an assignment due to physical or mental impairment; or the denial of eligibility for nursing facility services would result in undue hardship, Medicaid must be authorized.

Districts should note that the eligibility calculations discussed in 04 OMM/ADM-6, for institutionalized individuals who do not provide the necessary resource documentation for coverage of all care and services, are revised with the issuance of this directive. The budgeting, as described in the Income Eligibility section, does not provide for a deduction from the institutionalized spouse's income for a community spouse monthly income allowance.

If an institutionalized individual has not made a prohibited transfer and is financially eligible for Medicaid, the district must determine the individual's liability toward the cost of care using chronic care/post-eligibility budgeting (Budget Type 07, 08, 09 or 10, as applicable).

3. Penalty Period Begin Date for Otherwise Eligible Individuals

For individuals who are determined to have made an uncompensated transfer within the look-back period, the treatment of multiple transfers and the begin date for a transfer penalty period depend on when the transfer was made. Districts will continue to calculate the penalty period for uncompensated transfers using the Medicaid regional nursing home rates that are established annually.

a. Transfers Prior to February 8, 2006

For institutionalized individuals, if an uncompensated transfer of assets has occurred during the look-back period and prior to February 8, 2006, the penalty period begins on the first day of the month following the month in which the transfer occurred. Social services districts should continue to follow the policies outlined in 96 ADM-8 in cases where multiple transfers have been made within the look-back period but prior to February 8, 2006.

If an applicant is determined to be subject to a transfer penalty, Attachment III, LDSS-4144(Rev.8/06), "Notice of Decision on Your Medical Assistance Application – Limited Coverage (Transfer of Assets Penalty)", must be used to inform the individual of his/her limited coverage. For recipients who request an increase in coverage and are determined to be subject to a transfer penalty, Attachment IV, LDSS-4145(Rev.8/06), "Notice of Decision on Your Request for Coverage of Nursing Facility Services – Limited Coverage (Transfer of Assets Penalty)", must be used.

Note: Social services districts must reproduce these notices until further notice.

For institutionalized A/Rs, Coverage Code 10 (All Services Except Nursing Facility Services) or Coverage Code 23 (Outpatient Coverage with no Nursing Facility Services) must be used.

b. Transfers on or After February 8, 2006

For transfers made on or after February 8, 2006, the penalty period starts the first day of the month after which assets have been transferred for less than fair market value, or the first day of the month the otherwise eligible institutionalized individual is receiving nursing facility services for which Medicaid

would be available but for the transfer penalty, whichever is later, and which does not occur during any other period of ineligibility.

For institutionalized A/Rs, Attachment III or IV must be used, as applicable, to inform the A/R of his/her limited coverage depending on whether the individual is an applicant requesting coverage or a recipient requiring an increase in coverage.

For institutionalized A/Rs, Coverage Code 10 (All Services Except Nursing Facility Services) or Coverage Code 23 (Outpatient Coverage with no Nursing Facility Services) must be used.

The following examples demonstrate the new transfer provisions:

Example 1 (Institutionalized applicant not otherwise eligible): An applicant is determined to have made a prohibited transfer after February 8, 2006, and is also determined to have excess resources for the month nursing home coverage is requested. The penalty period for the transfer of assets would not be calculated since the individual is not otherwise eligible due to excess resources.

Example 2 (Institutionalized applicant otherwise eligible): An applicant makes an uncompensated transfer of $30,534 in April, 2006. The institutionalized individual is determined to be otherwise eligible for Medicaid starting September 1, 2006. A four-month penalty period ($30,534 divided by $6,872, the Medicaid regional rate, = 4.443) is imposed from September, 2006, the first month eligibility is established, through December, 2006 with a partial month penalty calculated for January, 2007. The calculations for this specific example follow:

Step #1	$30,534	uncompensated transfer amount
	÷ $6,872	Medicaid regional rate
	= 4.443	number of months for penalty period
Step #2	$6,872	Medicaid regional rate
	X 4	four-month penalty period
	$27,488	penalty amount for four full months
Step #3	$30,534	uncompensated transfer amount
	-$27,488	penalty amount for four full months
	$3,046	partial month penalty amount

Example 3 (Institutionalized recipient transfer): On September 18, 2006, the district discovers that an institutionalized **recipient** failed to pursue his right of election from his spouse's estate. The last date the institutionalized individual could have pursued his elective share was determined to be July 10, 2006. The district calculates a transfer penalty of four months based on the value of the recipient's elective share.

The penalty for this example starts August 1, 2006, the month following the month of transfer. However, the district must send a 10-day notice prior to the reduction in coverage. If the district can notify the individual 10 days prior to October 1, 2006, coverage would be reduced for October 1, 2006 and November 2006, the third and fourth month of the penalty period. If timely notice cannot be sent 10 days in advance of October 1, 2006, coverage could not be reduced until November 1, 2006, the fourth month of the penalty period. In such cases, districts may pursue Medicaid incorrectly paid for months that should have been affected by the transfer penalty (August, September and possibly October, depending on when notification was sent).

If a transfer penalty period falls within another penalty period, the penalty does not start until after the first penalty expires, with the exception of partial month penalties. Districts are to begin a subsequent penalty in the month in which the partial month penalty from a previous penalty period ends.

Example 4 (Overlapping penalties): An application for nursing facility services is filed September 21, 2006, and the applicant is determined to have made a prohibited transfer prior to February 8, 2006. The transfer results in a penalty period that ends with a partial penalty of $929 for November, 2006. Another $10,000 transfer was made in March, 2006. Due to the period of ineligibility from the pre-February 8, 2006 transfer, the penalty period for the March, 2006 transfer would begin in November, 2006. For November, 2006, only the amount of the March transfer that is needed to bring the penalty up to the full Medicaid regional rate would be used. Beginning December 2006, the remaining amount of the March transfer is used to calculate the remaining transfer penalty. The calculations for starting the March transfer follow:

Step #1	$6,872	Medicaid regional rate
	- $929	partial month penalty 1st transfer
	= $5,943	amount of penalty remaining
Step #2	$10,000	uncompensated transfer 2nd transfer
	$5,943	transfer amount used for November penalty
	=$4,057	remaining amount of transfer

Since $4,057 is less than the Medicaid regional rate of $6,872, the remaining $4,057 results in a partial penalty for December, 2006.

Once a penalty period has been established for an otherwise eligible individual, the penalty period continues to run regardless of whether the individual continues to receive nursing facility services or remains eligible for Medicaid. Upon reapplication for Medicaid coverage of nursing facility services, any uncompensated transfer that still falls within the new

look-back period which has already resulted in an expired penalty period, would not again be assessed a penalty. Only subsequent transfers can result in a transfer penalty period.

(i) Short-Term Rehabilitation

In cases where the initial days of nursing facility care were covered as short-term rehabilitation under Community Coverage Without Long-Term Care or Community Coverage With Community-Based Long-Term Care, the look-back period is the period immediately preceding the month the individual started to receive the short-term rehabilitation service. Any transfer penalty for an **otherwise eligible** individual would also start the first month the individual started to receive the short-term rehabilitation service. However, districts are reminded that if a determination to impose a transfer penalty is made during the 29 days of short-term rehabilitation, a transfer penalty cannot be imposed until a 10-day notice has been provided. The 10-day notice requirement does not apply to coverage beyond the 29 days of short-term rehabilitation services.

(ii) Treatment of Multiple Transfers

Multiple transfers of assets for less than fair market value made on or after February 8, 2006, must be accumulated and treated as one transfer. Districts will accumulate all uncompensated transfers of assets whether the transfers add up to the regional rate used to determine a period of ineligibility, or total less than the regional rate. The total will be used to determine the period of ineligibility for nursing facility services.

(iii) Exceptions for Transfers

The exceptions to the application of transfer of asset penalties that apply to transfers made on or after August 11, 1993, continue to apply to transfers made on or after February 8, 2006 (see 96 ADM-8). The following clarification should be noted with respect to assets that are returned to the individual.

For active Medicaid cases, if all or parts of the transferred assets are returned after the Medicaid eligibility determination, the assets must be counted in recalculating the individual's eligibility as though the returned assets were never transferred, and the length of the penalty period must be adjusted accordingly. The recalculated penalty period, if any, will begin when the individual is receiving nursing facility services for which Medicaid coverage would be

available but for the imposition of the transfer penalty. Therefore, the recalculated penalty period cannot begin before the assets retained by the individual at the time of transfer, combined with the assets transferred and subsequently returned to the individual, have been spent down to the applicable Medicaid resource level.

If an application is denied or a case discontinued where a transfer penalty has been imposed, the individual must file a new application. If upon reapplication, the transferred assets have been returned to the applicant, for purposes of determining eligibility, including coverage for the three-month retroactive period, the original transfer penalty period is to be reduced by the returned assets.

For example: A transfer of $100,000 was made in June just prior to filing an August, 2006 application. The institutionalized individual is otherwise eligible in August. The transfer results in a 14.5 month penalty that starts August 1, 2006, and runs through September, 2007 with a partial penalty for October, 2007. Seven months later, $50,000 of the transferred assets is returned to the recipient. In calculating a reduction of the penalty period, eligibility is redetermined for August, 2006 counting the $50,000. The individual does not have medical bills to offset the amount of the excess resources until March, 2007 ($50,000 ÷ $7,000 actual monthly nursing home costs = 7.1 months). The adjusted 7.2 month penalty for the remaining $50,000 transfer ($50,000 ÷ $6,872 = 7.2) would start in March, 2007 and run through September, 2007 with a partial month penalty for October, 2007.

(iv) Provision for Undue Hardship Waiver

An individual who is unable to demonstrate that a transfer was made exclusively for a purpose other than to qualify for nursing facility services, may have coverage authorized for these services if the individual meets undue hardship. For transfers made on or after February 8, 2006, undue hardship exists when:

- the individual applying for nursing facility services is otherwise eligible for Medicaid; and

- despite his/her best efforts, as determined by the social services district, the individual or the individual's spouse is unable to have the transferred asset(s) returned or to receive fair market value for the asset or to void a trust; and

- either: the individual is unable to obtain appropriate medical care such that the individual's health or life would be endangered without the provision of Medicaid for nursing facility services; or

- the transfer of assets penalty would deprive the individual of food, clothing, shelter, or other necessities of life.

Note: The only change to the definition of undue hardship required by the DRA is the added provision regarding the individual being deprived of food, clothing, shelter or other necessities of life.

Undue hardship cannot be claimed:

- if the applicant failed to fully cooperate, to the best of his/her ability, as determined by the social services district, in having all of the transferred assets returned or the trust declared void. Cooperation may include, but is not limited to, assisting in providing all legal records pertaining to the transfer or creation of the trust, assisting the district, wherever possible, in providing information regarding the transfer amount, to whom it was transferred, any documents to support the transfer or any other information related to the circumstances of the transfer; or

- if after payment of medical expenses, the individual's or couple's income and/or resources are at or above the allowable Medicaid exemption standard for a household of the same size; or

- if the only undue hardship that would result is the individual's or the individual's spouse's inability to maintain a pre-existing life style.

At application for Medicaid coverage of nursing facility services, the individual, individual's spouse, representative and/or nursing facility, with consent from the institutionalized individual, individual's spouse or individual's representative, may apply for an undue hardship waiver. If Medicaid coverage is approved based on a determination that the individual meets undue hardship, a notice must be sent informing the individual that undue hardship has been met. To meet this notice requirement, a new notice has been developed (Attachment V). As stated in Attachment V, the notice must be sent with a second notice of decision that informs the individual of his or her Medicaid eligibility. If

an individual who claimed undue hardship is determined not to meet the undue hardship criteria, Attachment V must be used to inform the individual that he/she was determined not to meet undue hardship. Undue hardship determinations are to be made within the same time period that districts have to determine eligibility. Additional time for providing documentation to determine undue hardship may be approved by the district. If an individual disagrees with the district's determination of undue hardship, the recipient's notice will inform the individual of his/her right to request a fair hearing.

Recipients of limited coverage may request a consideration of undue hardship in order to obtain Medicaid coverage of nursing facility services at any time during a transfer penalty period. The (re)determination may include up to three months prior to the month in which the request for review of undue hardship is made. The individual, individual's spouse, representative, or nursing facility, with the consent of the individual or individual's representative, may request a (re)determination of undue hardship. Social services districts may use Attachment II to inform the requestor that proof of undue hardship is required and that the (re)determination may be made for up to three months prior to the month in which the request is made.

(v) <u>Explanation of the Effect of Transfer of Assets on Medical Assistance Eligibility</u>

To inform individuals of the changes to the transfer of assets provisions required by the DRA, the LDSS-4294 (Rev. 8/06) "Explanation of the Effect of Transfer of Assets on Medical Assistance Eligibility" (Attachment VI) has been revised. The Department will distribute this revised notice to all medical institutions, nursing facilities and long-term care providers. Social services districts are required to make the notice available to all persons requesting such information, and are required to include the notice with all Medicaid applications involving an institutionalized individual applying for nursing facility services. A copy of this notice must also be sent when an A/R's (re)application is denied or discontinued due to a prohibited transfer. The explanation must be included with the appropriate mandated notice. The notice is mandated, and must be reproduced by the district without modification until such time that it becomes available from this Department.

4. Disclosure of Annuities Purchased on or After February 8, 2006

Effective for applications filed on or after August 1, 2006 for Medicaid coverage of nursing facility services, including requests for an increase in coverage for nursing facility services, A/Rs are required to disclose a description of any interest the A/R or the A/R's spouse has in an annuity, regardless of whether the annuity is irrevocable or treated as an asset.

In order to inform A/Rs of their obligation to disclose information concerning annuities purchased on or after February 8, 2006, and the requirement for Medicaid coverage of nursing facility services that the State be named the remainder beneficiary of the A/R's or the spouse's annuity, the LDSS-2921 "Application for Public Assistance/Medical Assistance/Food Stamps/Services" is being revised. Until the revised form is available, districts must include a copy of Attachment VII with all applications for nursing facility services. The attachment must also be given to individuals who request an increase in Medicaid coverage for nursing facility services.

For annuities purchased by the A/R or the A/R's spouse on or after February 8, 2006, the purchase of the annuity shall be treated as a transfer of assets for less than fair market value unless:

- the State is named as the remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of the annuitant; or

- the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child, or in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value.

The social services district must require a copy of the annuity contract owned by the A/R or A/R's spouse in order to verify that the State has been named the remainder beneficiary. If the A/R or the A/R's spouse fails or refuses to provide the necessary documentation, the district must treat the purchase of the annuity as a transfer of assets for less than fair market value.

In addition to naming the State as a remainder beneficiary on an annuity, the purchase of an annuity by or on behalf of an A/R is to be treated as a transfer of assets for less than fair market value unless:

- the annuity is an individual retirement annuity contract or endowment issued by an insurance company that is not transferable, has fixed premiums and the entire interest is non-forfeitable by the owner; **or**

- the annuity is a voluntary employee funded account that is established under, but is separate from a qualified employer plan; **or**

- the annuity is:

    - o purchased with the proceeds from an individual retirement trust or account as described in subsection (a), (c) or (p) of Section 408 of the Internal Revenue Code;

    - o a simplified employee pension plan. A simplified employee pension plan is an individual retirement annuity as described in Section 408(k) of the Internal Revenue Code; or

    - o a Roth IRA. A Roth IRA is an individual retirement plan described in Sect ion 408A of the Internal Revenue Code; **or**

- the annuity is:

    - o irrevocable and non-assignable;

    - o actuarially sound as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration (see Attachment VIII life expectancy table); and

    - o provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

The annuity provisions apply to transactions, including purchases, which occur on or after February 8, 2006. Transactions subject to these provisions include any action by the individual that changes the course of payment from the annuity or that changes the treatment of the income or principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions.

5. <u>Assets Transferred to Purchase Life Estate Interest</u>

A life estate is a limited interest in real property. A life estate holder does not have full title to the property, but has the use of the property for his or her lifetime, or for a specified period. Generally, life estates are in the form of a life lease on property that the person is using, or has used, for a homestead.

When an A/R or the A/R’s spouse transfers assets to purchase a life estate interest in property owned by another individual on or after February 8, 2006, the purchase is to be treated as a transfer of assets for less than fair market value unless the purchaser resides in the home for at least a continuous period of one year after the

date of purchase. If the purchaser has not resided in the home for at least one year after the date of purchase, the amount used to purchase the life estate interest is to be treated as the uncompensated transfer of assets amount in the eligibility determination. This provision applies to applications filed on or after August 1, 2006 for nursing facility services, including requests for an increase in coverage for nursing facility services.

Districts should note that this provision does not apply to A/Rs or their spouses who transfer property and retain life use. It only applies to the purchase of life use interest in property not previously owned by the A/R.

6. Assets Transferred to Purchase Loans, Promissory Notes and Mortgages

Effective for applications filed on or after August 1, 2006, for nursing facility services, including requests for an increase in coverage for nursing facility services, if an A/R or the A/R's spouse purchases a loan, promissory note or mortgage, the funds used are to be treated as a transfer for less than fair market value unless the note, loan or mortgage:

- has a repayment term that is actuarially sound;
- provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- prohibits the cancellation of the balance upon the death of the lender.

The amount of the transfer is the outstanding balance due as of the date of the individual's application for nursing facility services.

C. TREATMENT OF SUBSTANTIAL HOME EQUITY

Effective immediately, districts must review the equity value of an A/R's home if the A/R requires Medicaid coverage for nursing facility services or community-based long-term care services. Individuals applying for nursing facility services or community-based long-term care services on or after January 1, 2006, are to be denied Medicaid coverage for such services if the equity interest in the individual's home exceeds $750,000. The equity value is derived by subtracting any legal encumbrances (liens, mortgages, etc.) from the fair market value. If the home is owned jointly with one or more individuals, each owner is presumed to have an equal interest in the property, absent any evidence to the contrary. Individuals cannot spenddown excess equity with the use of medical bills to obtain eligibility. Individuals whose equity interest in the home exceeds $750,000 continue to be eligible for Medicaid coverage of Community Coverage Without Long-Term Care.

The home equity limitation does not apply if the individual's spouse, minor child or certified blind or certified disabled child lawfully resides in the home.

Individuals may use a reverse mortgage or home equity loan to reduce the individual's equity interest in the home. Social services districts should note that although payments received from a reverse mortgage or home equity loan are not counted in the month of receipt for eligibility purposes, if the funds are transferred during the month of receipt, the transfer is to be considered a transfer for less than fair market value.

Individuals who are subject to the home equity limitation may claim undue hardship. Undue hardship exists if the denial of Medicaid coverage would:

- deprive the A/R of medical care such that the individual's health or life would be endangered; or

- deprive the A/R of food, clothing, shelter, or other necessities of life;

and there is a legal impediment that prevents the A/R from being able to access his or her equity interest in the property.

If an otherwise eligible individual is determined not to meet the undue hardship criteria, Attachment IX informs the individual that he/she is being authorized for Community Coverage Without Long-Term Care due to substantial home equity interest. Undue hardship determinations are to be made within the same time period that districts have to determine eligibility. Additional time for providing documentation to determine undue hardship may be approved by the district. If an individual disagrees with the district's determination of undue hardship, the recipient's notice will inform the individual of his/her right to request a conference and/or fair hearing.

Individuals who are not eligible for nursing facility services and community-based long-term care services due to substantial home equity must be authorized with RVI Code 3/Coverage Code 20 or RVI Code 3/Coverage Code 22 (Outpatient Coverage Without Long-Term Care, as applicable. Districts should not authorize short-term rehabilitative nursing home care and the recipient is not eligible for certified home health care (CHHA) services.

The home equity limitation applies to applications for long-term care services and to requests for an increase in coverage for long-term care services filed on or after January 1, 2006. For individuals who applied on or after January 1, 2006, and were determined eligible for and in receipt of long-term care services, the home equity limitation is to apply at next client contact or recertification, whichever occurs first. The home equity limitation does not apply to individuals who applied and were determined eligible for and in receipt of long-term care services before January 1, 2006 and have no break in eligibility for long-term care services after January 1, 2006.

D. TREATMENT OF CONTINUING CARE RETIREMENT COMMUNITY CONTRACTS

CCRCs are paid primarily with private funds, but a number also accept Medicaid payment for nursing facility services. Sections 1919(c)(5)(A)(i)(II) and (B)(v) of the Social Security Act are amended so that State licensed, registered, certified or equivalent CCRCs, or life care communities (including nursing facility services provided as part of that community) which are certified to accept Medicaid and/or Medicare payment may require in their admissions contracts that residents spend their resources declared for the purposes of admission on their care, before they apply for Medicaid.

Effective for Medicaid applications filed on or after August 1, 2006, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource to the extent that:

- the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

- the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

- the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

For applicants with a community spouse, only that part of the entrance fee that is not protected by the community spouse's resource allowance would be considered in the computation of the share available to Medicaid.

V. NOTICE REQUIREMENTS

The following manual notices are to be used for applications filed on or after August 1, 2006. The attached manual notices are to be reproduced by the social services district until further notice.

1. LDSS-4144 (Rev. 8/06): Notice of Decision on Your Medical Assistance Application – Limited Coverage (Transfer of Assets Penalty):

   This revised notice (Attachment III) must be used to inform an institutionalized applicant that his/her Medicaid application for nursing facility services has been accepted with limited coverage due to a transfer of assets. In addition, if the applicant is required to meet a spenddown requirement, a LDSS-4038, "Explanation of the Excess Income Program" must be sent.

2. LDSS-4145 (Rev. 8/06): Notice of Decision on Your Request For Coverage of Nursing Facility Services – Limited Coverage (Transfer of Assets Penalty):

   This revised undercare notice (Attachment IV) is used to inform a recipient that his/her request for an increase in coverage for nursing facility services is accepted with limited coverage due to a transfer of assets. In addition, if the individual is required to meet a spenddown requirement, a LDSS-4038, "Explanation of the Excess Income Program" must be sent.

3. Notice of Decision on Your Request for Undue Hardship (Transfer of Assets Penalty):

   This notice (Attachment V) must be used to inform an institutionalized individual that a determination has been made regarding undue hardship. The notice must be used to accept or deny an individual's Medicaid coverage for nursing facility services based on an evaluation of the individual's circumstances and the undue hardship criteria.

   Accept Undue Hardship – For acceptance situations, the notice must be accompanied with the appropriate Medical Assistance acceptance notice.

   Deny Undue Hardship - In denial situations, the notice must be sent with the "Notice of Decision on Your Medical Assistance Application - Limited Coverage (Transfer of Assets)".

4. LDSS-4294 (Rev. 8/06): Explanation of the Effect of Transfer of Asset(s) on Medical Assistance Eligibility:

   The revised explanation notice (Attachment VI) must be made available to all individuals who apply for Medicaid coverage of nursing facility services. A copy must also be sent when an A/R's application for nursing facility services is denied/discontinued or limited due to a prohibited transfer.

5. Notice of Decision On Your Medical Assistance Application – Long-Term Care Services (Substantial Home Equity):

   This notice (Attachment IX) must be used to inform individuals applying for nursing facility services or community-based long-term care services that they are not eligible for these services due the value of their home equity interest. The notice is used to accept the individual for Community Coverage Without Long-Term Care. The notice describes the home equity limit and the circumstances when undue hardship may exist.

VI. SYSTEMS IMPLICATIONS

A. UPSTATE WMS IMPLICATIONS

There are no systems implications.

B. CNS UPSTATE

The following CNS notices have been created to assist districts in implementing the requirements contained in this directive. The WMS/CNS Coordinator Letter associated with this directive will advise districts of the Reason Codes associated with the below notices.

1. New Notices

a. Accept CC Without LTC, Home Equity Interest Exceeds Limit, No Undue Hardship, No SD

This notice must be used to accept an individual without a spenddown requirement for Community Coverage Without Long-Term Care due to substantial home equity and no undue hardship. This notice informs the applicant of his/her ineligibility for long-term care services.

b. Accept CC Without LTC, Home Equity Interest Exceeds Limit, No Undue Hardship, 6-Mo Exc Inc and Res SD Met

This notice is used to accept an individual who has met a 6-month excess income and resource spenddown with Community Coverage Without Long-Term Care due to substantial home equity and no undue hardship. This notice informs the applicant of his/her ineligibility for long-term care services.

c. Continue MA Unchanged, Individual Home Equity Interest Exceeds Limit, No Undue Hardship, No SD

This undercare notice must be used to continue unchanged a recipient’s coverage of Community Coverage Without Long-Term Care due to substantial home equity and no undue hardship. The individual does not have a spenddown requirement. This reason code informs the applicant of his/her ineligibility for long-term care services.

d. Continue MA Unchanged, Individual Home Equity Interest Exceeds Limit, No Undue Hardship, 6-Mo Exc Inc and/or Res SD Met

This undercare notice must be used to continue unchanged recipient’s coverage of Community Coverage Without Long-Term Care due to substantial home equity and no undue hardship. The recipient has met a 6-month excess income and/or resource spenddown. This reason code informs the applicant of their ineligibility for long-term care services.

e. Accept CC Without LTC, Home Equity Interest Exceeds Limit, No Undue Hardship, Exc Inc SD Met

This undercare notice must be used to accept an individual who has met an excess income spenddown with Community Coverage Without Long-Term Care due to substantial home equity and no undue hardship. This notice informs the applicant of his/her ineligibility for long-term care services.

Note: In cases where an individual with substantial home equity **does** meet undue hardship, districts should use the appropriate acceptance or change notice to authorize coverage for long-term care services.

2. Revised Notices

Explanation of the Effect of Transfer of Assets on Medical Assistance Eligibility

This explanation notice has been revised to include information concerning prohibited transfers made on or after February 8, 2006.

C. NYC WMS IMPLICATIONS

NYC WMS instruction will be provided under separate cover.

VII. EFFECTIVE DATE

The transfer provisions, including the treatment of annuities, apply to applications for nursing facility services filed on or after August 1, 2006, including requests for an increase in coverage of nursing facility services made on or after August 1, 2006. The home equity provisions are effective August 1, 2006 retroactive to January 1, 2006 for applications filed on or after January 1, 2006 for nursing facility services or community-based long-term care services. The provisions for certain entrance fees for CCRCs are effective for applications filed on or after August 1, 2006.

Brian J. Wing, Deputy Commissioner
Office of Medicaid Management

TO: Local District Commissioners, Medicaid Directors

FROM: Judith Arnold, Director
Division of Health Reform and Health Insurance Exchange Integration

SUBJECT: 2012 Update to the Actuarial Life Expectancy Table

EFFECTIVE DATE: Immediately

CONTACT PERSON: Local District Support Unit
Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to provide local departments of social services with the updated life expectancy table issued by the Office of the Chief Actuary of the Social Security Administration (SSA).

As advised in Administrative Directive 06 OMM/ADM-5, "Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility," the life expectancy table issued by SSA is required to be used in evaluating whether an annuity purchased by or on behalf of an applicant/recipient on or after February 8, 2006 is actuarially sound. The table is also used in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound.

The life expectancy table that was attached to 06 OMM/ADM-5 as Attachment VIII, is being updated to reflect the current information obtained from the Office of the Chief Actuary of the Social Security Administration. The revised life expectancy table is provided as an attachment to this GIS. Effective with the release of this GIS, districts must use the revised table.

Please direct any questions to your local district support liaison.

Life Expectancy Table

Age	Male Life Expectancy	Female Life Expectancy	Age	Male Life Expectancy	Female Life Expectancy
0	75.38	80.43	30	47.13	51.50
1	74.94	79.92	31	46.20	50.53
2	73.98	78.95	32	45.27	49.56
3	73.00	77.97	33	44.33	48.60
4	72.02	76.99	34	43.40	47.64
5	71.03	76.00	35	42.47	46.68
6	70.04	75.01	36	41.54	45.72
7	69.05	74.02	37	40.61	44.76
8	68.06	73.03	38	39.68	43.81
9	67.07	72.04	39	38.76	42.86
10	66.08	71.04	40	37.84	41.91
11	65.09	70.05	41	36.93	40.97
12	64.09	69.06	42	36.02	40.03
13	63.10	68.07	43	35.12	39.10
14	62.12	67.08	44	34.22	38.17
15	61.14	66.09	45	33.33	37.24
16	60.18	65.11	46	32.45	36.32
17	59.22	64.13	47	31.57	35.41
18	58.27	63.15	48	30.71	34.50
19	57.33	62.18	49	29.84	33.59
20	56.40	61.20	50	28.99	32.69
21	55.47	60.23	51	28.15	31.80
22	54.54	59.26	52	27.32	30.91
23	53.63	58.29	53	26.49	30.02
24	52.71	57.32	54	25.68	29.14
25	51.78	56.35	55	24.87	28.27
26	50.86	55.38	56	24.06	27.40
27	49.93	54.40	57	23.26	26.53
28	49.00	53.44	58	22.48	25.67
29	48.07	52.47	59	21.69	24.82

Age	Male	Female	Age	Male	Female
	Life Expectancy	Life Expectancy		Life Expectancy	Life Expectancy
60.	20.92	23.97	90	3.92	4.69
61	20.16	23.14	91	3.64	4.36
62	19.40	22.31	92	3.38	4.04
63	18.66	21.49	93	3.15	3.76
64	17.92	20.69	94	2.93	3.50
65	17.19	19.89	95	2.75	3.26
66	16.48	19.10	96	2.58	3.05
67	15.77	18.32	97	2.44	2.87
68	15.08	17.55	98	2.30	2.70
69	14.40	16.79	99	2.19	2.54
70	13.73	16.05	100	2.07	2.39
71	13.08	15.32	101	1.96	2.25
72	12.44	14.61	102	1.85	2.11
73	11.82	13.91	103	1.75	1.98
74	11.21	13.22	104	1.66	1.86
75	10.62	12.55	105	1.56	1.74
76	10.04	11.90	106	1.47	1.62
77	9.48	11.26	107	1.39	1.52
78	8.94	10.63	108	1.30	1.41
79	8.41	10.03	109	1.22	1.31
80	7.90	9.43	110	1.15	1.22
81	7.41	8.86	111	1.07	1.13
82	6.94	8.31	112	1.00	1.05
83	6.49	7.77	113	0.94	0.97
84	6.06	7.26	114	0.87	0.89
85	5.65	6.77	115	0.81	0.82
86	5.26	6.31	116	0.75	0.75
87	4.89	5.87	117	0.70	0.70
88	4.55	5.45	118	0.64	0.64
89	4.22	5.06	119	0.59	0.59

TO: Local District Commissioners, Medicaid Directors

FROM: Judith Arnold, Director
Division of Coverage and Enrollment

SUBJECT: Evaluating Personal Service Contracts for Medicaid Eligibility

EFFECTIVE DATE: Immediately

CONTACT PERSON: Local District Liaison:
Upstate (518)474-8887 New York City (212)417-4500

The purpose of this message is to provide guidance for social service districts in evaluating personal service contracts.

A personal service contract, also known as a caregiver agreement, is a formal written agreement between two or more parties in which one or more of those parties agree to provide personal and/or managerial services in exchange for compensation paid by the party receiving the services. Since the enactment of the Deficit Reduction Act of 2005, which lengthened the look-back period for asset transfers and changed the penalty start date, districts have seen an increase in the number of Medicaid applications involving personal service contracts. Under the personal service contracts reviewed to date, the elderly applicant's resources are transferred in a lump sum to a family member in exchange for services to be provided by the family member for the lifetime of the applicant. This planning tool is being used to reduce the applicant's resources in order to qualify for Medicaid while compensating family members for services provided, even though the services may have been provided free of charge in the past.

For Medicaid eligibility purposes, a determination must be made as to whether the applicant received or will receive fair market value (FMV) for the resources transferred to the caregiver. If a determination cannot be made that the applicant will receive FMV for the resources transferred, the resources are subject to a transfer penalty.

Uncompensated Transfer – A personal service contract that does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill his/her duties under the contract, or if the A/R dies before his/her calculated life expectancy, must be treated as a transfer of assets for less than fair market value. If there are no such legally enforceable provisions, there is no guarantee that FMV will be received for the prepaid monies.

If a personal service contract stipulates that services will be delivered on an "as needed" basis, a determination cannot be made that FMV will be received in the form of services provided through the contract. A transfer of assets penalty must be calculated for an otherwise eligible individual.

Calculating the Transfer Penalty Amount - Districts do not need to evaluate personal service contracts until the individual applies for and is otherwise eligible for nursing facility services. When doing such an assessment, if the district determines that the funding of a personal service contract is an uncompensated transfer, the district must give the applicant credit (i.e., by reducing the transfer amount) for the value of any services actually received from the time the personal service contract was signed and funded through the date of the Medicaid eligibility determination.

Note: No credit is allowed for services that are provided as part of the Medicaid nursing home rate.

In order to assess the value of these furnished services, the district must be provided with credible documentation (e.g., a log with the dates and hours of services already provided). Any amount subtracted (i.e., the credit for caregiver services actually provided) must be commensurate with a reasonable wage scale, based on fair market value for the actual job performed and the qualifications of the caregiver. If credible documentation is not provided, no credit is deducted when calculating the uncompensated transfer amount.

For assistance in evaluating job duties and pay rates, districts may refer to the U.S. Departm*ent* of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook. The latest 2006-07 Edition is available at: http://www.bls.gov/oco/. The handbook includes information on training and other qualifications needed for particular jobs. If a district determines that a reasonable pay rate for a particular job/service is less than the amount spelled out in the contract, the district should use the lesser amount in calculating the amount of compensation received for the transfer.

Districts should contact their local district liaison if they have any questions concerning the treatment of a particular personal service contract.

DRAFTING PERSONAL SERVICES CONTRACTS AND REIMBURSEMENT AGREEMENTS

by

FRANCES M. PANTALEO, ESQ.

Walsh, Amicucci & Pantaleo LLP
Purchase

With special acknowledgement to JUDITH GRIMALDI, Esq. and ANTONIA MARTINEZ, Esq. for their contributions to prior NYSBA CLE materials and articles regarding the topics covered by these materials.

PERSONAL SERVICES CONTRACTS

I. INTRODUCTION:

Since the enactment of the Deficit Reduction Act in 2006, Personal Services Contracts (PSC), have been increasingly utilized by elder law practitioners as an alternate Medicaid planning tool. Personal Services Contracts enable family members to be compensated for providing essential long term care. Today, more than 65 million Americans are involved in some form of family care giving. Informal 'family style' care provides approximately 75% of all the long term care given in this country. This care is often provided at great financial sacrifice when family members leave the work force to care for their relatives with long term or chronic illnesses.

Family care giving has decreased due to the following societal conditions:

1. The family caregivers are now in the work force themselves and are unavailable to provide substantial elder care.
2. Women are having children later in life and are still fully engaged in their own children's needs and cannot take on elder care. In some cases, the elder had later life children, and these are not fully matured themselves to take on the care.
3. The birth rate has decreased. Thus, with fewer children, there are fewer potential caregivers.
4. Elderly people are living longer and the level of care needed at home is more intense and requires special training and skills. Family caregivers may be ill equipped to meet the requirements and burden of care.
5. The pool of available professional caregivers is shrinking as individuals seek more highly compensated and less physically demanding work.

In light of this new reality, informal or family caregivers who are willing to take on their relative's care burden increasingly need to be paid. This payment can offset the loss of their previous income and make up for the loss of their own Social Security (SSA) credits towards their future retirement. Paying for informal care giving should be a legitimate public policy objective in that it acknowledges the valuable service family caregivers perform and encourages this work to continue. With the lengthening of the life cycle, with its greater likelihood of chronic illnesses, the need for long term personal care is ever increasing. Our country will need to find a new economic model to replace this shrinking unpaid family labor force. The shortage of professional caregivers and the complexity and cost of care has made compensating the informal and family caregiver a necessity.

The PSC is not a new elder law planning technique. Outside of NY, the PSC had been used successfully for many years as a Medicaid planning tool and was found to be a "compensated transfer" i.e. payments made pursuant to the PSC were not subject to Medicaid transfer penalties. However, New York elder law

practitioners had not widely used the PSC because of the easier availability of gifting strategies and the liability of the paid caregiver to pay income taxes on sums received for family care. Informal caregivers often took their compensation in the form of direct gifts from the elder, with no resulting income tax liability for the caregiver.

The enactment of the Deficit Reduction Act (DRA) changed the manner in which the Medicaid program calculates penalties for transfers of assets. The change lengthened the "look back" period for uncompensated transfer of assets from three to five years. Moreover, for all transfers which take place on or after February 8, 2006, the penalty for an uncompensated transfer now begins on "the first day of a month during or after which assets have been transferred for less than fair market value, **or the date on which the individual is eligible for medical assistance under the State Plan and would otherwise be receiving institutional level care…based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection."** (Emphasis added.) As a result of this change, individuals who transfer assets must be prepared for a transfer penalty which can be imposed for a full five years after the gift has been made. This change forced caregivers and elder law attorneys to re-examine the wisdom of outright gifts to family caregivers and to consider the use of Personal Care Contracts as an alternate way of compensating family members for legitimate provision of care services. As a compensated transfer for value, it was believed that payments made to family care givers would not interfere with Medicaid eligibility.

II. PERSONAL SERVICE CONTRACTS:

A. Definition:

In 2007, the Department of Health issued GIS 07/MA 019 "Evaluating Personal Services Contracts for Medicaid Eligibility". The GIS defines a personal service contract, also known as a caregiver agreement, as "a formal written agreement between two or more parties in which one or more of those parties agree to provide personal and/or managerial services in exchange for compensation paid by the party receiving the services." The GIS imposes many limitations on the use of these contracts, but confirms that payment for services under a properly drafted personal services contract, when combined with good record keeping by the caregivers, is not a transfer of assets for less than fair market value and should not result in a period of Medicaid disqualification. *See Exhibit A for GIS 07 MA 019.*

B. Rebutting the Presumption of Care Provided for Free:

In order to establish the validity of a contractual relationship for service between the elder and the care giver, it is critical to have a formal written document which specifically sets out the services which will be provided and the rate of compensation for each service.

The Medicaid program has historically applied a presumption that services provided by family caregivers are intended to be uncompensated and are provided for love and affection alone. See the following language from 96 ADM-8 page 12:

> …while relatives and families members legitimately can be paid for care they provide to the individual, there is a ***presumption*** that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past was normally not considered a transfer of assets in which the recipient of the service received FMV. ***However, an individual can rebut this presumption*** that the value was received with tangible evidence that services were performed and that the services were received or agreed to receive in the future. An example of acceptable evidence would be a ***promissory note or written care contract*** executed at the time services were provided. (See also HCFA Transmittal 64, section 3258.1(A). (emphasis supplied.)

Practice Tip: A properly drafted personal services contract can rebut the presumption that care provided by family caregivers is provided without expectation of remuneration, but is performed as a fee for service. However, in a recent fair hearing, *In the Matter of Basil E.* discussed later, a PSC was found not to be a compensated transfer in part because the caregiver daughters had provided their father with services for free prior to the institution of the contract and prior to the application for Medicaid benefits. DOH took the position that because services were provided for free before the start of the contract, the payment for services pursuant to the contract is not a compensated transfer but a technique solely for Medicaid planning.

C. Relationship of Medicaid and SSI program:

Federal law provides that the rules governing the Medicaid program may not be more restrictive than the rules which govern the Supplemental Security Income (SSI) program.[1] The rules governing the SSI program can be found at 42 U.S.C.§1381 et seq, 20 CFR §416 and the Social Security

[1] 42 USC 1396a (a)(10)(c); 42 CFR. 435.4 and 435.840(b)(2).

Administration's manual entitled Program Operation Manual Systems, otherwise known as the POMS.[2]

The POMS contains guidance regarding the factors to be considered in determining whether an exchange of money for services will be considered a transfer for fair market value.

D. Fair Market Value (FMV):

The Medicaid program imposes periods of disqualification for nursing home services upon individuals who transfer assets for less than fair market value ("FMV"). However, a person will not be ineligible for Medicaid as a result of a transfer of assets if a satisfactory showing is made that the individual intended to dispose of the asset at fair market value, or for other valuable consideration or that the asset was transferred exclusively for a purpose other than to qualify for Medicaid. See, 42 U.S.C. §1396p(c) (2(C) (i); New York Social Services Law §366.5, 18 N.Y.C.R.R. 360-4.4(c) (ii) (d).

The SSI POMS contains several pages of guidance entitled "Determining Fair Market Value" at SI 01150.005. Fair Market Value is defined as "the current market value (CMV) of a resource at the time the resource is transferred. The CMV of a resource is the going price for which it can be reasonably expected to sell on the open market in the geographic area involved."[3] The POMS goes on to state that compensation for a resource may include "in-kind support and maintenance or services to be provided to the individual because of the transfer."[4] "The transferor may actually receive the compensation before, at, or after the actual time of transfer.[5]

New York State's GIS 07 MA 019 is similar to the POMS and states that the rate of compensation must be "commensurate with a reasonable wage scale, based on fair market value for the actual job performed and the qualifications of the caregiver." The GIS directs Medicaid eligibility workers to the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook for assistance in evaluating job duties and pay rates and indicates that if the pay rate in the contract is higher than the amount spelled out in the contract, the lesser rate should be used to calculate the rate of fair market compensation.

The POMS specifically discusses agreements to provide personal services for compensation and provides several examples of how such contracts

[2] The POMS and the regulations can be accessed through the Social Security Administration's user friendly website: http://www.ssa.gov
[3] POMS SI 01150.005 at B.1
[4] Id. at B. 2
[5] Id. at C. 2

should be evaluated, thus evidencing the appropriateness of their use in family or informal caregiving situations. *POMS annexed as Exhibit B.*

Services for Life and Lump Sum Payments for Future Services

The POMS also addresses **lump sum** payments for services. These will be considered to be for fair market value as long as the compensation is reasonable when compared to the going market rate for such services and the term during which the services are rendered does not exceed the individual's life expectancy.

Example: Advance payment for room and board over 5 year period: The POMS provides an example of an individual who pays his sister $30,000 pursuant to a written agreement that she will give him room and board in her home at a cost of $500 per month. The transfer is considered to be a transaction for fair market value.

Commentary: The POMS appears to assume that a lump sum pre-payment for personal services will be considered a transfer for FMV as long as the term of the pre-payment is not for a period longer than the individual's life expectancy.[6] Another example given under the POMS is a pre-payment of five years of yard maintenance services. From the examples provided in the POMS, it would seem that a lump sum pre-payment for future services is acceptable, even if the care recipient dies sooner than his or her life expectancy.

The POMS indicates that contracts to provide services over the lifetime of the individual will be considered to be Fair Market Value transactions if such agreements are calculated using the **life expectancy tables** promulgated by the Social Security Administration.[7] The Social Security Administration's life expectancy tables are periodically revised. *The currently applicable table is attached to these materials as Exhibit C.* [8]

GIS 07 MA/019 does not provide specific guidance about the mechanism for calculating a lump sum payment for services for life. However, the GIS does refer to payments over the "calculated life expectancy" of the care recipient. The GIS is more restrictive than the POMS by adding the following additional requirement:

[6] See also POMS SI 00835.480 which discusses prepayment of in-kind maintenance and support.
[7] Id. at D.3.c. and D.4.c.
[8] The New York State administrative directive regarding the implementation of the DRA, 06 ADM-5, directs local social services districts to use the life expectancy tables promulgated by the Social Security Administration. 12 MA/025 directs local offices to use the updated table annexed as Exhibit C to these materials.

"a Personal Service Contract that does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill his/her duties under the contract, or if the A/R dies before his/her calculated life expectancy, must be treated as an transfer of assets for less than fair market value. If there are no such legally enforceable provisions, there is no guarantee that FMV will be received for the prepaid monies."

Commentary: Some elder law attorneys have argued that the GIS requirement that a lump sum payment must be refundable in the event that the care recipient dies is in conflict with the POMS provisions which permit lump sum payments which are actuarially reasonable. Participants in a panel discussion of DSS and DOH attorneys sponsored by the Elder Law Section a few years ago stated that DOH is not bound by the POMS in programmatic issues such as personal service contracts. This issue has been addressed in fair hearing discussions and appeals discussed below and may be the subject of future appeals and decisions.

Services Provided on an "As Needed" Basis: GIS 07 MA/019 provides "If a personal service contract stipulates that services will be delivered on an "as needed" basis, a determination cannot be made that FMV will be received in the form of services provided through the contract. A transfer of assets penalty must be calculated for an otherwise eligible individual".

Practice Tip: Individuals who apply for community Medicaid services do not have to disclose the existence of a Personal Services Contract, as there is no transfer of assets penalty for community Medicaid. However, if the individual applies for nursing facility coverage, the contract must be disclosed and evaluated. "When doing such an assessment, if the district determines that the funding of personal services contract is an uncompensated transfer, the district must give the applicant credit (i.e. by reducing the transfer amount) for the value of any services actually received from the time the personal service contract was signed and funded through the date of the Medicaid eligibility determination. Thus, if the contact provided for compensation on an "as need basis", the district would still need to give credit for the actual services provided. See fair hearing and court decisions discussed below.

E. DOCUMENTING THE REASONABLENESS OF THE RATE OF COMPENSATION

Case law and the administrative directives governing the Medicaid program support the need for caregivers and their attorneys to establish fair market rates by researching rates charged in the market place. The

POMS instructs the social services agency to contact at least one local knowledgeable source in addition to the provider to verify the current market value of the services if the services were not purchased on the open market. Similarly, GIS 07/MA 019 refers Social Services district officials who are evaluating the hourly rates for services contained in Personal Care Contracts to the U.S. Department of Labor, Bureau of Labor and Statistics, Occupational Outlook Handbook which can be found at the Department of Labor website: http://www.bls.gov/oco. Districts which determine that a reasonable pay rate for a particular service is less than the amount spelled out in the contract are advised to use the lesser amount in calculating the amount of compensation received for the transfer.

The Occupational Handbook cited in the GIS is frequently updated by the Department of Labor and contains both regional and national averages for various occupations. The 2012-2013 Handbook lists the national average hourly rate of pay for home health aides as $10.49 with a mean hourly rate in NY state of $10.21. The Handbook documents the tremendous variations in rates of compensation in various regions of the country and throughout each state.

Another reputable resource for establishing fair market rates for caregiving is **The Genworth Financial Cost of Care Survey[9],** which is updated annually. For 2013, the survey reports that the national average hourly rate for home health aides was $19, and that the national average hourly rate for homemakers/companions was $18. In New York State, the survey reports the hourly rate for licensed homemaker services to range from a low of $15 to a high of $33. Licensed home health aide services range from a low of $15 to a high of $36 per hour. However, these are average rates for care provided by licensed agencies, not the rates received by the caregiver aide.

On March 11, 2010, Maria L. Colavito, Associate Attorney for the New York State Department of Labor, issued an Opinion Letter which interprets New York's minimum wage regulation to require that "live-in companions" "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours of sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable." The letter also makes it clear that individuals who work in excess of forty hours per week must be paid not less than one and one half times the minimum wage rate for all hours

[9] . The Genworth 2013 Cost of Care Survey can be found at https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html.

worked in excess of forty hours per week. This opinion letter can be utilized to justify the rate and number of hours of compensation for family caregivers who provide services on a live-in basis. *Opinion letter is annexed to these materials as Exhibit D.*

In addition to providing personal care and home health services, family caregiver services often include bookkeeping, bill paying, coordination of medical services, housekeeping and other services. In the opinion of the author of these materials, the following rates for professional services in the NY metropolitan region are reasonable and commonplace:

Geriatric care management: $75 to $150 per hour
Bookkeeping: $30 to $50 per hour

Note, however, that local Departments of Social Services may be reluctant to approve compensation at these higher rates of services if the care provider does not possess a professional degree in the area in which the service will be provided.

Attorneys who draft Personal Services Contracts should independently document the reasonableness of the hourly rates of pay for various services in their region by obtaining letters or invoices from professionals in the particular field and researching the rates for these services listed in the U.S. Department of Labor, Bureau of Labor and Statistics, Occupational Outlook Handbook.

Practice Tip: The GIS acknowledges that the services detailed by the contract may be personal or managerial. The pay scale for services under the contract may provide different rates of compensation for varying types of duties performed. The personal service contract should specify the current market value of the services which will be provided. The contract should set forth the range of costs for each service in the local area. The practitioner must be able to document the open market price for each service identified in the contract if asked. Records of billing rates of local geriatric care managers, home care agencies, bookkeepers, personal assistants, housekeepers, etc. should be available to justify contract rates. It may be helpful to secure a social assessment of need by a professional such as a Geriatric Care Manager or Social Worker to establish the medical necessity of the care and services detailed in the contract.

In Matter of J.C., , FH decision 3565848H, the hearing officer required the appellant, on remand, to document the need for services which were paid at a rate of 24 hours per day pursuant to the agreement. *(Decision annexed as Exhibit E.)*

F. SCOPE OF SERVICES: Services provided to Nursing Home Residents

GIS O7 MA/019 contains a boldface note on page 2: **"No credit is allowed for services that are provided as part of the Medicaid nursing home rate."**

The Department of Health has consistently taken the position that a person who is in a nursing facility does not need supplemental assistance from family caregivers and that the services in the contract duplicate services already provided by the facility and paid for by the Medicaid program. (*See, **Matter of M.G.** fair hearing decision discussed below and annexed as Exhibit F.)*

Practice Tip: In light of fair hearing and court decisions which have imposed transfer of asset penalties for services provided to residents of nursing facilities, the use of the PSC for nursing home residents has been severely curtailed.

G. Cases and Fair Hearing Decisions:

Personal care contracts have been upheld as legitimate fair market value transactions which do not constitute transfers of assets which result in the imposition of a Medicaid transfer penalty. Recent NY fair hearing decisions dealing with personal service contracts do not negate their use, but narrow the types of cases in which they will be accepted as a transfer for fair market value.

In re Appeal of J.C. Fair hearing #3565848H, February 20, 2002. An 81 year old father began living with his son in October 1999. In December 1999 the father entered into a personal services contract with his son and his daughter. Under the terms of the contract, the father agreed to pay his children as caregivers the lump sum of $150,000 pending the sale of the father's home, or in the alternative, if the house was not sold within 120 days of the signing of the contract, to transfer his ownership of the home to the children. The father lived with both the daughter and his son until he entered a nursing home in November 2000. In May 2000, the home was sold for $140,057 and the proceeds provided to the son. The hearing officer reversed the initial determination that the transfer of the proceeds from the sale of the house to the son was a transfer of assets for less than fair market value. The contract enumerated the specific services to be provided by the children as including room and board, housekeeping, laundry, personal assistance, financial management and securing health care services at a rate of $131,400 per year which was based upon a rate of $15 per hour for 24 hours per day for a year of personal care and financial management at a cost of $21,900 per year based upon three hours per

week at $20 per hour. Room and board was charged at $800 per month or $9,600 for the year. The Commissioner upheld the contract as an agreement to provide services at a fair market value. Given the clear intent of the parties and the detailed terms of the contract, the Commissioner found that the Appellant overcame the presumption that personal services were provided out of love and affection and not for compensation. However, as the contract required the caregivers to keep detailed records and it was not clear whether they had done so, the matter was remanded for further proceedings. The Commissioner also directed the parties to provide medical documentation that that the Appellant required 24 hour care, especially as the record indicated that the Appellant had been attending a day care program during the period he was living with his children. The children were directed to show documentation that they actually earned the compensation which they claimed under the contract. (*Decision annexed as Exhibit E.)*

Carpenter v. State of Louisiana, Department of Health and Hospitals, 94 So.2d 604 (Louisiana , 1st Cir. 2006) 92 year old woman left her daughter's home to reside in a nursing home in February 2004. The Medicaid application submitted in March 2004 was denied due to a finding that the mother had made an uncompensated transfer of assets in the amount of $29,339.68 shortly prior to her admission to the skilled nursing facility. The daughter presented evidence that in March 1989, her mother had entered into a personal care contract with the daughter in which she agreed to pay daughter the sum of $1,000 per month on demand by the daughter. The agreement was signed by the mother, the daughter and two witnesses. No payments were made pursuant to the agreement until the mother was about to enter the nursing home. At that time, the mother transferred the balance of an investment account to the daughter, pursuant to the terms of the note and in compensation for the services the daughter provided to the mother over the intervening fifteen years since the agreement was signed. The Department of Social Services officials argued that the signature on the document was questionable and that the agreement was not notarized. However the witnesses testified as to the signature and that the mother was competent when she signed it, immediately prior to moving in with the daughter. The hearing officer's decision upholding the Medicaid denial indicated suspicion of the testimony of the witnesses and the genuineness of the signature but no contrary evidence had been submitted. The court reviewed the provisions of the Louisiana Medicaid manual which permit relatives to be paid for services pursuant to a written agreement and determined that the agreement appeared to be valid on its face. The court rejected the argument that the agreement should have been notarized or dated, as no such requirements were contained in the state Medicaid manual. There was nothing in the Medicaid Manual which required that payments had to

be made at the time the contract was signed or prohibited an "on demand" payment.

Thomas v. Florida Dept of Children and Family Services, 707 So. 2d 954 (Fla. App.4 Dist. 1998) The Fourth District Appellate court reversed a finding that a payment of $67,725 to a daughter pursuant to a personal services contract by which the daughter agreed to care for the mother over the course of the mother's lifetime was a transfer for less than fair market value. The evidence presented at the hearing proved that the Medicaid applicant had in fact paid a fair market value for the services provided under the contract. No contrary evidence was presented at the hearing.

Reed v. Missouri Department of Social Services , 193 S.W.3d 839 **(**Missouri Court of Appeals Eastern District 2006) Appellate court upheld a trial court finding that a payment of $11,000 by a nursing home resident to her daughter was an uncompensated transfer of assets. The court found that it was reasonable for the daughter to be compensated for services such as feeding her mother in the nursing home, purchasing clothing, interacting with the staff in order to safeguard the mother's care, relocating lost items, monitoring usage of prescription drugs, accompanying the mother to social events in the facility as the mother would otherwise lie in bed and refuse to participate, taking the mother to restaurants and on trips outside the facility. The court noted that the daughter regularly drove sixty miles round trip three or four times per week to perform these services and found that "these services, among others, support (the mother's) independence, autonomy, well-being and care in ways that the facility's services do not. They enhance (the mother's) life in ways that the facility does not, and are above and beyond the care provided by the facility. "

Brewton v. State of Louisiana Department of Health and Hospitals
(Louisiana, 5th Cir. 3/13/07) Appellate court upheld a decision of the district court reversing the Medicaid agency's denial of Medicaid eligibility. Mr. and Mrs. Brewton both entered a skilled nursing facility in 2003. In August 2003, the Brewtons entered into a personal care service agreement with three relatives: a niece, her husband and a nephew. The agreement set forth services which would be provided by the relatives on behalf of Mr. and Mrs. Brewston and set forth compensation in a lump sum of $150,000 upon the sale of the home. Upon the sale of the home, a total of $118,805.22 was provided to the relatives pursuant to the terms of the agreement. The Medicaid agency argued that the agreement "was not actuarially sound" because the recipients were residing in a nursing home. The ALJ upheld the agency determination as it found that the services provided in the agreement were already provided by Medicaid and could thus have no value. The Appellate Court upheld the reversal by the District Court finding that the Brewtons did receive valuable services. The

evidence revealed that the relatives spent many hours rendering services such as managing personal and financial affairs, dealing with the sale of the home, cleaning, repairing, inspecting and arranging for professional inspection prior to the sale of the home. The services rendered by the family members were not duplicative of nursing home services. They included replacing lost laundry, providing phone and phone service, replacing lost hearing aides, regular visits to the home, visiting the residents upon hospitalization, attending periodic conferences at the home and making funeral arrangements, purchasing a radio and record player, providing music, ordering cable television, bringing furniture to the home, replacing personal items, accompanying the Brewtons to medical appointments, providing holiday gifts, decorating the room, bringing a pet to visit and dealing with Medicaid personnel. All of these services were found to be valuable consideration for the transfer of funds.

But see, the following cases in which payments pursuant to a personal services contract were found to be transfers of assets for less than fair market value:

Andrews v. Division of Medical Assistance , 861 N.E.2d 483 (Mass. Ct. App. 2007) Mass. App. Ct. refused to reverse a finding by the Medicaid agency that payments made to the Medicaid applicant's daughter and her husband were a transfer of assets. After the Medicaid applicant moved into a nursing home, her daughter and son in law quit their jobs to renovate her ramshackle Victorian home for sale. The renovations took almost two years and increased the value of the house by approximately $230,000 and the house was sold. The Tekulas paid themselves $100,000 for the work they did in the renovations. However, there was no written agreement which permitted the Tekulas to be paid for their services. Accordingly, they failed to rebut the presumption that services provided by family members was intended to be provided for free.

In the Matter of M.G., Fair hearing decision #473952M (May 3, 2007) (*Copy annexed as Exhibit F*.) In November 2006, an application for Medicaid nursing home eligibility was filed on behalf of a 94 year old woman. The local Medicaid agency denied the application on the grounds that the applicant had made an uncompensated transfer of assets valued at $101,053.44 resulting in a 16.22 month period of Medicaid disqualification. The decision states that the applicant entered a skilled nursing facility in June 2006. On August 5, 2006, the applicant entered into a "Personal Service Support and Maintenance Contract" with her two daughters. The daughters were to be paid $15 per hour pursuant to the terms of the contract for services to be rendered to the mother over the course of her lifetime. (The decision does not specify the number of hours of care to be provided by the daughters pursuant to the terms of the agreement.) The applicant submitted logs prepared by the daughters which

set forth the services they performed pursuant to the agreement, the date each task was performed and the amount of time spent on each task. The daughters testified that the services they performed included checking the mother's oxygen tank at the facility which was found to be empty on at least one occasion. Other tasks included monitoring the mother for changes related to her medication, assisting with her personal hygiene and grooming of hair and nails, obtaining items such as blankets and clothing and monitoring her finances. The daughters argued that some of these tasks were medically necessary and that others were above and beyond the care provided by the nursing home staff and supported the mother's well-being and care in ways the nursing home staff does not. The daughters argued that the services they provided for their mother were similar in nature to the services provided by the Long Term Care Ombudsprogram. On cross-examination, a daughter admitted they did not file complaints with the Department of Health about deficits in the mother's treatment by the nursing home and that she had performed many of these services without compensation prior to entering into the personal services contract with her mother. The hearing officer upheld the determination that an uncompensated transfer of assets had occurred. Since the mother was residing in a skilled nursing facility, any medically necessary services were already provided by the nursing home and "have already been purchased." The hearing officer also found that a significant number of the entries in the logs consisted of mere "visits" with mom and that "It is difficult to separate a visit to an aged and infirm parent by an adult child as a paid services (sic) and valuable consideration from one motivated by love and affection." The services consisting of shopping for clothes, calling mother by telephone, shoveling snow from the driveway and roof, mopping the cellar and mowing the lawn were found not to constitute personal care "within the context of the regulations." Lastly, the logbook showed that the services provided by the daughters sometimes overlapped. Since the daughters testified that they had performed many of these services prior to the execution of the contract, they "cannot now claim payment for services they provided to their mother, out of their love and affection for her." The hearing officer also found that the services provided by the daughters in the nature of financial management were duties that the daughters had elected to undertake under the terms of a power of attorney which made no specific provision for payment to them as agents. Lastly, the hearing officer distinguished the decision in the J.C. fair hearing (discussed above) as the Medicaid applicant in J.C. entered into the personal services contract prior to his admission to a skilled nursing facility.

In the Matter of Basil E; Fair hearing decision #4832282L (November 12, 2007). (*Decision annexed as Exhibit G.)* Basil E., aged 90, entered into a PSC with his two daughters for his care while a resident of a skilled nursing facility in Scotia, NY. The lifetime contract was valued at

$106,860.00. The daughters were to perform services such as visitation, providing amenities (entertainment, recreational and social activities) monitoring health care, shopping, securing health care, and providing financial management. The Agency determined that the $106,860 paid on the PSC was an uncompensated transfer and imposed a 14 month penalty period for this transaction.

The decision found in favor of the Agency and determined that the PSC was not a compensated transfer and the 14 month penalty period was upheld. The Personal Service Contract was found to be invalid for the following reasons:

- The written contract did not provide tangible evidence to overcome the presumption that the services provided by the children are intended to be without compensation since they had **previously** provided the same services for free.
- The main objection is that the contract was entered into 11 weeks after the Appellant entered the nursing facility and four weeks prior to the filing of the Medicaid application. These facts were used to distinguish this contract from the J.C. Fair hearing decision in which the family members provided their father with care while he was living in their homes.
- The services being performed under the contract were already being performed by the skilled nursing facility and therefore were built into the cost of care and represented a duplication of services.
- The contract tasks which were not deemed to part of the medical care provided by the skilled nursing facility such as visiting with father, transporting father home for meals, cleaning father's house, walking with father, grooming father and laundering father's clothes, are the types of tasks each daughter performed **prior** to the execution of the contract, out of their love and affection for their father and the decision held that these cannot now be claimed to be done because payments are being made.
- The contract allows for services to be performed on an "as needed basis" which was found to be vague and ambiguous.
- It was uncertain if the caretakers will meet their expected contractual obligation since contract was based on the father's life expectancy not on a date certain.
- The hourly rate charged for the services rendered was found to be too high and not commensurate with the daughter's skills and training.
- The provision of financial, managerial and administrative services was held to be a duplication of other paid services or was covered under the caretaker's durable power of attorney which does not provide for compensation.

Commentary: Ironically the decision honored the contractual obligation between the A/R and the home repair contractor, while in the same decision the hearing officer did not apply the same contractual obligation to the contract between the father and his caretaker daughters. The decision implies that these kinds of non--medical services might be acceptable if the parties could provide better documentation of specific services and appropriate pay scales.

Matter of Barbato; 65 A.D. 3rd 821, 884 N.Y.S. 2d 525 (4th Dept. 2009) The 4th Department upheld determinations by the Herkimer and Oneida County Departments of Social Services that found lump sum payments for services pursuant to personal services contracts to be uncompensated transfers of assets. The decision indicates there was no way to determine fair value for contracts which contained provisions that services be provided on an "as needed basis." Moreover, the court found that the absence of a refund provision raises the possibility that a caregiver will receive a windfall in the event that the Medicaid recipient dies before his or her expected life expectancy. However, the matters were remanded to the respective local social services districts to make determinations regarding the fair market value of services rendered between the date on which each agreement was executed and the date of the eligibility determination. The court concluded that "substantial evidence supports the determinations that services provided by caregivers that are duplicative of services afforded petitioners by the nursing facilities in which they reside are non-compensable… Inasmuch as service logs kept by the caregivers for each petitioner are included in the record, the …duplicative services may be identified, and the services provided distinguished from those yet to be provided. Moreover, the fair market value of the non-duplicative services performed may be determined and used in calculating each of the periods during which petitioners are ineligible for medical assistance benefits….The determination of the issue whether certain services are duplicative of those provided by the nursing facilities may be facilitated by reference to the standards for services in such facilities set forth in 10 NYCRR 415.1 through 415.27."

Stern v. Dairies, (Queens Co. 2009) 2009 NY Slip Opinion 32836 (unpublished) (*Decision annexed as Exhibit H.)* Appeal from a fair hearing decision which found that a lump sum payment pursuant to a PSC was an uncompensated transfer. The PSC was executed by an agent under power of attorney subsequent to the admission of the care recipient to a nursing home. The court rejected that appellant's argument that GIS 07 MA/019 was promulgated in violation of the rule making provisions of the State Administrative Procedure Act. The court found that the contract was

defective as it provided for services on an "as needed basis" and failed to contain a refund provision. The court also determined that the Medicaid program is not bound by the arguably narrower interpretation of fair market value in the SSI POMS as the Medicaid and SSI programs have different rules regarding transfers of assets. The respondent Social Services district conceded that in light of **Barbato**, the case should be remanded for a determination of the actual fair market value of the services provided from the time of the execution of the PSC and the date of the Medicaid eligibility determination. The court also noted that the caregiver under the PSC was also the agent under power of attorney for the care recipient, and that she had the authority to transfer the resident to another facility if she was dissatisfied with the care received at the nursing home. No credit should be given for services provided by the nursing home.

Kerner v. Monroe County Department of Human Services, 2010 NY Slip Op 5904, 2010 N.Y. App.Div. LEXIS 5776. The 4th Department reversed a determination of the Monroe County Department of Social Services which imposed a thirteen month transfer penalty for services rendered pursuant to a PSC by the Medicaid applicant's son. The son was paid $9,283 per month for room and board, care and supervision, food and food preparation and daily assistance with personal care needs, laundry, cleaning, transportation and medical office visits. The son alleged this rate of service was commensurate with nursing home costs. The Medicaid applicant lived with his son and his wife from September 2006 until July 2007 and was paid $105,041 for services pursuant to the PSC. Services pursuant to the contract were provided on an "as needed basis." The 4th Department concluded that although a daily log of hours worked and services rendered is not necessarily required, the local district erred in issuing a decision which refused to give credit for any services. The matter was remanded to allow the local district the opportunity to recalculate the transfer penalty. The caregiver was to be given the opportunity to identify with reasonable specificity the services rendered and the number of hours spent rendering those services, as well as the fair market value of those services.

Swartz v. New York State Department of Health, 3rd Department, June 14, 2012 . (*Decision annexed as Exhibit I.)*The Medicaid applicant and his wife executed a PSC with his daughter in which they were to pay her at rates ranging from $15.50 to $17 per hour for various services. The contract required the daughter to maintain contemporaneous records of the dates and nature of the services that she provided. The daughter was not paid until the father entered a nursing home and his home was sold. The local district determined that $36,056.74 of the total compensation to the daughter of $51,940.50 was uncompensated as the daughter failed to maintain detailed contemporaneous time records. The court noted that the

Medicaid applicant bears the burden of proof to establish that the transfer of funds to the daughter was not an uncompensated transfer and that this burden was not met as the daughter failed to maintain detailed records. Moreover, the rate of compensation was higher than the mean rate for a home health care rate as established by the US Department of Labor.

H. DRAFTING THE AGREEMENT

The written contract should clearly set forth the **type, frequency, and duration** of the services to be provided. *A sample contract is annexed as Exhibit J.*

When drafting the contract, be mindful that GIS 07/MA 019 states:

> if a personal services contract stipulates that services will be delivered on an 'as needed' basis, a determination cannot be made that FMV will be received in the form of services provided through the contract.

Practice Tip: Avoid the use of 'as needed' language in contracts which provide for services to be rendered to a nursing home resident. If the care recipient will be receiving care in the community, it may be acceptable for the contract to provide for services "as needed". However, the contract should lay out the expectation as to the average number of hours that such services will be provided on a typical week or month but that it is expected that during some periods the services will be rendered more frequently and in some, less. The contract should specify that there is a need for flexibility in delivering services and recognize that changing care needs may affect the frequency and scope of future services. ***The caregiver must be instructed to maintain meticulous, detailed logs regarding the dates, duration and types of services actually provided***.

Type of Services: The contract should specifically enumerate the types of services which will be provided by the caregivers. Some of these services may be equivalent to the services which may be provided by professionals such as geriatric care managers, nurses and accountants: for example, monitoring health care, accompanying the individual to doctor appointments, monitoring living arrangements, providing for social and entertainment activities, financial management, bill paying. In some instances, the services may include doing laundry, assisting the individual with bathing, toileting, feeding, hair care, manicures or other chores such as the services typically provided by personal care or home health aides.

Practice Tip: Individuals who enter nursing facilities often have apartments or homes which must be cleaned out and then returned to landlords or sold. Consider drafting a combined Personal Services Contract/Reimbursement Agreement which will provide for compensation and/or reimbursement to caregivers who clean out or maintain the residence, prepare the residence for sale or return to a landlord, arrange for sale or donation of personal property.

Frequency of Services: The contract should set forth a specific expectation as to the average number of hours in which services will be provided per week, or per month.

Compensation: The contract should set forth the understanding of the parties as to the average market rate for services being provided under the contract.

Practice Tip: The contract should separately enumerate a range of hourly rates in the locality for services which are equivalent to geriatric care management, accounting or financial management services and personal care or home health aide services. All assumptions used in the creation of the contract must be subject to verification, in writing, in the event the Medicaid application is denied and a fair hearing is required.

Do the Math! The contract should set forth the exact calculation of the fair market value for the services provided under the agreement. Provide the rate for each service and multiply by the number of hours the service will be provided over the duration of the contract. Consider using a rate for services which is considerably below the average rate charged by commercial service providers. **Remember: This contract will be closely scrutinized by Social Services officials.** Consider paying the caregiver less than the calculated fair market value for the services and stating that the services are being provided at a discounted rate.

Room and Board: If the individual receiving care will be living in the household of the caregivers, consider including an obligation to pay monthly room and board, in addition to the hands-on personal care services provided under the agreement. Be prepared to document the average cost for the room and board in the locality in which the clients live. The sample agreement annexed as Exhibit J provides for room and board at a rate commensurate with the monthly fees for charged by an independent living facility in the area.

Multiple Caregivers: There may be circumstances where multiple caregivers will be providing services under an agreement. The agreement

should specify whether each caregiver is to receive a pro rata part of the payment, or any other division, as appropriate and agreed upon by the parties. If the agreement provides for payment for only one of several children or would otherwise result in an unequal division of assets, the practitioner should be particularly cautious about ethical issues such as the competence of the elderly or disabled care recipient or undue influence by the provider and should proceed with caution.

Practice Tip: Consider calling a family meeting or preparing an agreement among the family members regarding the payments pursuant to the personal care contract. Similarly consider advising the recipient of the care and caregivers to retain separate counsel.

Execution of Documents. There is no requirement under New York law for a contract to be notarized or witnessed in order to be binding upon the parties. However each of the parties must sign the contract and the contract should be dated.

Execution by Agent under Power of Attorney: If the PSA is executed by an agent under power of attorney who is also the caregiver, the Power of Attorney document should contain specific authority in the Modifications section which specifically authorizes the agent to enter into such contracts. Sample language might be: "Enter into buy/sell agreements, and/or agreements for goods and/or services for my benefit, including but not limited to personal services agreements with any person, including my agent(s)."

The Power of Attorney document should also authorize the agent to be compensated for his or her services and the Modifications section should contain the parameters for reasonable compensation. Sample language could be: "Provide reasonable compensation to my agent for services provided pursuant to this document, provided that such compensation is authorized by section (j) below. Reasonable compensation shall be limited to hourly compensation for all services at a rate which shall not exceed $20.00 per hour."

I. Miscellaneous Issues and Considerations

Lump Sum vs. Periodic Payments: Most last minute or emergency Medicaid plans will utilize a lump sum payment for personal care services. However, there may be instances where it makes sense to enter into a care agreement for services which will be provided over time and paid for accordingly. The latter arrangement may be particularly appropriate as a way of providing market rate compensation for a caretaker child who has given up employment in order to care for an aging or disabled parent. The ongoing payments pursuant to the personal services contract can be

supplemented with additional post-DRA Medicaid planning techniques in the event that the parent requires a subsequent placement in a skilled nursing facility. This may be a particularly appropriate technique where the parent has highly appreciated assets which would result in a capital gains tax if transferred to the caregiver child or liquidated in order to make a lump sum payment. This arrangement may also offer advantages to the caretaker by offering social security earnings and the protection of worker's compensation coverage and unemployment insurance.

If a lump sum payment will be made under the contract, or services will be provided over the lifetime of the potential Medicaid applicant, consider adding language that the contract is irrevocable and may not be amended except upon consent of all of the parties. In light of recent fair hearing and judicial decisions, the contract should provide for a refund of payments which are not earned in the event that the caregiver becomes unable to provide services or the care recipient dies before receiving services paid for by the lump sum.

Real Estate as a form of Payment: The payment pursuant to the terms of the personal care contract may be in the form of a transfer of an interest in real property. However, the clients must be advised to obtain a current value real estate appraisal at the time of the transfer in order to document the value of the consideration received under the contract. Partial interests in real estate may be conveyed, as appropriate after consideration of the life expectancy of the potential Medicaid applicant and the nature, scope and duration of the services to be provided under the contract.

Assignments of a Future Interest to the Contract:
There may be situations where the individual entering into the contract for services does not currently have the funds to make a lump sum or periodic payment but will soon have such liquid funds i.e. anticipated proceeds from a lawsuit, inheritance or sale of an interest in real property. The individual can assign the future interest to the caregivers as consideration for the services to be provided under the contract. The assignment by an individual who is already receiving Medicaid services can avoid the loss of benefits which would be incurred if the lump sum payment was received and then transferred to the care providers under the agreement.

Query? Could the agreement impose interest charges if the provider of services has to wait for payment until such time as a residence is sold or an inheritance is received? Should the care provider perfect the claim for services by filing a lien against real property?

Employment Issues and Payment of Taxes: The payment to the caregiver pursuant to the terms of the agreement is taxable income. The practitioner is advised to provide written instructions to the caregivers that

the payment pursuant to the agreement must be reported on the annual income tax returns filed by the caregiver. If the provider of services meets the requirements to be considered an employee, as discussed below, the care recipient must provide the employee with a W-2 and report the wages paid to the employee.

Independent Contractor or Employee: IRS Publication 926 sets forth guidance regarding whether an individual who provides services in the household is a household employee. The publication states that a worker is an employee if 'the employer' can **control** not only what work is done, but how it is done:

> If only the worker can control how the work is done, the worker is not an employee but is self-employed. A self-employed worker **usually** provides his or her own tools and offers services to the general public in an independent business. (Emphasis supplied.) See also: The general rule is that an individual is an independent contractor if you, the person for whom the services are performed, have the right to control or direct only the result of the work and not the means and methods of accomplishing the result Employer's Supplemental Tax Guide, IRS, and Pub. 15A.

See IRS Training Manual: Independent Contractor or Employee? Training materials, Course 3320-102, p. 2-7 and IRS Rev. Rul. 87-41 for a list of factors that may be considered to determine independent contractor or employee status.

If the individual who is receiving services directs the provision of such services, the caregiver is an employee and not an independent contractor. The distinction is critical as an employer must pay and withhold social security and Medicare taxes, pay federal and state[10] unemployment taxes and worker's compensation [11] for the employee. An employer must also verify that the worker is eligible to work in the United States by verifying citizenship or alien worker status. An employer must also obtain an Employer Identification number by filing form SS-4 with the IRS. An employer is not required to withhold income taxes, but must report the income of all employees on a W-2 form. Federal and New York State taxing authorities have the ability to look beyond the filing of a W-2 or 1099 form to determine whether the individual is an employee or independent contractor.

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[10] For information about New York State unemployment taxes, see the Department of Labor website: http://www.labor.state.ny.us.

[11] An employer must make New York State worker's compensation payments for domestic employees who work 40 or more hours per week. See http://www.wcb.state.ny.us

Practice Tip: The practitioner should advise the clients to seek competent professional services from an accountant or payroll service regarding the obligations to pay and report payroll taxes, unemployment insurance and worker's compensation.

Record Keeping and Documentation of Services: The provider should be advised to keep detailed records of all services provided pursuant to the agreement as well as all expenditures made on behalf of the care recipient.

Practice Tip: Rather than evaluate each situation on a case-by-case basis, local districts of social services frequently issue decisions which find all payments pursuant to a PSC to be uncompensated transfers of assets. Medicaid applicants and family members must then request fair hearings to prove the adequacy of the contract and the legitimacy of the services provided. Attorneys who counsel clients about the option of entering into these contracts should warn the clients, at the outset, about the likelihood that a fair hearing will be required. This factor must be weighed in the determination whether to utilize this technique

III. REIMBURSEMENT AGREEMENTS

As stated in Section II above, the Medicaid program has historically applied a presumption that services provided by family caregivers are intended to be uncompensated and are provided for love and affection alone. See, 96 ADM-8 page 12. Accordingly, the Medicaid program will generally impose a transfer penalty period upon a payment to a child or other individual which is intended to be a reimbursement for out of pocket expenditures advanced by the child. For example, many times a child will pay real estate taxes, mortgage payments or other obligations of a parent who has meager resources. Later, upon the sale of the real estate, the parent will reimburse the child for these out of pocket expenses. However, in the absence of a written agreement that the funds advanced by the child were intended to be a loan, the Medicaid program will generally treat these later payments to the child as a gift, subject to a Medicaid transfer penalty. This result can be avoided by the use of a written reimbursement agreement between the parent and the child which clearly evidences a contractual agreement that the parent will pay the child back for the sums advanced, at a future date. *A sample reimbursement agreement is attached as Exhibit K.*

IV. CONCLUSION:

Family care giving is valid work which fulfills a real societal need.

If the work of the family caregiver was replaced by paid professional staff, the impact of the economy would be tremendous. A carefully drafted Personal Services Contract can provide valuable compensation to the family care giver and withstand scrutiny as a compensated transfer for value if the care recipient later requires placement in a skilled nursing facility and applies for Medicaid.

BASIC OVERVIEW OF ESTATE DISCOUNT VEHICLES

By

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Avi Z. Kestenbaum is a partner with the law firm Meltzer, Lippe, Goldstein & Breitstone, LLP, with offices on Long Island, New York and in New York City. Avi co-chairs the Estate and Tax Planning Department, a group of more than 20 attorneys, and practices in the areas of domestic and international trusts and estates, taxation, asset preservation, family business succession planning, charitable planning and tax-exempt organizations. Avi is also an adjunct Law and Tax Professor at Hofstra University School of Law teaching *Federal Income Taxation, Gift and Estate Taxation, Estate Planning, and Wills, Trusts and Estates.* Avi has been listed in *Superlawyers* and *Best Lawyers in America* and has been frequently quoted in *Forbes, Investor's Business Daily, The Wall Street Journal, USA Today, The Washington Post,* and other national news publications and has written dozens of articles in leading national estate planning and tax journals. Avi is also on the Editorial Advisory Board of *Trusts and Estates Magazine* and co-chairs its "The Modern Practice" committee.

Avi has also lectured for many prestigious professional organizations, including, but not limited to: the "Notre Dame Tax and Estate Planning Institute"; the "Society of Trust and Estate Practitioners" (STEP); "Ed Slott's Master Elite Program"; the "American Bar Association"; the "Estate Planning Council of New York"; and the "New York State CPA Society, Annual Estate Planning Conference"; and for and to many nonprofit institutions on a variety of topics relating to domestic and international tax, estate and charitable planning, asset preservation, tax-exempt organizations, business succession and special needs planning. Avi earned his B.S. degree, *summa cum laude,* from Touro College, J.D. degree from Brooklyn Law School and LL.M. degree in Taxation from the University of Miami School of Law where he received academic scholarships at each of these universities. Avi resides in Cedarhurst, New York with his wife Miriam and their four young and lively boys, Eli, Joey, Nate and Liam.

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1. Family Limited Partnership or Family Limited Liability Company Memo

FAMILY LIMITED PARTNERSHIP or FAMILY LIMITED LIABILITY COMPANY

Introduction:

A Family Limited Partnership or Family Limited Liability Company (hereinafter for uniform purposes referred to as "Family Limited Partnership") can help provide maximum management flexibility over your family's assets. It can also reduce estate and gift taxes and offer creditor protection. In general, a Family Limited Partnership is created pursuant to an agreement between family members who contribute specified assets to the Partnership in exchange for Partnership interests. The Partnership is run by a General Partner. The Partnership agreement typically contains the following provisions:

X The Partnership shall exist for a specified number of years

X Partnership earnings may be retained by the Partnership

X Partners cannot withdraw before the end of the specified term

X The General Partner together with a majority of the Limited Partners has the discretion to dissolve the Partnership

X The General Partner must agree to a transfer of a Limited Partnership interest

X The Partnership annually distributes available cash to the Partners pro rata to each partner's percentage share in the Partnership

X Transferees of Limited Partnership interests may only receive an assignee's (economic) interest in the Partnership unless admitted as a Partner to the Partnership by the General Partner

X A Partner may transfer an assignee's interest in the Partnership subject to the remaining Partners right of first refusal to purchase the interest from the transferor Partner

X Partnership interests cannot be pledged for debts

The primary *tax* benefit associated with a Family Limited Partnership is the reduction of transfer taxes (i.e., estate tax and gift tax). Significant *non-tax* benefits associated with the Family Limited Partnership include:

X Control over Partnership distributable cash flows
X Protection of family assets from future creditors
X Simplification of gift-giving program
X Operational and investment flexibility

Family Limited Partnership:

The Family Partnership will own investment assets that you, your family members and/or trusts for their benefit transfer into it, such as interests in limited partnerships, limited liability companies, C corporations, mortgages, brokerage accounts, bonds, bank accounts, promissory notes, etc. and real property interests. The portion of your assets used to pay current living expenses or interests in a primary residence should not be transferred to the Partnership.

A limited partnership may not own shares in a Subchapter S corporation. However, shares in an S corporation can generally be sold to a Trust for a promissory note. A promissory note may be contributed to a partnership together with other investment assets.

The Family Partnership is divided into two classes of ownership; the General Partnership Interest (typically 1%) and the Limited Partnership Interests (the remaining 99%). The Management authority is vested in the General Partnership Interest. All Partners are entitled to proportionate distributions of available cash from the Partnership.

REDUCTION OF TRANSFER TAXES

General Application:

In general, Federal transfer tax law provides that the value of a Family Limited Partnership interest is determined under a "willing buyer-willing seller" test. Under this test, the fair market value of a Family Limited Partnership interest would be equal to the price at which the interest would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all relevant facts.

Due to the restrictive terms of a typical Family Limited Partnership agreement, the amount a willing buyer would pay for a Limited Partnership Interest in a Family Limited Partnership is far less than the fair market value of the assets underlying that Limited Partnership Interest. Substantial discounts for lack of management and liquidation rights in the Limited Partnership Interests have been approved by the courts. These discounts are in addition to discounts attached to non-managerial interests you may have in limited liability companies.

To give effect to the restrictions associated with a Family Limited Partnership, appraisers typically compute discounts on Limited Partnership Interests of 30 percent to 45 percent and more from the fair market value of the assets held within a properly drafted Family Limited Partnership. When combined with discounts available to underlying limited liability companies, the combined discounts can often exceed fifty (50%) percent.

As previously discussed, you would fund your Family Partnership with investment assets. In return, you will take back the 1% General Partnership Interest and you and other family members and/or trusts for their benefit will take back a 99% Limited Partnership Interest. The Management over the partnership rests in the General Partnership Interest. As long as you retain the 1% General Partnership Interest, you will control the investment of the assets within the

Partnership regardless of how much of the Limited Partnership interests you retain. The General Partner will distribute all Available Cash (after a determination is made by the General Partner as to how much cash is needed to be invested back into the business) pro rata to each Partner's percentage interest in the Limited Partnership. Holders of Limited Partnership Interests will have no management rights in the Limited Partnership.

The opportunity to save transfer tax (estate tax or gift tax) exists because you can reduce your taxable estate by transferring Limited Partnership Interests to your family members (or to a Trust for their benefit) at a reduced or discounted value. There are three methods of transferring Limited Partnership Interests out of one's estate. One method is by gifting Limited Partnership Interests to a Family Trust; the second method is by transferring Limited Partnership Interests to a trust and taking back an annuity interest; and the third method is by selling Limited Partnership Interests to a Family Trust.

Transfer by Gift:

Under current federal law, every individual has a Five Million Two Hundred Fifty Thousand ($5,250,000) Dollar gift tax exemption (this is the exemption for 2013, to be indexed for inflation in subsequent years). A married couple, therefore, has a Ten Million Five Hundred Thousand ($10,500,000) Dollar exemption. Accordingly, you and your spouse may give away up to the amount of your exemptions during your lifetimes without paying gift tax. In addition, you and your spouse may, together, make tax-free gifts of up to $28,000 per individual donee per year without reducing your exemptions (each person has a $14,000 annual exclusion per donee). By making gifts to a Family Trust, you can exclude gifts equal to $28,000 multiplied by the number of descendants who are trust beneficiaries.

If a gift is made in the form of Limited Partnership Interests, the value of the gift should be discounted; sometimes as much as 30-45% or more. As a result, the gift of Limited Partnership Interests valued at $132,000 could actually be a transfer of approximately $220,000 of underlying property, assuming a 40% discount, all of which may be completely excluded from taxation. Once the assets are transferred to a properly drafted Family Trust, they should be effectively removed from your taxable estate. Additionally, all the appreciation on the assets contained in the trust should also be excluded from your taxable estate.

In your case, annual exclusion gifts and even the use of the full exemptions of you and your spouse may not be sufficient to adequately reduce your estate. However, there are techniques that will transfer a much larger portion of the estate to the Family Trust. There are two common techniques which we use to accomplish this. One is a transfer of Limited Partnership Interests to a "Grantor Retained Annuity Trust" (GRAT). The other is a sale of Limited Partnership Interests to a Family Trust drafted as an "Intentionally Defective Grantor Trust" (IDIT).

Transfers to a Grantor Retained Annuity Trust (GRAT):

A GRAT is a trust which receives assets from the transferor and pays him back an annuity for a term of years calculated as a percentage of the original value of the transferred property. The present value of the retained annuity is calculated and subtracted from the amount transferred thereby reducing the value of the gift. The longer the term and the larger the annuity percentage the larger the value of the retained annuity and the less the value of the gift. The annuity can actually be calculated so that the current value of the gift made by you is close to zero.

The main benefit of the GRAT works as follows: the assets you transfer to the GRAT will not be included in your estate upon your death. The annuity payments will be included in your estate at death (to the extent not spent). Therefore, if the assets inside the GRAT produce income and appreciate at a higher rate than the annuity payment rate, then the difference should be effectively removed from your estate at potentially little or no gift tax cost. This benefit is multiplied when transferring Limited Partnership Interests since the annuity payments are calculated based on the discounted value of the Limited Partnership Interests, rather than on the value of the underlying partnership property.

Another benefit of the GRAT is that it is "self correcting" meaning that if the IRS disagrees with your position as to the fair market value of the Limited Partnership Interests, including the amount of the discount, the GRAT payments simply increase. The use of a GRAT, therefore, cannot result in an IRS tax or penalty for underpayment of tax due to an undervaluation of assets. Thus, the IRS would probably be dissuaded from ever auditing such a transaction.

The downside of the GRAT is that you have to live for the full term of the GRAT in order for the transferred assets to be successfully removed from your estate. If you die before the term, the assets become part of your estate as though the transfer never took place. You, however, are not in any worse position than if you did nothing. Also, the interest rate used for a GRAT is higher than the normal long-term, mid-term and short-term rates published by the IRS, making it more difficult to achieve a rate of return which surpasses such a rate (although funding the GRAT with discounted limited partnership interests will enhance the effective rate of earning within the GRAT, often mitigating this problem).

There is an additional downside when using GRATs, which I will briefly explain. In addition to the Estate and Gift Tax regimes, in the U.S. there is also a tax called the Generation Skipping Tax (GST). The GST is a tax on transfers to grandchildren. Currently it is a flat 40% tax. Distributions from trusts to grandchildren may be subject to the tax. Individuals currently have $5,250,000 of GST exemption (the same as the Federal gift tax exemption) that they can allocate in order to avoid GST. When using GRATs, the GST exemption may not be allocated to the GRAT until the end of the term (after property may have appreciated significantly). As a result, a significant amount of one's GST exemption generally must be allocated to a GRAT in order to make it fully exempt from GST. In some cases, the GRAT may become so large that it

will be impossible to make it fully exempt. Accordingly, distributions from the GRAT to grandchildren will be subject to the GST.

Sale to an Intentionally Defective Grantor Trust (IDIT):

The other method for transferring Limited Partnership Interests is by selling the Limited Partnership Interests to an IDIT.

Defective Grantor Trust

A "grantor trust" is a trust which is not recognized, for income tax purposes, as a separate entity from its creator. Therefore, all income items (i.e. interest, capital gains) realized by the trust are recognized by the creator on his or her income tax return. Also, transactions between the creator and the grantor trust are not recognized events for income tax purposes.

The Internal Revenue Code specifies those powers which must be retained by the creator in order to qualify a trust as a grantor trust. The retention of a number of these powers do not cause the trust assets to be included in the creator's taxable estate at his death. This difference in income tax and estate tax law creates an opportunity for estate tax savings. Trusts containing these certain powers are known as intentionally defective grantor trusts ("IDITs").

The IDIT may be set up so that it is free of Generation Skipping Tax (GST) as well. Setting up the IDIT so that it is free of GST can be accomplished by initially transferring a nominal amount to the Trust and then allocating a portion of GST exemption to the whole amount transferred. This would make the Trust wholly exempt from GST. Property sold to the IDIT would not be subject to GST. As a result, all distributions from the Trust to grandchildren should be free from GST.

Implementing the Sale:

The principals of the sale transaction are similar to those of the GRAT. However, with the sale, you sell your assets to the IDIT in exchange for a promissory note. The trust pays you interest and/or principal on the outstanding note balance with interest paid at a rate published by the IRS. The assets in the IDIT are not included in your estate upon your death. However, the outstanding balance of the note will be included. As with the GRAT, if the assets appreciate at a higher rate than the applicable IRS interest rate, the difference in appreciation should be effectively removed from your estate. Also as with the GRAT, the benefits are multiplied when selling Limited Partnership Interests because the value of the note (and the payments therefrom) are based upon the discounted value of the limited partnership interests rather than the underlying value of the partnership assets. Consequently, your estate is significantly reduced the moment the sale transaction is consummated.

It is recommended that when structuring the sale transaction you prefund the IDIT before selling the Partnership Interests. This can be done by making a gift of cash to the trust or by giving Family Partnership interests to the trust. This allows the trust to begin paying down the

note from its own assets rather than from the assets it purchases, thereby making the transaction more commercially reasonable. It is also beneficial, as previously explained, for tax reasons as well. However, if this is not possible the note can be guaranteed by the beneficiaries of the Family Trust.

In general, we feel the sale transaction is a better transaction than the GRAT for several reasons: (1) There should be no gift tax because the transfer is structured as a sale. Note, however, no taxable gain will be realized on the transfer since the IDIT is not recognized as a separate entity from its creator for income tax purposes (it is separate for gift and estate tax purposes); (2) A lesser interest rate may be used for the sale transaction than for the GRAT transaction. As a result, achieving a higher rate of return than the published IRS rate is easier to attain thereby affording your family a greater opportunity for transfer tax savings; (3) Unlike the GRAT, the transaction is not undermined by your death before the note is paid. If you were to die before the note is paid, only the outstanding portion of the note would be in your taxable estate. The assets in the IDIT should not be included in your estate; (4) The sale transaction affords you the opportunity to exclude the assets in the trust from the Generation Skipping Tax. The exemption may be allocated to the amount used to prefund the trust thereby making it fully GST exempt. Since GST does not apply to assets sold to the Family Trust, distributions from the trust to grandchildren should be free from the GST.

The downside of the sale transaction is that it is not self correcting like a GRAT. If the IRS deems that the interest sold was not for adequate consideration, they may deem the transaction to be a part sale part gift. However, obtaining a bonafide appraisal for the value of the assets and the appropriate discount should minimize the risk that the IRS would successfully challenge the values upon which the transaction is based.

Estate Tax Minimization:

A Limited Partner need not make gifts during his or his life in order to obtain discounts for transfer tax purposes. Valuation discounts of Partnership Interests, for estate tax purposes, may also be obtained at the death of a Partner, as long as a Limited Partner dies without also owning the General Partnership interest.

For example, if Husband dies while holding the General Partnership Interest (either himself or through a corporation in which he is sole shareholder) and virtually all of the Limited Partnership Interests of a Family Partnership, he may do the following under his will:

(i) give the General Partnership Interest to a trust (or trusts) funded in the amount of the remaining federal estate tax exemption amount ("exemption trust"). The current federal estate tax exemption amount is $5,250,000 (this is the exemption for 2013, to be indexed for inflation in the subsequent years).

(ii) give all of the Limited Partnership Interests to his wife or to a second trust. The second trust would be for the benefit of his wife ("marital trust") and qualify for a full marital deduction. There would be no estate tax on the husband's death because of the marital

deduction. Under the marital deduction, assets left to a spouse or to certain marital trusts for a spouse are exempt from estate tax.

When the second spouse subsequently dies, the Limited Partnership Interests owned by the spouse or the marital trust will then be subject to the estate tax in second spouse's estate. However, the value of the Limited Partnership Interests, for estate tax purposes, should be discounted for lack of control because the general partnership interest is not owned by the spouse or the marital trust, it would be owned by the exemption trust.

Accordingly, the separation of the controlling General Partnership Interest from the Limited Partnership Interest affords the husband and wife a valuation discount without having to make gifts.

Substantial discounts for lack of management and liquidation rights and for lack of control have been approved by the courts. To give effect to the restrictions associated with a Family Limited Partnership, appraisers typically compute discounts of 30 percent to 45 percent and more from the fair market value of the assets held within a properly drafted Family Limited Partnership.

IRS Position

The IRS is obviously unhappy with the significant tax advantages attained through the use of family limited partnerships. They have had some success as of late in challenging certain partnerships. Accordingly, people who use family limited partnerships as part of their estate plan leave themselves open to challenge by not respecting the integrity of the entity they have established. Using partnership assets for the payment of personal expenses, placing one's residence in the partnership and not paying rent to the partnership, not making pro rata distributions from the partnership to the partners are all examples of ways to leave oneself open for an IRS challenge. The vast majority of experts in the field feel that challenges currently being made by the IRS are not based on a correct interpretation of the law. Moreover, the facts present in the cases challenged are distinguished from your situation. We can discuss this in more detail including steps you can take in creation and implementation of the family limited partnership to preserve the tax and non-tax benefits of the family limited partnership.

NON-TAX BENEFITS

The IRS has stated (although we have not necessarily agreed with them) that they will not respect Family Limited Partnerships that are established solely for tax avoidance purposes. The benefits of the Partnerships we establish for your family will be manifold. Below we explain some of the non-tax benefits of the Partnerships.

Control Over Partnership Cash Flows

Parents often hesitate transferring substantial wealth to their children. They fear their children will not spend the wealth wisely or that they may become less productive citizens. If parents transfer an interest in a Family Limited Partnership to their children, those children will receive only a share of the Partnership's distributable cash flows. The parents, as General Partners, can reinvest Partnership earnings in the Partnership instead of making distributions. Thus, parents can transfer substantial wealth to their children while maintaining authority over how that wealth is used.

Protection of Assets from Creditors

An interest in a Partnership is a personal property interest, with each Partner owning an interest in the underlying Partnership assets. However, a Partner has no right to posses Partnership property without the consent of the other Partners. As a result, a creditor of a Partner has no rights to the Partnership's assets; rather, the creditor may only charge the partnership interest of the debtor Partner with payment of the unsatisfied claim.

In most states, the primary remedy of a creditor is generally to obtain a "charging order" which essentially garnishes any distributions from the Partnership to the debtor Partner. The creditor who obtains the "charging order" is only an "assignee" and not a substitute Partner. As such, the creditor may only receive distributions actually made by the General Partner. With little or no hope of receiving Partnership distributions until some time in the distant future when the Partnership terminates, the creditor may be willing to settle the liability at a reduced amount. This is particularly true since the creditor may well be charged with a substantial portion of the partnership income for federal income tax purposes.

Family Limited Partnership agreements can also contain provisions prohibiting individual Partners from pledging their interests for debts. This accomplishes some "spendthrift" protection for family assets.

Simplifications of Gift-Giving Program:

Consolidating family assets into a Partnership facilitates transferring assets which are not easily valued and/or difficult to divide among beneficiaries (e.g., developed and undeveloped real property). Rather than making gifts of such assets, Family Limited Partnership interests can be given to heirs.

When Family Limited Partnership interests are transferred, it is important to obtain a professional appraisal of the transferred interest at the time the transfer is made. An appraisal is necessary to substantiate the transfer tax value should the Internal Revenue Service challenge the amount at some future date.

Flexibility

A Family Limited Partnership is essentially a contract between the Partners. Provided the Partners agree, a Family Limited Partnership agreement can be amended or terminated. If structured properly, a Family Limited Partnership may be terminated without adverse tax consequences.

Further, the General Partner is able to invest the family assets in a fashion which produces the highest rate of return consistent with his or her tolerance for risk. Since the primary purpose of the Partnership is to invest the Partners' assets, Partners should only transfer investment assets into the Partnership. Accordingly, assets which a Partner uses to pay his or her monthly expenses and assets that a Partner uses on a regular basis such as a primary residence or a vacation home should not be transferred into the partnership.

Summary

The sale to the defective grantor trust, as well as the GRAT, are innovative techniques which use Limited Partnership Interests in a Family Limited Partnership to reduce transfer taxes on the transfer of assets to your heirs. Considering the confiscatory nature of today's top estate, gift and generation skipping tax rates, significant tax savings can be achieved. The non-tax benefits discussed herein are also significant.

2. Family Limited Liability Company Operating Agreement

DRAFT

OPERATING AGREEMENT

OF

[LLC]

OPERATING AGREEMENT of [LLC], dated as of the _____ day of _____, 2013, a New York Limited Liability Company, having its principal place of business at [LLC Address] (hereinafter referred to as the "Company"), by and among [MANAGER], as Manager (hereinafter sometimes referred to as "Manager" or "Managers") and the Members thereof, whose names and addresses appear on Schedule "A" annexed hereto.

ARTICLE 1. DEFINITIONS.

1.1. "Act" means the New York Limited Liability Company Law as in effect on the date hereof, as such Act may be hereafter amended from time to time, and any successor provision or provisions thereto.

1.2. "Articles of Organization" means the Articles of Organization filed with the Department of State for the purpose of forming the Company pursuant to Section 203 of the Act, as amended or restated pursuant to Section 211 or Section 214 of the Act.

1.3. "Assignee" means the transferee pursuant to this Agreement of a Member's right to the share of the profits and losses of the Company and the right to receive Distributions

from the Company, who or which has not been admitted as a Substituted Member.

1.4. "Available Cash" means the cash reserves of the Company in excess of that required to satisfy existing liabilities and to provide for future contingencies or future needs of the business of the Company, as determined from time to time by the Manager.

1.5. "Bankruptcy Event" means with respect to any Member, the occurrence of any of the following events:

(a) the Member makes an assignment for the benefit of creditors;

(b) the Member files a voluntary petition of bankruptcy;

(c) the Member is adjudged bankrupt or insolvent or there is entered against the Member an order for relief in any bankruptcy or insolvency proceeding;

(d) the Member files a petition seeking for the Member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

(e) the Member seeks, consents to, or acquiesces in the appointment of a trustee for, receiver for, or liquidation of the Member or of all or any substantial part of the Member's properties;

(f) the Member files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the Member in any proceeding described in clauses (I) through (v) above; or

(g) any proceeding against the Member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, continues for one hundred twenty (120) days after the commencement thereof, or the appointment of a trustee, receiver, or liquidator for the Member or all or any substantial part of the Member's properties without the Member's agreement or acquiescence, which appointment is not vacated or stayed for one hundred twenty (120) days or, if the appointment is stayed, for one hundred twenty (120) days after the expiration of the stay during which period the appointment is not vacated.

1.6. "Capital Account" means the capital account established and maintained for each Member in accordance with Section 1.704-1(b) of the Treasury Regulations or any successor provisions thereto. In the event of a Transfer of some or all of a Membership Interest, the Capital Account of the assignor shall become the Capital Account of the Assignee or the Substituted Member, as the case may be, to the extent it relates to the portion of the Membership Interest Transferred.

1.7. "Code" means the Internal Revenue Code of 1986, as amended and in effect from time to time.

1.8. "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to render services that a Member contributes to the Company in the capacity of a Member.

1.9. "Distribution" means the transfer of property by the Company to one or more of its Members in the capacity of a Member.

1.10. "Majority In Interest" of the Members means the Members whose aggregate Percentage Share constitutes more than one-half (1/2) of the Percentage Shares of all Members.

1.11. "Member" means each of the initial Members designated on Schedule "A" hereto and each Person who has been admitted as a Member or a Substituted Member of the Company in accordance with the terms and provisions of the Act and this Agreement and has a Membership Interest in the Company with the rights, obligations, preferences and limitations specified under the Act and this Agreement.

1.12. "Manager" means [MANAGER] and the successor(s) thereto from time to time appointed in accordance with Paragraph 4.2.

1.13. "Membership Interest" means the Members' aggregate rights in the Company, including, without limitation, the Members' right to the share of the profits and losses of the Company, the right to receive Distributions from the Company and the right to vote and participate in the management of the Company.

1.14. "Percentage Share" means a Member's aggregate share of the current profits and losses of the Company as set forth from time-to-time on Schedule "A" attached hereto.

1.15. "Person" means any association, corporation, joint stock company, estate, general partnership (including any registered limited liability partnership or foreign limited liability partnership), limited association, limited liability company (including a professional service limited liability company), foreign limited liability company (including a foreign professional service limited liability company), joint venture, limited partnership, natural person, real estate investment trust, business trust or other trust, custodian, nominee or any other individual or entity in its own or any representative capacity.

1.16. "Substituted Member" means an Assignee who or which has been admitted as a Member, to the extent of the Membership Interest assigned.

1.17. "Transfer" means any sale, assignment, transfer, exchange, mortgage, pledge, grant, hypothecation, or other transfer, absolute or as security or encumbrance (including dispositions by operation of law).

1.18. "Treasury Regulations" means the regulations promulgated by the Department of the Treasury under the Code, as in effect from time to time.

ARTICLE 2. FORMATION; TERM

2.1. Formation. The Company shall be formed as a limited liability company under the Act. The parties hereto desire to set forth the duties and obligations of the Manager and Members of the Company in accordance with the terms and conditions set forth herein. The provisions of this Agreement shall become effective upon the acceptance for filing of the Articles of Organization by the office of the Department of State.

2.2. Place of Business. The principal office of the Company shall be located at [ADDRESS] or at such other place as the Manager may, from time to time, designate.

2.3. Character of Business. The Company has been organized to pursue any lawful business purpose or purposes, except to do any business for which another statute of the State of New York or any other applicable jurisdiction specifically

requires some other business entity or natural person to be formed or used for such business.

2.4. Powers. In furtherance thereof, but subject to other provisions of this Agreement, the Company may exercise all of the powers provided in Section 202 of the Act.

2.5. Term. The Company shall continue to exist until the Company is dissolved or terminated as herein provided, as provided in the Articles of Organization or as provided by law. The Company shall forthwith be terminated and dissolved and its business and affairs liquidated upon the occurrence of any one of the following events or conditions:

(a) The sale (by way of foreclosure or otherwise) taking or condemnation, destruction or other disposition of all or substantially all of the property;

(b) Upon determination of the Manager and a Majority in Interest of the Members to terminate and dissolve the Company;

(c) The death, dissolution, expulsion, incapacity or withdrawal of the last remaining Manager, or in the occurrence of any other event that precludes the last remaining Manager from acting as such, unless within forty-five days after such event, a Majority in Interest of the Members vote to appoint one or more successor Managers; or

(d) The entry of a decree of judicial dissolution under Section 702 of the Act.

ARTICLE 3. MEMBERS' CONTRIBUTIONS; ADMISSION TO MEMBERSHIP

3.1. Initial Members. The initial Members ("Initial Members") shall make Contributions to the capital of the Company as set forth on Schedule "A" hereto. Each Member's Percentage Share in the first instance shall be the percentage set forth opposite such Member's name on Schedule "A" hereto and shall be subject to subsequent adjustment as provided in this Agreement.

3.2. Admission of Additional Members. The Manager is authorized to admit additional Members for such Contributions and upon such terms and conditions as it shall deem to be in the best interest of the Company. In the event any additional Members are admitted to the Company pursuant to this Paragraph "3.2", the Percentage Share in the Company of the then existing Members (as shown on Schedule "A" hereto) shall be reduced pro rata in an aggregate amount equal to the aggregate Percentage Share in the Company acquired by the new Member or Members. To accomplish the purposes of this Paragraph, the Manager is authorized to do all things necessary to effectuate the admission of such additional Members (including the recomputation and revision of Schedule "A" hereto), each of whom shall become a signatory hereto, whereby each such additional

Member shall be deemed to have adopted and to have agreed to be bound by all of the provisions of this Agreement.

3.3. Members' Liability. The liability of each Member, as such, shall be limited to the amount of such Member's Contributions in accordance with the provisions hereof. None of the Members shall have any further personal liability to contribute money to or in respect of the liabilities or the obligations of the Company, nor shall any Member be personally liable for any other obligations of the Company. Each Member acknowledges, however, that, to the extent required by Section 508 of the Act, if such Member knowingly receives a Distribution from the Company in violation of subdivision (a) of Section 508 of the Act, such Member may be liable to the Company for the amount of such Distribution; but nothing herein is intended to or shall expand the rights, if any, that a creditor may have under applicable law apart from this Agreement.

3.4. Withdrawal. No Member shall have the right to withdraw from the Company except as expressly permitted by the terms of this Agreement. Any attempt by a Member to withdraw from the Company in violation of this Agreement shall be ineffective.

3.5. Interest. Members shall not be entitled to receive any interest on their Contributions to the Company.

3.6. Negative Capital Account. A "Negative Capital Account" resulting from any Distribution in accordance with the provisions of this Agreement, or from losses, is hereby recognized as a possibility under this Agreement, and such negative Capital Account shall not affect a Member's participation in the profits and losses of the Company. In no event shall a Member be required at any time to restore a negative Capital Account or shall such negative Capital Account be in any way considered a liability of such Member or an asset of the Company.

ARTICLE 4. RIGHTS, DUTIES AND POWERS OF MANAGER

4.1. Duties and Powers of Manager.

(a) The Manager shall possess and enjoy any and all of the management rights and powers provided in the Act, except as otherwise modified or limited by this Agreement. Except as otherwise specifically provided herein, the Manager shall conduct and manage the business of the Company in accordance with the provisions of the Act and the terms of this Agreement. A Manager shall not be required to devote any amount of such Manager's time and attention to the Company's business.

(b) Without limiting the foregoing general powers, the Manager is hereby authorized and empowered on behalf and in the name of the Company to:

(i) admit additional Members on such terms and conditions as they shall determine;

(ii) appoint, delegate authority to, remove and terminate such employees, officers and agents as they consider appropriate;

(iii) sell, exchange, pledge, or otherwise transfer all or any portion of the assets of the Company;

(iv) approve any merger or consolidation of the Company with or into another limited liability company or other business entity;

(v) borrow or lend money on behalf of the Company on such terms and conditions as they shall determine;

(vi) make all tax elections on behalf of the Company;

(vii) invest the assets of the Company in stock, debt obligations, and other securities of, any issuer, wherever such issuer may be located, organized or operated, whether within or without the United States of America, without limitation as to marketability of the securities or other interests reflecting such investments, and in options and other rights with respect to such securities;

(viii) employ one or more custodians of the assets of the Company;

(ix) possess, sell, exchange, lend, pledge, mortgage, transfer, hypothecate, write options on, lease and otherwise deal in, or take other action with respect to, any or all of the assets of the Company;

(x) vote, give assent and otherwise exercise all rights, powers, privileges and other incidents of ownership or possession with respect to assets of the Company; and execute and deliver proxies or powers of attorney to such person or persons as they shall deem proper, granting to such person or persons such power and discretion with relation to the Company's assets as they shall deem proper;

(xi) institute, prosecute, defend, settle, compromise or otherwise adjust all claims (including but not limited to claims for taxes) and litigation arising out of the conduct or the affairs of the Company or in the enforcement of obligations due it, including all rights of appeal;

(xii) employ or consult with such agents or independent contractors as they may deem necessary or advisable, including without limitation, brokers, auditors, counsel, investment advisers or managers or specialists in any field of endeavor whatsoever, including such persons or companies as may be Members or affiliated with any Member;

(xiii) pay all expenses, fees, charges, taxes and liabilities incurred or arising in connection with the conduct of the affairs of the Company;

(xiv) enter into joint ventures, general or limited partnerships and any other combinations or associations;

(xv) endorse, accept or guarantee the payment of any notes, drafts or other obligations of any Person; and make contracts of guaranty or suretyship, or otherwise assume liability for payment thereof;

(xvi) purchase and pay for such insurance as they shall deem necessary, desirable or appropriate for the conduct of the business of the Company;

(xvii) make, issue, accept, endorse and execute promissory notes, drafts, bills of exchange, guarantees and other instruments and evidences of indebtedness, and secure the payment thereof by mortgage, pledge, or assignment of or security interest in all or any part of the assets then owned or thereafter acquired by the Company;

(xviii) adopt, amend and repeal by-laws not inconsistent with this Agreement providing for the conduct of the Company's business;

(xix) enter, make and perform such other contracts, agreements and other undertakings as may be

necessary, desirable or advisable or incidental to the carrying out of any of the foregoing powers, objects or purposes, including contracts, agreements and undertakings with affiliates of any Member; and

(xx) execute all other instruments of any kind or character and take all action of any kind or character which they may in their sole discretion determine to be necessary or appropriate in connection with the business of the Company.

(c) Unless specified in this Agreement, if at any time there is more than one acting Manager, the Managers shall manage the Company by an affirmative vote of a majority of the acting Managers.

(d) No Member, solely by reason of being a Member, shall be an authorized agent of the Company.

(e) Each Manager shall be an agent of the Company for the purpose of its business, and the act of any one Manager, including the execution in the name of the Company of any agreement, document or instrument for apparently carrying on in the usual way, the business of the Company (including but not limited to deeds, notes, mortgages and related documents) shall bind the Company, unless (I) the Manager so acting has in fact no authority to act for the Company in the particular matter and

(ii) the person as to which such Manager is dealing has knowledge of the fact that such Manager has no such authority.

4.2. Appointment of Managers. The initial Manager shall be [MANAGER]. So long as [MANAGER] can fulfill the obligations of Manager hereunder, [MANAGER] may not be removed as Manager. If at any time [MANAGER] ceases to serve as Manager and has failed to appoint a successor Manager or an additional Manager and no Manager is then serving, then [ALTERNATE MANAGER] shall serve as Manager. The Manager or Managers, as the case may be, are authorized to appoint by acknowledged instrument any Person(s) to act as an additional Manager(s). Each Manager is authorized to appoint by acknowledged instrument any Person to act as his or her successor Manager. If at any time no individual named in this Section 4.2 is serving as Manager and no Manager has been appointed pursuant to the preceding provisions of this Section, a Majority in Interest of the Members may appoint one or more successor Managers. Any Manager, other than [MANAGER] or [ALTERNATE MANAGER], may at any time be removed as a Manager by the vote of a Majority in Interest of the Members. Any successor Manager or additional Manager appointed by [MANAGER] and [ALTERNATE MANAGER] may at any time be removed as a Manager by the vote of seventy-five (75%) percent of the Membership Interests.

4.3. Indemnification of Members and such Manager.

(a) Each Member and each Manager (including any executor or administrator of any such Member or Manager) and, to the extent any such Member or Manager is not a natural person, each Member's, or Manager's, directors, officers, employees or agents acting on its behalf (hereinafter "Indemnified Parties") shall be held harmless and indemnified by the Company from any liability, loss, cost or expense, (including, without limitation, judgment, fines, amounts paid in settlement, attorneys' fees and expenses actually and necessarily incurred) arising out of any action or proceeding arising out of any act taken in the capacity of a Member or Manager (or a director, officer, employee or agent thereof) or any failure to take action in such capacity in connection with activities of the Company; provided, however, that no indemnification may be made to or on behalf of any Indemnified Party if a judgment or other final adjudication adverse to the Indemnified Party establishes (a) that the acts in question were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or (b) that the Indemnified Party or a principal of the Indemnified Party personally gained in fact a financial profit or other advantage to which the Indemnified Party or any such principal was not legally entitled. The Company shall

advance to each Indemnified Party any expenses incurred by the Indemnified Party in the defense of any action or proceeding arising out of any act taken in the capacity of a Member or Manager (or a director, officer, employee or agent thereof) or any failure to take action in such capacity in connection with activities of the Company upon the written undertaking of the Indemnified Party to reimburse the Company therefor in the event that such Indemnified Party is ultimately found not to be entitled to indemnification as a result of the proviso set forth above.

(b) A Manager (including any executor or administrator of such Manager) and, to the extent a Manager is not a natural person, each of such Manager's directors, officers, agents or employees acting on its behalf (hereinafter "Exculpated Parties") shall not be liable to the Company or any Member for any damages suffered by the Company or any Member as a result of any breach of duty by any Exculpated Party in the capacity of a Manager, except to the extent that a judgment or other final adjudication adverse to the Exculpated Party, or a principal of such Exculpated Party, establishes that the acts or omissions of the Exculpated Party, or a principal of such Exculpated Party, were in bad faith or involved intentional misconduct or a knowing violation of law or that the Exculpated Party, or a principal of such Exculpated Party, personally

gained in fact a financial profit or other advantage to which the Exculpated Party, or a principal of such Exculpated Party, was not legally entitled or that with respect to a Distribution the subject of subdivision (a) of Section 508 of the Act the acts the Exculpated Party, or a principal of such Exculpated Party, were not performed in accordance with Section 409 of the Act.

4.4. Outside Interests. A Member or a Manager may, directly or indirectly, own, manage, operate, control, be employed by, participate in, be financially interested in, or represent, or render any advice or services in any other business, regardless of whether the activities of such other business may conflict with, may be competitive with, or may be similar to that of the Company.

4.5. Books, Records and Reports.

(a) The fiscal year and accounting period of the Company shall be the calendar year and at all times during the continuance of the Company the Manager shall keep or cause to be kept full and true books of account in which shall be entered fully and accurately each transaction of the Company. All of the books of account, together with (i) a current list of the full name set forth in alphabetical order and last known mailing address of each Member, together with the Contribution and the percentage share of each Member or information from

which such share can be readily derived; (ii) a copy of the Articles of Organization and all amendments thereto, or restatement thereof, together with executed copies of any powers of attorney pursuant to which any certificate of amendment has been executed; (iii) a copy of this Agreement, any amendments thereto and any amended and restated Operating Agreement; and (iv) a copy of the Company's Federal, state and local income tax or information returns and reports, if any, for the three most recent fiscal years, shall at all times be maintained at the principal office of the Company, or at such other office as the Manager may designate by written notice to all Members. Any Member or his duly authorized representative may inspect and copy at his own expense for any purpose reasonably related to the Member's interest as a Member the records referred to herein, any financial statements maintained by the Company for the three most recent fiscal years and other information regarding the affairs of the Company as is just and reasonable, at any time during regular business hours upon reasonable prior notice to the Company.

(b) All financial statements and income tax returns referred to in this Agreement shall be prepared on the basis employed by the Company for Federal income tax purposes and otherwise shall follow, to the extent possible or practicable, sound accounting practice consistently applied.

(c) The Company shall deliver to each Member the following:

(i) Within ninety (90) days following the end of the Company's fiscal year, the following:

1. Balance sheet of the Company and a statement of each Member's Capital Account as of the end of the fiscal year; and

2. Information necessary for the preparation by each Member of his Federal Income Tax Return as to the Company's income, gain, and loss or deductions, if any.

4.6. Tax Matters.

(a) [MEMBER] shall be the "tax matters partner" for purposes of Federal and state income tax matters. The tax matters partner shall cause the preparation and timely filing of all tax returns required to be filed by the Company pursuant to the Code and all other tax returns deemed necessary and required in each jurisdiction in which the Company does business.

(b) The expenses of professional representation during any tax audit controversy or dispute shall be a Company expense payable out of Company funds.

(c) The Manager may in its sole discretion settle or dispose of any tax controversy or dispute affecting the Company or any of the tax positions taken by the Company.

4.7. Status of Members.

(a) No Member shall be subject to calls or assessments for Contributions in excess of such Member's agreed Contributions, nor shall any Member in the capacity of a Member, be bound by, or be personally liable for, any expense, liability or obligation of the Company, except to the extent of such Member's agreed Contributions.

(b) No Member shall have the right to demand the return of any Contributions to the Company, except upon dissolution of the Company.

4.8. Action by Members or Managers Without a Meeting.

(a) Whenever Members or Managers are required or permitted to take any action by vote, or any consent of Members or Managers are required hereunder, such action may be taken, or such consent given, without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken shall be signed by (i) all Managers or (ii) the Members who hold Membership Interests representing not less than the minimum number of Membership Interests that would be necessary to authorize or take such action at a meeting at which all of the Members entitled to vote thereon were present and voted. All such consents shall be delivered to the principal office of the Company, or a Manager,

employee or agent of the Company having custody of the records of the Company. Delivery made to the principal office of the Company or Manager, employee or agent shall be by hand or by certified or registered mail, return receipt requested.

(b) Every written consent shall bear the date of signature of each Manager and/or each Member who signs the consent, and no written consent shall be effective to take the action referred to therein unless, within sixty (60) days of the earliest dated consent, written consents signed by (I) all Managers or (ii) holders of sufficient Membership Interests to authorize or approve the action are delivered to the principal office of the Company or a Manager, employee or agent of the Company having custody of the records of the Company. Delivery made to such principal office or Manager, employee or agent shall be by hand or by certified or registered mail, return receipt requested.

(c) Prompt notice of the taking of the action without a meeting by less than unanimous written consent of all Members shall be given to those Members who have not consented in writing, but would have been entitled to vote thereon had such action been taken at a meeting.

ARTICLE 5. TRANSFERS OF MEMBERSHIP INTERESTS

5.1. Restriction on Transfer. Except as expressly permitted by this Article "5", a Member may not Transfer all or

any portion of a Membership Interest, nor enter into any agreement as a result of which any other person shall become interested in the Company, including any purported assignment of the economic rights only, without the prior consent of the Manager.

5.2. Absolute Right to Assign or Transfer Membership Interest. Notwithstanding Paragraph "5.1" above:

(a) By Individuals. A Member, who is an individual, may during his or her lifetime Transfer the right to the share in the profits and losses of the Company and the right to receive Distributions from the Company to his or her parent, spouse, or descendant (including their spouses; except as incident to a divorce) (hereinafter "Relatives") or a trust for the benefit of, or a corporation, limited partnership or other entity controlled by, the Member and/or any Relatives, or any combination thereof (each a "Permitted Transferee"), without the consent of the Manager.

(b) By Estates. A Member which is an estate may Transfer its right to the share in the profit and losses of the Company and the right to receive Distributions from the Company, to the parents, spouse, or descendants (including their spouses) of the estate's decedent ("Decedent's Relative") or a trust for the benefit of, or a corporation, limited partnership or other entity controlled by the estate and/or the Decedent's

Relatives, or any combination thereof, without the consent of the Manager.

(c) By Trusts. A Member which is a trust may transfer its right to the share in the profit and losses of the Company and the right to receive Distributions from the Company to any beneficiary of the trust (hereinafter "Trust Beneficiary") as required or permitted by the terms of the governing trust instrument, without the consent of the Manager.

(d) Right to Transfer Profits/Losses. A Member may transfer the right to share of the profits and losses of the Company and the right to receive Distributions from the Company to any person who is not a Relative, subject to the Notice provisions and the Option to Purchase provisions under Article 7, hereunder, and upon receipt, the transferee of such interest shall enjoy the status of an Assignee. Any transfer permitted by: (i) Paragraph 5.1 (Transfer consented to by Manager); (ii) Paragraph 5.2 (a) (to a Relative); (iii) Paragraph 5.2 (b) (to a Decedent's Relative); or (iv) Paragraph 5.2 (c) (to a Trust Beneficiary), hereof, shall not be subject to the Notice Provisions or the Option to Purchase provisions under Article VII.

(e) Any permitted transferee pursuant to this Paragraph "5.2" shall become an Assignee of the economic rights of the Transferor, but shall not acquire any right to vote or

consent, regarding Company matters or participate in the management of the Company, subject only to compliance with Paragraph 5.4(b) below.

(f) If a Permitted Transferee (the "Donee") receives a membership interest as a gift (the "Gift Interest") from [CLIENT], unless at the time of such gift [CLIENT] specifically provides that the provisions of this paragraph shall not apply, the Donee shall have the right to "put" the Gift Interest to the Company at its External Fair Market Value. This right may be exercised by executing and delivering to the Manager all documents necessary to transfer the Gift Interest to the Company, accompanied by written notice that the Donee is exercising his or her put. Upon receipt of such documents and notice, the Manager shall forthwith transfer to the Donee, in exchange for the Gift Interest, cash or other property which can be immediately used, possessed or enjoyed by the Donee (such that the Donee's interest in such property shall qualify as a present interest under Section 2503(b)(1) of the Internal Revenue Code of 1986, as amended), having a fair market value equal to the External Fair Market Value of the Gift Interest. This right of the Donee shall expire, as to any Gift Interest, thirty (30) days after the date of such gift.

(i) The External Fair Market Value of any interest in the Company shall mean, for purposes of this

Article, the price that a willing buyer would pay to a willing seller of such interest (neither being under any compulsion to buy or sell), which shall be:

1. determined without regard to the existence of the put rights under paragraph (f) of this paragraph 5.2, i.e. determined as if the holder of the interest had no such rights; and

2. determined without regard to any restrictions on the transfer of such interest contained in this Agreement to the extent such restrictions are more restrictive than the provisions of the [New York Limited Liability Company Law] that would apply in the absence of a specific provision herein; but

3. otherwise taking into account all applicable factors, including the voting rights attached to such interest; whether such interest is a "minority" or "controlling" interest; and appropriate discounts for lack of marketability.

(ii) If the Manager and the Donee do not agree upon the External Fair Market Value of the interest to be purchased, the same shall be determined by a professional appraisal to be performed by a qualified appraiser selected by the accounting firm which regularly prepares the Company's tax returns. The cost of the appraisal shall be paid by the Company.

5.3. Death, Dissolution, Bankruptcy Event, Incapacity or Other Involuntary Transfer. In the event of the death, incapacity, Bankruptcy Event or other event which results in an involuntary Transfer of a Member's interest in the Company (including, without limitation, a transfer by way of attachment, levy, foreclosure, sheriffs' or other judicial sale, or pursuant to a divorce decree), the executor, administrator, guardian, other personal representative or successor in interest to such Member shall become a Assignee of the economic rights of such Member, but shall not acquire any right to vote or consent or participate in the management of the Company. In the event any Member that is a corporation or limited liability company is dissolved, or any Member that is a trust or other entity is liquidated, or any case if the legal existence of an entity is otherwise terminated, the legal representative or successor to such Member shall become an Assignee of the economic rights of such Member, but shall not acquire any right to vote or consent or participate in the management of the Company.

5.4. Relationship of Assignees and Substituted Members.

(a) No Assignee shall have the right to participate in the management of the Company, inspect the books of account of the Company or exercise any other rights of a Member until admitted as a Substituted Member. An Assignee

shall be entitled to share in the profits and losses of the Company and receive Distributions from the Company, to the extent distributions are made, provided, however, that no assignment shall be binding on the Company until written notice thereof is received by the Company. An Assignee may become a Substituted Member only upon the terms and conditions set forth in subparagraph "(b)" below.

(b) In order to become a Substituted Member an Assignee of a Membership Interest must first obtain the prior consent of the Manager. The admission of a Substituted Member shall be conditioned upon the Substituted Member's written acceptance and adoption of all of the terms and provisions of this Agreement.

ARTICLE 6. PROFITS, LOSSES AND DISTRIBUTIONS

6.1. Cash Distributions. [Distributions shall be made to the Members in the sole discretion of the Manager, provided, however, all such distributions shall be made among the Members pro rata in proportion to their relative Membership Interest.]

6.2. Determination of Profits and Losses. Net taxable income (or loss) of the Company and all items of which it consists shall be determined for all purposes in accordance with the accounting methods used in preparing the Company's Federal Income Tax returns.

6.3. Allocations of Company Net Taxable Income. Company net taxable income shall be allocated among the Members pro rata in proportion to their relative Percentage Shares.

6.4. Allocations of Company Losses. Company losses, if any, shall be allocated among the Members with positive Capital Account balances pro rata in proportion to their relative positive Capital Account balances (determined immediately prior to such allocations) and thereafter in accordance with their relative Percentage Shares.

6.5. Other Payments to Members. Any payment to a Member (or any affiliate of a Member) in any capacity other than as a Member, which is deemed to constitute a partnership distribution shall be treated for Federal income tax purposes as a special allocation of income and a distribution of Available Cash.

6.6. Distribution of Proceeds from Sale or Liquidation. The proceeds to the Company resulting from (i) the liquidation of any substantial portion of Company assets or (ii) any sale by the Company of all or any substantial part of its assets, shall be distributed and applied in the following order of priority:

(a) To the payment of debts and liabilities of the Company (including all expenses of the Company incident to any such liquidation of the Company or sale referred to

immediately above), and to the setting up of any reserves which the Liquidating Agent (or the Manager if the distribution is not pursuant to the dissolution of the Company) deems reasonably necessary for contingent, unmatured or unforeseen liabilities or obligations of the Company, specifically excluding any liabilities to Members in respect of any partnership distributions of Available Cash or any distributions to Members in respect of their Membership Interests upon their withdrawal from the Company;

(b) To the Members (or former Members) in respect of any Distributions of Available Cash or any Distributions to Members (or former Members) in respect of their Membership Interests upon their withdrawal from the Company;

(c) Among the Members, pro rata in proportion to their relative Capital Account balances; and

(d) Thereafter to each Member in the same manner as cash Distributions are allocated pursuant to Paragraph "6.1" above. If there are insufficient funds to make payment in full to all of the Members entitled to such payments under clause (b) and (c) hereof then the funds then available for payment under such clause shall be allocated proportionately among the Members entitled to payment pursuant to such clause in proportion to the amount each would be entitled to receive if

there were sufficient funds to make the entire payment contemplated by clause (b) or (c), as the case may be.

6.7. Proration of Allocations. If there is a transfer of a Membership Interest, a daily net allocation of the items or amounts allocated pursuant to this Article VI shall be computed by dividing the items or amounts for the period by the number of days in the period. The result obtained shall be applied to the former Member and the present Member in proportion to the number of days each of them was a Member in the Company for such fiscal year; provided, however, any item or amount arising from the acquisition or disposition of Company assets shall be taken into account as of the date thereof.

6.8. Alternative Minimum Tax. All Company items of income, gain, loss, deduction and credit shall be allocated for purposes of the alternative minimum tax in a manner that satisfies the requirements of Section 1.704-1(b) of the Treasury Regulations and that results in each Member being allocated during the term of the Company an amount of alternative minimum taxable income with respect to the Company during such term equal to the amount of regular tax income allocated to such Member during such term.

6.9. Conforming Tax Allocation. Prior to making any allocations under Paragraph "6.2" hereof, the following

allocations shall be effected in the order or priority in which they are listed:

(a) Minimum Gain Chargeback. This Agreement incorporates by reference the "Minimum Gain Chargeback Requirement" of Section 1.704-2(f) of the Treasury Regulations.

(b) Qualified Income Offset. This Agreement incorporates by reference the "Qualified Income Offset" requirement of Section 1.704-1 (b) (2) (ii) (d) of the Treasury Regulations.

(c) Curative Allocations. Subject to the provisions of subparagraphs 6.6 (a) and (b) above, if any allocation is made pursuant to one or more of subparagraph 6.6 (a) or (b), then items of income and gain (including gross income, if necessary) and deduction and loss shall be allocated among the Members as soon as possible (without violating the requirements of the regulations under Section 704 (b) of the Code) to restore the Capital Accounts to the balances that would have existed if such allocations pursuant to subparagraphs 6.6 (a) and (b) had not occurred so as to preserve the intended economic arrangement among the Members as otherwise expressed herein.

6.10. Contributed Business Property. Notwithstanding any provision to the contrary in this Agreement, income, gain, loss, and deduction with respect to property contributed to the

Company by a Member shall be shared among the Members so as to take account of the variation between the basis of the property to the Company and its fair market value at the time of contribution in accordance with Section 704(c) of the Code and the Treasury Regulations thereunder, or any successor provisions thereto.

6.11. Required Amendment. The allocations set forth herein shall be amended as may be required from time to time as may be necessary to comply with the Code and the Treasury Regulations as the same shall be amended after the date hereof.

ARTICLE 7. PROHIBITED TRANSFERS - OPTION TO PURCHASE

7.1. Notice Requirement. In the event of: (1) any proposed or imminent Transfer either voluntarily or by operation of law of a Member's interest in the Company other than as permitted by (i) Section 5.1 (Transfer consented to by the Manager),(ii) Section 5.2(a) (Transfer to a Relative), (iii) Section 5.2(b) (Transfer to a Decedent's Relatives), and (iv) Section 5.2(c) (Transfer to a Trust Beneficiary), including any Transfer by way of attachment, levy, foreclosure, sheriff's or other judicial sale or by Bankruptcy Event or incompetency proceeding or a transfer incident to a divorce decree, where such Transfer would be in violation of Article 5 or any other provision of this Agreement; or (2) any proposed Transfer by a Member as described in Section 5.2 (d) hereunder, said Member

(or said Member's legal representative) (the "Selling Member") shall first give written notice (the "Notice") thereof to the Company and to the Manager.

7.1.1. The Notice shall specify: the name(s) of the proposed assignee(s) or transferee(s), the extent of the Membership interest which the Selling Member voluntarily proposes to assign, transfer or otherwise dispose of, or the identity of any transferee about to acquire the Membership Interest by operation of law, the consideration to be received by the Selling Member, if any, and all other terms and conditions of the proposed transaction.

7.1.2. The Notice shall be deemed to have been given (if not actually given) when the Manager all have obtained actual notice of any such imminent transfer.

7.2. Option to Purchase. Upon proper service of the Notice (or actual notice) to the Manager, the Members shall have the option, exercisable at any time within twenty (20) days following the effective date of such service, to elect to purchase all or any part of the Membership Interest described in the Notice upon the terms and conditions set forth below.

(a) The Members shall exercise such options pro rata in proportion to their relative Membership Interests and, in the event less than all of such Members elect to exercise such option, the Members electing to exercise such

option may purchase the remainder of the interest offered by the Selling Member pro rata in proportion to their relative interests. To the extent that neither the other Members nor the Company purchases the interest so offered, the transferee of such interest, if such transferee is not a relative, shall become an Assignee and may become a Substitute Member subject to Section 5.4.

(b) In the event the Members do not exercise such option within such twenty (20) day period, the Company may during the ten (10) day period following the expiration of such twenty (20) day period exercise the option to purchase the remainder of the interest described in the Notice at the same price and upon the same terms as are applicable to the option in favor of the Members.

(c) The purchase price for the Membership Interest described in the Notice shall be the fair market value of such Membership Interest at the time of the transfer determined without regard to any potential control premium but specifically taking into account any minority discount.

(d) In the event the parties are unable to agree upon the purchase price described in Section 7.2.1, the parties shall attempt to agree upon a Qualified Appraiser to determine the purchase price. The Qualified Appraiser should be qualified to appraise the interest described in the Notice (a

"Qualified Appraiser"). If within thirty (30) days of the date of the giving of the Notice (the "Commencement Date") the parties are able to agree upon one Qualified Appraiser, the written appraisal submitted to the parties by such Qualified Appraiser shall be final and determinative for all purposes hereof and the fees and expenses of such Qualified Appraiser shall be borne equally by both parties. If the parties are unable to agree upon one Qualified Appraiser within thirty (30) days of the date of the giving of the Notice (the "Commencement Date"), each of (i) the Selling Member and (ii) the other Members, within forty-five (45) days following the Commencement Date shall engage (at their own cost and expense), a separate Qualified Appraiser, each of whom shall render a written appraisal within sixty (60) days of the Commencement Date. If the higher of such two appraisals is not greater than one hundred fifty (150%) percent of the lower of such two appraisals, the fair market value of the interest described in the Notice shall be deemed to be the arithmetical mean of the two appraisals; otherwise the two Qualified Appraisers shall agree, within seventy (70) days of the Commencement Date, upon a third Qualified Appraiser whose written appraisal shall be submitted within ninety (90) days of the Commencement Date to the parties and which appraisal shall be final and binding upon the parties. The selling Member and the other Members shall

each bear fifty (50%) percent of the fees and expenses of any such third Qualified Appraiser. The time periods for the purchaser(s) (or potential purchaser(s)) to exercise the option to purchase the interest of the Selling Member hereunder shall be suspended until a final appraisal has been submitted to the parties.

(e) The purchase price shall be payable as follows: not less than ten (10%) percent of the purchase price shall be payable upon the closing of such purchase and the excess of the purchase price over the amount paid at the closing shall be evidenced by a non-negotiable self-liquidating promissory note of the purchasing Member(s), which note shall be payable in sixty (60) equal consecutive monthly installments commencing one month after the closing date and the balance of installments due on each consecutive month thereafter until the note is paid in full. The note shall bear interest on the unpaid balance from time to time outstanding at the applicable federal rate of interest as determined under Section 1274 of the Code in effect on the date of the purchase.

(f) In the event the Company and/or other Members elect to purchase the Selling Member's interests, such purchase shall occur at a date mutually agreeable to the parties to the purchase and sale which shall in no event be more than sixty (60) days after the last date upon which the purchase

price of the Membership Interest has been determined in accordance with Section 7.2.3 hereof.

(g) To the extent that neither the other Members nor the Company purchases the Membership Interest so offered, the transferee of such Membership Interest, if such transferee is not a relative shall become an Assignee Member and may become a Substitute Member subject to Section 5.4.

(h) Any transfer of a Member's interest in violation of this Article "VII" shall be of no force and effect and shall not be binding upon the Company or the other Members.

ARTICLE 8. DISSOLUTION AND LIQUIDATION

8.1. Dissolution. Upon the dissolution of the Company, the Manager or if none, a Liquidating Agent selected by a Majority in Interest of the Members, shall proceed to the orderly liquidation of the Company. Such persons winding up the Company's affairs may, in the name of and for and on behalf of the Company, prosecute and defend suits, whether civil, criminal or administrative, settle and close the Company's business, dispose of and convey the Company's property, discharge the Company's liabilities and distribute to the Members any remaining assets of the Company.

8.2. Distributions in Kind. In the event it becomes necessary to make Distributions of Company property in kind, such property shall be transferred and conveyed to the

Members or their assignees so as to vest in each of them, as a tenant in common, an undivided interest in the whole of said property, equal to such Member's Percentage Share as if the property had been sold and the proceeds of sale were being distributed as provided in Paragraph "6.3" above.

8.3. Orderly Liquidation. A reasonable time shall be allowed for the orderly liquidation of the assets of the Company and the discharge of liabilities to creditors so as to minimize the losses normally attendant upon liquidation.

8.4. Statements on Liquidation. On liquidation, each of the Members shall be furnished promptly with a statement which shall set forth the assets and liabilities of the Company as at the date of liquidation, and each Member's share thereof and a final Federal Partnership Tax Return. Within ninety (90) days following the date of dissolution, the Manager, or the Liquidating Agent if there be one, shall execute and cause to be filed Articles of Dissolution of the Company.

ARTICLE 9. NO REQUIREMENT TO RESTORE DEFICIT IN CAPITAL ACCOUNT

9.1. No Requirement to Restore Deficit in Capital Account. Nothing contained in this Agreement shall be construed to require any Member to restore any deficit in a Capital Account by making any Contributions to the Company.

9.2. Provisions of Agreement Not For Benefit of Any Creditor. None of the provisions of this Agreement shall be

construed as existing for the benefit of any creditor of any of the Members or of the Company, nor shall any such provision be enforceable by any party not a signatory to this Agreement.

ARTICLE 10. MISCELLANEOUS

10.1. Title to Property. Title to all assets of the Company shall be held in the name of the Company.

10.2. Notices. Except as otherwise provided herein, all notices, demands or other communications hereunder shall be in writing and shall be deemed to have been given upon personal delivery thereof or, if mailed by certified or registered mail, postage prepaid, return receipt requested, to the parties at the addresses set forth below, five (5) days following deposit of same in the United States mail. Notices shall be mailed as follows:

(a) To the Company at the principal office of the Company;

(b) To any Member or Manager at the address for such Member or Manager set forth on Schedule "A" hereto, with a copy to the Company.

(c) Any party may change an address by giving notice to the Company and each Member and each Manager in the manner provided above, effective upon receipt thereof.

10.3. Further Assurances. The Members and/or Manager will execute and deliver such further instruments and do

such further acts and things as may be required to carry out the intent and purpose of this Agreement.

10.4. Integration. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and undertakings of the parties as Members and/or Manager in connection herewith. No covenant, representation or condition not expressed in this Agreement shall affect, or be effective to interpret, change or restrict, the express provisions of this Agreement.

10.5. Successors in Interest. Except as otherwise provided herein, all provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against the parties hereto and each of their respective heirs, executors, administrators, personal representatives, successors and assigns. However, none of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Company.

10.6. Governing Law. This Agreement shall be construed in accordance with the laws and decisions of the State of New York. In the event any provision hereof shall be judicially declared invalid or inoperative, the Members agree that this Agreement shall remain in full force and effect and

that all other provisions hereof shall be carried out to the extent legally possible.

10.7. Counterparts. This Agreement may be executed in one or more counterparts each of which shall constitute one Agreement, binding on all parties hereto, even though all the parties are not signatory to the original or the same counterpart and such counterpart signature may be effected by execution of a Certification Signature Page.

10.8. Headings. The headings of the Articles, Paragraphs and subparagraphs of this Agreement are inserted for convenience of reference only and shall not be deemed to be part of this Agreement.

10.9. Amendments. This Agreement may be amended from time to time upon the written consent of (I) all Managers and (ii) sixty (60%) percent of the Membership Interests, and this Agreement, as so amended, shall be binding upon all of the Members, provided, however, that no amendment of this Agreement shall be made without the written consent of each Member adversely affected thereby, if any such amendment (I) increases the obligations of any Member to make Contributions, (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit in a manner that is not consistent with the purposes hereof, (iii) alters the manner of computing the Distributions to any Member, (iv) alters the voting or other

rights of any Member, (v) allows the obligation of a Member to make Contributions to be compromised by consent of fewer than all Members or (vi) alters the procedures for amendment of this Agreement. Without the consent of the Members, the Managers may from time to time amend this Agreement if the sole purpose and effect of such amendment is to preserve to the extent possible the tax treatment of the Company and the Members as originally intended hereunder under the Code and applicable Treasury Regulations in effect from time to time.

10.10. Remedies. The Members and the Manager agree that they will be irreparably damaged in the event that this Agreement should not be specifically enforced. If any dispute arises concerning any transfer or other disposition of any Membership Interest under this Agreement, a court of competent jurisdiction may issue a temporary restraining order, injunction or decree of specific performance, without any bond or other security being required and without proof of actual damage. Such remedies shall be cumulative and not exclusive, and shall be in addition to any other remedies which the parties may have.

10.11. Gender/Plural. The neuter gender herein shall be deemed to include the masculine and/or feminine and vice versa, the masculine gender shall be deemed to include the feminine and vice versa, and the singular shall be deemed to

include the plural and vice versa wherever necessary or appropriate or required by the context.

IN WITNESS WHEREOF, each of the parties hereto has executed this Agreement as of the date first written above.

MANAGER:

_____

[MANAGER]

MEMBERS:

_____

[MEMBER]

SCHEDULE "A"

MEMBERS

Name and Address	Capital Contribution	Percentage Share
_____		

3. Sale to Grantor Trust Purchase Agreement And Promissory Note

DRAFT

PURCHASE AGREEMENT

This Purchase Agreement (this "Agreement") is entered into as of the [DATE], by and between [CLIENT] ("Seller"), and the [TRUST], u/t/a dated as of [DATE], [TRUSTEE], as Trustee, made by [NAME], as Grantor ("Purchaser").

RECITALS:

A. Seller is the record and beneficial owner of a _____% membership interest in [LLC], a [STATE] Limited Liability Company (the "Company").

B. Seller desires to sell to Purchaser, and Purchaser desires to purchase from Seller, a _____% membership interest in the Company, subject to and conditioned upon the terms and conditions set forth in this Agreement. The _____% membership interest in the Company to be acquired by Purchaser hereunder is herein referred to as the "Interest."

NOW, THEREFORE, in consideration of the recitals and the covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Purchase and Sale of the Interest. Subject to the terms and conditions of this Agreement, Purchaser agrees to purchase and acquire from Seller, and Seller agrees to sell, assign, transfer, and deliver to Purchaser, the Interest, free and clear of all security Interest, claims and encumbrances.

2. Consideration for the Interest. The consideration (the "Purchase Price") payable by Purchaser to Seller for the Interest shall be the sum of [DOLLARS] ($_____), in the form of a promissory note from Purchaser to Seller in the form annexed hereto as Exhibit "A" (the "Promissory Note").

3. Closing. The consummation of the transactions contemplated by this Agreement (the "Closing") shall occur at [ADDRESS], or at such other location and time as Seller and Purchaser shall agree. The date upon which the Closing occurs is referred to in this Agreement as the "Closing Date." Neither party shall be required to attend the Closing, and each party is authorized to designate a representative to attend on behalf of such party and to deliver such documents and/or payments as are required hereunder.

(a) Deliveries by Purchaser. At the Closing, Purchaser shall deliver to Seller the duly executed Promissory Note, as well as any payment(s) due thereunder as of the Closing Date.

(b) Deliveries by Seller. At the Closing, Seller shall execute and deliver an Assignment and Transfer of the Membership Interest in the Company with respect to the Interest owned by such Seller, substantially in the form of Exhibit "B" hereto.

(c) Simultaneous Delivery. All proceedings to take place on the Closing Date shall be considered to take place simultaneously, and no delivery or payment shall be considered to have been made on such date until all deliveries, payments and proceedings due to occur under this Agreement on such Closing Date have been completed.

4. Closing Costs. Each party shall bear its own attorney's fees and other closing costs related to this Agreement.

5. Representations and Warranties of Seller. As a material inducement to Purchaser to execute and perform Purchaser's obligations under this Agreement, Seller represents and warrants to Purchaser as of the Closing Date that:

(a) The Company is a limited liability company duly organized and validly existing in the compliance with the laws of the State of [STATE]. The Company has full power to own all of its properties and assets and to carry on its businesses as they are now being conducted.

(b) Seller is the record and beneficial owner of the Interest being sold hereunder by Seller, free and clear of all security interest, liens, encumbrances, restrictions, claims or other charges and has the full right, power, and authority to sell, transfer, and deliver such Interest to Purchaser.

(c) Attached hereto as Exhibit C-1 and C-2 are true and complete copies of the Articles of Organization of the Limited Liability Company and the Operating Agreement of the Limited Liability Company, including all amendments thereto, as in full force and effect on the date hereof.

(d) There are no outstanding obligations or other rights of any kind to acquire any of the Interest. Since the Company's organization, there have not been any distributions in respect of the Interest, or any direct or indirect redemption, purchase or other acquisition of any of the Interest.

(e) Seller has made the Company's financial books and records available to Purchaser for inspection at any time prior to the Closing Date (the "Financial Books and Records").

(f) There are no existing liabilities of the Company, including contingent or unasserted liabilities, except for liabilities reflected in the Financial Books and Records. Since the date of the Financial Books and Records there has not been any material adverse change in the business or the results of operations of the Company.

(g) Except as disclosed on the Financial Books and Records, there exists no unpaid Federal, state, local or foreign taxes which comprise or could comprise a lien against any of the assets of the Company.

(h) The Company has filed with all appropriate, Federal, state, local and foreign authorities all tax returns and tax information required by law, regulation or otherwise to have been filed by it for all taxable periods for which returns have been due, if any.

(i) The Company is the owner of certain property, both tangible and intangible (the "Property"). There is no security interest, liens, mortgages, defects, encumbrances, adverse claims, restrictions, claims or other charges affecting the Property which have not previously been disclosed to the Purchaser.

(j) There is no claim, demand, action, suit or proceeding pending or, to the best of Seller's knowledge, threatened, against or affecting the Company or the Property before or by any court, governmental authority or arbitrator which, if adversely decided, would materially adversely affect the Company or the use or value of the Property, and Seller is not aware of any facts that might result in or form the basis for any such claim, demand, action, suit or proceeding.

(k) To the best knowledge of Seller, the business and operations of the Company has been and are being conducted in all material respects in accordance with all applicable statutes, laws, rules, regulations, judgments, decrees, writs, injunctions, orders and awards of all arbitrators, courts and governmental authorities, including, without limitation, all those applicable to the Property.

(l) General:

(i) No consent or approval of, or registration of filing with, any governmental authority or any other person is required to be obtained or made by Seller in connection with the execution, delivery, or performance of this Agreement.

(ii) Seller's execution and delivery of and performance and compliance with this Agreement will not result in the violation of or be in conflict with or result in the breach of any applicable law, rule, or regulation of any governmental body.

(iii) Seller has the full power and authority to enter into this Agreement, to sell the Interest to Purchaser on the terms and conditions contained herein, and to perform all of his obligations hereunder. The execution and delivery of this Agreement, and the consummation of the transactions contemplated hereby, will not violate any provisions of, or with the passage of time, result in a violation or acceleration of (or entitle any party to accelerate) either after the giving of notice or lapse of time or both, any obligation of Seller or the Company, or result in the imposition of any liens or security Interest against any assets or properties of Seller or the Company whether pursuant to any mortgage, lien, lease, agreement, instrument, order, arbitration award, judgment, or decree to which Seller or the Company are a party or by which any of them are bound, or otherwise.

(iv) This Agreement is the legal, valid and binding agreement of Seller enforceable in accordance with its terms, subject with respect to enforceability only to the effect of bankruptcy, insolvency,

reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights generally as they pertain to Seller and to the availability of equitable remedies.

(v) No representation, warranty or statement of Seller in this Agreement contains any untrue statement of a material fact, or omits to state any material fact required to make the representations, warranties and statements contained herein not misleading in the light of the circumstances under which they were made.

6. Representations and Warranties of Purchaser. As a material inducement to Seller to execute and perform Seller's obligations under this Agreement, Purchaser represents and warrants to Seller as of the Closing Date that:

(a) No consent or approval of, or registration of filing with, any governmental authority or any other person is required to be obtained or made by Purchaser in connection with the execution, delivery, or performance of this Agreement.

(b) Purchaser's execution and delivery of and performance and compliance with this Agreement will not result in the violation of or be in conflict with or result in the breach of any applicable law, rule, or regulation of any governmental body.

(c) The execution and delivery of this Agreement, and the consummation of the transactions contemplated hereby, will not violate any provisions of, or with the passage of time, result in a violation or acceleration of (or entitle any party to accelerate) either after the giving of notice or lapse of time or both, any obligation of Purchaser, or result in the imposition of any liens or security interest against any assets or properties of Purchaser, other than those set forth herein, whether pursuant to any mortgage, lien, lease, agreement, instrument, order, arbitration award, judgment, or decree to which Purchaser is a party or by which Purchaser is bound, or otherwise.

(d) This Agreement is the legal, valid and binding agreement of Purchaser enforceable in accordance with its terms, subject with respect to enforceability only to the effect of bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights generally as they pertain to Purchaser and to the availability of equitable remedies.

7. Survival of Representations and Warranties; Indemnity. The representations, warranties, and covenants contained in this Agreement and any instrument delivered in connection with this Agreement shall survive the Closing and shall not be merged in the documents delivered at Closing.

(a) Seller agrees to indemnify Purchaser and hold Purchaser harmless from and against any loss, damage, cost or expense to Purchaser which results from:

(i) any and all tax liabilities of any and every nature, whether Federal, state, local, or foreign, which relate to the Interest and which are attributable to periods prior to the Closing Date;

(ii) any and all inaccuracies in or breach of the representations, covenants and warranties made by Seller in this Agreement; and

(iii) any and all claims, demands, actions, suits, proceedings, assessments, judgments, costs and expenses incident to any and all of the foregoing.

8. Formula Clause. (a) The assets to be transferred to the Purchaser under this Agreement shall be divided into two (2) portions, Portion A and Portion B in accordance with the following provisions: (i) The assets transferred in exchange for full and adequate consideration as finally determined for Federal Gift Tax purposes under Chapter 12 of the Internal Revenue Code, shall be allocated to Portion A; and (ii) The balance of assets, if any, shall be allocated to Portion B.

(b) Portion A and Portion B shall both be transferred to the Purchaser to be held, administered and distributed in accordance with the same terms and conditions of the Trust Agreement of the Purchaser; except that in addition, the property in Portion B shall, either during the Grantor's lifetime, or by upon the Grantor=s death, be paid to those of the Grantor=s issue as the Grantor shall during life or by the Grantor's Will appoint, outright or in trust, by an acknowledged instrument with specific reference to the power herein granted. Any such property not so appointed shall be held, administered and distributed in accordance with the same terms and conditions as Portion A, hereof.

9. Remedies. In the event that either party shall fail to perform its obligations under this Agreement, the other party shall be entitled to exercise any remedy legally available to such party at law or in equity, including without limitation the remedy of specific performance.

10. Entire Agreement; Amendment. This Agreement, together with all exhibits hereto, sets forth the entire understanding of the parties, and supersedes all prior arrangements and communications, whether oral or written, with respect to the subject matter hereof. This Agreement may not be modified, amended, or supplemented except by an agreement in writing signed by the party to be charged.

11. Severability. If any one or more of the provisions contained in this Agreement shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision in this Agreement and in lieu of such illegal, invalid, or unenforceable provision, there shall be added as a part of this Agreement a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible, and be legal, valid, and enforceable.

12. Notices. Any notice, demand or communication required or permitted to be given hereunder shall be in writing and shall be deemed to be duly given upon personal delivery, upon confirmed transmission by facsimile to the other party at the facsimile number of such party, or shall be sent by certified or registered mail, return receipt requested, postage prepaid, addressed to the applicable address of such party and shall be effective three (3) days after the mailing of the notice.

13. Assignment. This Agreement shall not be assignable by any party.

14. GOVERNING LAW AND VENUE. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF [STATE]. THE EXCLUSIVE FORUM FOR THE DETERMINATION OF ANY ACTION RELATING TO THIS AGREEMENT SHALL BE AN APPROPRIATE COURT OF THE STATE OF [STATE].

15. Attorneys' Fees. If either party to this Agreement brings an action against the other party to interpret or enforce this Agreement, the prevailing party shall be entitled to recover its costs and expenses, including without limitation attorneys' fees and costs actually and reasonably incurred in connection with such action, including any appeal of such action.

16. No Waiver. No waiver of any provision of this Agreement or any rights or obligations of any party hereunder shall be given effect, except pursuant to an acknowledged instrument signed by the party or parties waiving compliance, and any such waiver shall be effective only in the specific instance and for the specific purpose stated in such writing.

17. Cooperation and Further Assurances. Each party shall fully cooperate with the other party in good faith to execute any and all reasonable documents and to perform all actions reasonably necessary or appropriate to effect the consummation of the transactions contemplated by this Agreement, both before and after the Closing.

18. Third Parties. Nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person other than the parties hereto and their successors or permitted assigns, any rights or remedies under or by reason of this Agreement.

19. Survival. All of the obligations of the parties under this Agreement shall survive the closing of the sale and purchase of the purchased Interest.

20. Multiple Counterparts. This Agreement may be signed in multiple counterpart originals or facsimile of originals and upon signature of counterparts by all of the parties, such counterparts shall be effective as one document.

21. No Brokers. The parties represent and warrant to each other that no broker or agent has negotiated or represented either party to this transaction, and in the event that any claim for commission or fee is made, the party through whom such claims arises shall hold the other harmless from any such commission or fee.

Signatures appear on the following page.

IN WITNESS WHEREOF, each of the parties hereto have executed this Agreement on and as of the [DATE].

SELLER:

_____

[CLIENT]

PURCHASER:

[TRUST] u/t/a dated as of [DATE]

By: _____

[TRUSTEE], Trustee

EXHIBITS

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EXHIBIT A

Promissory Note between the [TRUST], u/t/a dated as of [DATE], [TRUSTEE], as Trustee

PROMISSORY NOTE

FROM

[TRUST], u/t/a dated of [DATE], [TRUSTEE], as Trustee

[CLIENT]

The [TRUST], u/t/a dated of [DATE], [TRUSTEE], as Trustee, created by [CLIENT], as Grantor, ("Borrower"), promises to pay to [CLIENT], with a mailing address of [ADDRESS] ("Lender"), [DOLLARS] ($_____), together with interest on the unpaid principal balance at the rate of _____% per annum.

The amount due under this Note is equal to the value of the assets transferred by Lender to Borrower plus interest.

SECTION 1 - PAYMENTS

1.1 **Maturity.** This Note shall mature on the day immediately preceding the ninth (9^{th}) anniversary of the date of the Note (the AMaturity Date@).

1.2 **Amortization Schedule.** Commencing with the first interest payment due on or before the anniversary hereof, and on or before the anniversary hereof of each subsequent year until the Maturity Date, Borrower will make annual payments of interest in the amount of [DOLLARS] ($_____). Upon maturity, Borrower will pay Lender any and all principal and interest which is then due and outstanding. Borrower and Lender agree that this payment schedule will control, absent any prepayment. Both parties also agree to report their interest and principal payments and balances for tax and financial purposes according to this schedule.

1.3 **Holidays.** If any Payment Date of this note falls on a Saturday, a Sunday or a day that is a legal holiday under the laws of the United States, the payment for that year shall be due on the next succeeding business day.

1.4 **Medium of Payment.** Payment may be made in lawful monies of the United States of America.

1.5 **Where Payment Made.** Payment may be made to Lender at the address set forth above or at such other place as he may designate in writing from time to time.

1.6 **Prepayment.** Borrower may prepay all or any portion of the principal balance of this note at any time, without penalty or premium.

SECTION 2 - SECURITY

This Note is secured by the full assets of Borrower, including all assets hereafter acquired, including the specific property purchased by Borrower from Lender for which this Note is full payment.

SECTION 3 - DEFAULT

3.1 **"Default" Defined.** The Borrower will be in default if the Borrower fails to pay any installment of principal or interest when due and does not cure such deficiency within thirty (30) calendar days of the Payment Date on which the payment was due.

3.2 **Acceleration.** Whenever Borrower is in default, Lender may declare the entire principal balance in default, and immediately due and payable.

3.3 **Lender's Remedies.** Upon any default, Lender may take such legal actions as Lender deems necessary or appropriate to collect the amounts in default.

3.4 **Attorney=s Fees.** If this Note shall be referred to an attorney for collection, there shall be due and payable a reasonable attorney=s fee. The Party seeking collection may take judgment for all costs and expenses of any action taken herein, including attorney=s fees.

SECTION 4 - CANCELLATION

Upon payment of all principal and interest required to be paid under this note, Lender will return to Borrower all copies of this note, marked "Canceled/Paid in Full," and all of Borrower's obligations under this Note will be terminated.

SECTION 5 - MISCELLANEOUS

5.1 **Headings.** The headings in this instrument are inserted for convenience and shall not be considered a part of this instrument or used in its interpretation.

5.2 **State of Law.** This note and the parties' rights and liabilities thereunder, shall be construed under the law of the State of [STATE].

5.3 **Gender/Pronouns.** The neuter gender hereunder shall be deemed to include the masculine and/or feminine and vice versa, and the singular to include the plural and vice versa wherever necessary or appropriate or required by the context.

Signatures appear on the following page.

Dated: [DATE]

[TRUST], u/t/a dated as of [DATE]

By: _____
[TRUSTEE], Trustee

EXHIBIT B

Assignment and Transfer of Membership Interest in [LLC], a [STATE] limited liability company, from [CLIENT] to the [TRUST], u/t/a dated as of [DATE], [TRUSTEE], as Trustee.

ASSIGNMENT AND TRANSFER OF MEMBERSHIP INTEREST

This Assignment and Transfer of Membership Interest is made by and between [CLIENT] (the "Assignor") and the [TRUST], u/t/a dated of [DATE], [TRUSTEE], Trustee (the "Assignee").

RECITALS:

A. Assignor owns a _____% Membership Interest in [LLC] LLC (the "Company"). The Company was formed as a [STATE] Limited Liability Company.

B. Assignor now desires to transfer and assign Assignor's right, title and interest in and to a _____% Membership Interest (the AInterest@) to Assignee and Assignee desires to accept such assignment pursuant to the terms and conditions set forth below or an aggregate.

NOW, THEREFORE, Assignor by these presents does hereby ASSIGN, TRANSFER, CONVEY and DELIVER unto Assignee all of the Interest to have and to hold together with all the rights and appurtenances thereto, with such rights and appurtenances inuring to Assignee, Assignee's heirs, legal representatives and assigns;

FURTHERMORE, Assignor warrants to forever defend all the rights, titles, and Interest assigned hereby unto Assignee, Assignee's heirs, legal representatives and assigns, against every person whomsoever lawfully claims same or any part thereof;

FURTHERMORE, Assignor and Assignee hereby constitute and appoint the Manager of the Company/or its successors and assigns, their agent and attorney-in-fact to execute and/or file any and all additional documents which may be required or advisable in connection with the implementation of the Agreement and to make, execute, sign, and acknowledge and file any certificates, amendments or other documents required pursuant to or pertaining to the Operating Agreement or the law of the State of [STATE] or any other state, county or municipality to evidence a change in the identity, interest or number of Members in the Company, so as to accomplish the intent of this document;

FURTHERMORE, by acceptance of this Assignment, Assignee does hereby agree to be bound by the terms, conditions, and provisions of the Operating Agreement as if an original signatory thereon.

The assets to be transferred to the Assignee shall be divided into two (2) portions, Portion A and Portion B in accordance with the following provisions: (i) The assets transferred in exchange for full and adequate consideration as finally determined for Federal Gift Tax purposes under Chapter 12 of the Internal Revenue Code, shall be allocated to Portion A; and (ii) The balance of assets, if any, shall be allocated to Portion B.

Portion A and Portion B shall both be transferred to the Assignee to be held, administered and distributed in accordance with the same terms and conditions of the Trust Agreement of the Assignor; except that in addition, the property in Portion B shall, upon the Grantor=s death, shall be paid to those of the Grantor=s issue as the Grantor shall by the Grantor's Will appoint, outright or in trust, by specific reference to the power herein granted. Any such property not so appointed shall be

held, administered and distributed in accordance with the same terms and conditions as Portion A, hereof.

FURTHERMORE, this instrument may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Signatures appear on the following page.

IN WITNESS WHEREOF, this Assignment has been executed as of and effective as of the [DATE].

Assignor:

_____

[CLIENT]

Assignee:

[TRUST], u/t/a dated as of [DATE]

By: _____

[TRUSTEE], Trustee

GUARANTY

THIS GUARANTY, dated as of [DATE] is made by [GUARANTOR] in his individual capacity (hereinafter referred to as the "Guarantor") in favor of [CLIENT] (hereinafter referred to as the "Holder").

WITNESSETH

WHEREAS, pursuant to a certain Promissory Note ("Note") dated as of [DATE], by and among the [TRUST], u/t/a dated as of [DATE], [TRUSTEE], Trustee (the "Borrower"), and the Holder, the Borrower is obligated to pay certain amounts to Holder, which obligation is set forth in the Note.

1. Guaranty of Obligations.

(a) The Guarantor hereby guarantees the full, complete and prompt payment when due of any and all amounts, subject to the limitations set forth herein, owed by Borrower to the Holder under or pursuant to the Note, including all Obligations as defined below. If for any reason any such sum shall not be paid promptly when due, the Guarantor will, within 15 days of written notice setting forth the amount due, pay such sum to or for the benefit of the Holder; provided, however, (i) Guarantor shall be entitled to assert any defense available to Borrower under the Note, including, but not limited to, Borrower's right, if applicable under the circumstances, to elect to pay amounts due under the Note to an Escrow Agent, pursuant to the terms of the Note; and (ii) Guarantor shall have no liability to make any payment otherwise due hereunder to the extent the amount thereof has been properly offset against the Note or while Borrower's right to make such an offset is pending.

2. Term. The liability of the Guarantor shall continue until the final payment of all Obligations in full.

3. Amendments. Any modification of the Note, including, but not limited to, any change in the financial terms therein or any change in the time or manner of payment, or any waiver with respect to enforcement of any term, shall be binding upon Guarantor, provided Guarantor is given written notice of same within 30 days of any such occurrence.

4. Additional Terms. Guarantor shall be given written notice within TEN (10) days after the occurrence of demand for payment under the Note or an event of default under the Note, or an event, which with the passage of time would constitute an event of default.

(a) Except as expressly set forth herein, the Guarantor hereby waives presentment, notice of non-payment or dishonor, and all other notices in connection with the delivery, acceptance, performance, default or enforcement of this Guaranty.

(b) Failure of the Holder to insist on strict compliance with any term or provision of this Guaranty shall not act as a waiver of any such term or provision, or act as a discharge of this Guaranty.

5. Notices. Any notice or demand given or made under this Guaranty shall be given or made in writing by U.S. certified or registered mail with return receipt requested and postage prepaid, or by any twenty-four (24) hour courier service with proof of delivery, addressed to the person for which it is intended at the address of that person provided in this Paragraph 5. Any such notice by mail shall be deemed to have been given three (3) business days after being deposited in the mail. Any such notice by Twenty Four (24) hour courier shall be deemed to have been given on the business day immediately following the business day so deposited. Such notices shall be sent:

If to Holder:

[CLIENT]

_____

_____

If to Guarantor:

[GUARANTOR]

_____

_____

With copies to:

[TRUST], u/t/a dated as of [DATE], [TRUSTEE], Trustee

_____

_____

6. Severability. In the event any one or more of the provisions contained in this Guaranty shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability at the option of the Holder shall not affect any other provision of this Guaranty, but this Guaranty shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

7. Miscellaneous. Captions herein are for convenience only and shall not affect the meaning or construction of this Guaranty. This Guaranty (a) shall be binding upon the Guarantor, the Guarantor's respective heirs, legal representatives, successors and assigns, and shall inure to the benefit of the Holder, the Holder's successors and assigns, (b) embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings relating to the subject matter hereof, (c) may not be modified or amended except by an instrument in writing duly executed by the Holder and the Guarantor, and (d) shall be governed by the internal, substantive laws of the State of [STATE], without giving effect to the conflicts of laws principles thereof.

Signatures appear on the following page.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty the day and year first above written.

GUARANTOR:

_____

[GUARANTOR]

EXHIBIT C-1

CERTIFICATE OF FORMATION OF [LLC]

EXHIBIT C-2

OPERATING AGREEMENT OF [LLC]

4. Qualified Personal Residence Trusts (QPRTs) and QPRT Document

I. Statutory Framework

1. Section 2702

A. Applies in determining value of gift when there is transfer or interest in trust for member of family.

B. Value of interest which is not a "qualified interest" is zero. Value of qualified interest determined under Section 7520. Gift = Value of Property Transferred - Value of Retained Interests

C. Section 2702(3) Exception- "transfer of interest in trust all the property of which consists of a residence to be used as a personal residence by persons holding term interests.."(i.e. a life interest or an interest for a term of years).

2. Reg sec. 25.2702-5 "personal residence trusts" - Only residence and "qualified proceeds" may be held during original term. Residence may not be sold or transferred during original term. Qualified proceeds are those received as a result of damage to or involuntary conversion of residence.

3. Reg. Sec. 25.2702-5 (c)- "qualified personal residence trust" - permits sale, holding sales proceeds, adding cash etc.

4. "Family members"- Sec 2704(c)(2)-(i) spouse,(ii) ancestor, or lineal descendant of individual or spouse; (iii)

brother or sister; (iv) spouses of those in categories (ii) through (iii).

II. General Description of How QPRT Is Structured and Tax Consequences

1. Grantor, by deed, transfers residence to QPRT established under an irrevocable trust agreement. Various provisions required during original term. (Trust may hold interest in only single residence. The residence must either be the Grantor's principal residence or one other residence. etc.). No restrictions under regs after orig term - except repurchase by Grantor etc.

2. Under trust agreement Grantor reserves use of residence for a stated number of years. ("original term"). At the conclusion of the original term, the residence passes to members of family (or continues in trust for members of family).

3. There is gift on creation of QPRT . Gift = Value of residence - value of retained interests.

4. Retained interests consist of:

A. income interest for original term- e.g. right to income for shorter of 10 years or until Grantor's death;

B. value of reversion- value of reversion to Grantor's estate if Grantor dies during original term, e.g. 10 years.

5. Illustration # 1

Residence: $1,000,000

Grantor's age: 50

Term: 10 years, or sooner death

Date: June, 2004

Sec 7520 Rate 4.6%

Taxable Gift $590,620

$1,000,000 - $351,620(income interest)- $57,760 (reversion) = $590,620

6. Illustration #2

Residence: $1,000,000

Grantor's Age: 70

Term: 10 years, or sooner death

Date: June, 2004

Sec 7520 Rate: 4.6%

Taxable Gift: $420,840

$1,000,000 - $309,320(income interest) - $269,840(reversion) = $420,840.

7. Title Insurance; consent of mortgage lender

8. Resources - IRS Publication 1457, Alpha Volume Numbers Crunchers;

IRS Model Trust, Rev. Proc. 200342

9. Estate Tax Consequences

A. Full value of home in Grantor's estate under section 2036 if Grantor dies during original term (because of retained right to live in residence)

B. If Grantor survives original term, taxable gift on creation of QPRT is added back to estate as "Adjusted Taxable Gift". The gift on creation does not qualify for annual exclusion.

C. The longer the QPRT term, the less will be the gift. This must be balanced against risk of inclusion in gross estate in event of death.

D. The higher the Section 7520 rate, the less will be the gift.

10. Basis

No step up in basis if Grantor survives the original term. Additional capital gain for members of family if residence is sold must be weighed against estate tax savings, particularly when residence has a low basis.

11. Sale of Home

A. Can use proceeds to replace with different home.

B. If new home costs less, Trust Agreement must provide either that surplus must be returned to Grantor, or continued as GRAT. All provisions for GRAT must be included. The

choice can be given to a Trustee, or the disposition may be mandatory. (See comments at end of this Section 10).

C. If new home costs more, Grantor can either add more funds to the QPRT, which will be an additional gift, or can purchase an undivided interest in the new home individually. If funds are added to QPRT, they must be used within 3 months to purchase the new residence, pursuant to an existing contract.

D. If a new residence is not purchased at all, proceeds of sale must either be returned to Grantor, or converted to a GRAT. A Trustee may be given discretion to do either. Caveat - may be subject to creditor's claims if Trustee has discretion. (EPTL 7-3.1) Also, lose tax benefits if sales proceeds are returned.

12. Payment of Expenses

A. Grantor typically pays all expenses during original term, as before.

B. Trust is Grantor Trust for income tax purposes under Section 677(a)(1) (applicable to accounting income, which may be distributed to Grantor) and Section 673(a) (as to both income and principal, since as of inception the Grantor's reversionary interest will usually exceed 5% of initial value).

C. Real estate taxes remain deductible, as does mortgage interest (to the extent previously deductible).

D. Sec. 121 excluding gain on sale of principal residence continues to apply.

III. PRACTICAL CONSIDERATIONS

1. Continued Use of Residence After Original Term Ends

A. Trust Agreement may permit Grantor to remain after original term ends, at fair rental.

B. Rent takes still more out of Grantor's estate.

C. Remaining without rent results in estate tax inclusion under section 2036. Estate of Mc. Nichol v. Commissioner, 265 F. 2d. 667 (3rd Cir. 1959), Rev. Rul. 70-155.

D. Not in gross estate under sec 2036 if fair market rent paid. Estate of Burlow v. Commissioner, 55 T.C. 666(1971). Rent probably not required for vacation home used occasionally as guest of new owner.

E. Continue as Grantor Trust for family members after original term ends.

(a) Rent not subject to income tax, since transaction between grantor and grantor trust. Rev. Rul. 85-13

(b) Grantor trust status if person acting in non fiduciary capacity has right to substitute property of equal value. Sec 675(c)(4). (Third party, Grantor or beneficiary may have power, PLRS 9311021 and 9037011. Not in estate of Grantor who has power, Jordahl, - 65T.C.92(1975), acq.)

(c) Grantor trust status if continues as sprinkling trust for family without standards for sprinkling, when none of Trustees is an adverse party, and more than half of Trustees are related or subordinate parties. See Sec. 674. (Under Section 672(c), related or subordinate parties include the Grantor's spouse, brother, sister, and certain employees. Caution: issue are related parties , but are usually adverse parties and should not be Trustees).

(d) Alt - Even if Trustees are independent, trust will be grantor trust if there is power to add beneficiaries.

(e) Caveat: Grantor should not be beneficiary, trustee, nor have right to change beneficial enjoyment. EPTL 7-3.1; Sections 2036, 2038.

2. **Another Method For Continued Use After Original Term Ends**

A. Continue in trust under terms of trust agreement after original term for surviving spouse, who would have right to remain in residence for her lifetime. Grantor would indirectly also have right to live in residence.

B. This is a good strategy where Grantor has owned the residence for some time.

C. Reciprocal Trusts, Step Transactions, and Section 2036.

(a) Illustration 1 - Suppose home held as tenancy by entirety is changed to tenancy in common between spouses. Each spouse then creates identical QPRT permitting other spouse to remain in residence after initial term ends. Both spouses while living will be able to continue to live in residence after original term. This may result in inclusion in gross estate under Sec. 2036 if a spouse dies after original term.

(b) Illustration 2 - Husband transfers his interest in residence to younger spouse, who creates QPRT permitting husband to remain after initial term. May be construed as step transaction.

3. Coop Apartment in QPRT

A. Many Co-ops do not permit trusts to own cooperative apartment shares and proprietary lease.

B. Service, in private letter rulings, permitted QPRT where title remained in Grantor's name pursuant to a nominee agreement, provided the agreement is recognized under State law. PLRS 9447036, 9433016.

4. Mortgaged Home

A. Permissible to be held in QPRT. Obtain consent of mortgage lender if due on sale clause.

B. Consider paying mortgage off first, otherwise each mortgage principal payment would be an additional gift to eh QPRT.

5. Generally, Do Not Split Gifts For Gift Tax Purposes

If Grantor dies during original term, entire residence will be in Grantor's gross estate under sec 2036. However, Grantor's adjusted taxable gift as a result of establishing the QPRT will be eliminated. Sec. 2001(b)(2). There is no comparable provision for removing the adjusted taxable gift for the consenting spouse. Any gift tax paid by Grantor will be allowed as credit against Grantor's estate tax. (Sec. 2012).

6. Transfer of Fractional Interests

A. May be discount for lack of marketability and control where each spouse transfers an undivided interest in same residence to his or her own QPRT. - See cases cited in file.

B. Similar discount for transfer of several fractional interests in same residence to a number of trusts. This also lessens risk of premature death.

Reg. Sec. 25.2702-5(C) defines a personal residence as "(A) The principal residence of the term holder..(B) One other residence.... or (C) an undivided fractional

interest in either." Reg §25.2702-5(a)(2), after limiting Grantor to two trusts provides "for this purpose, trusts holding fractional interests in the same residence are treated as one trust."

7. GST Considerations

A. Problem: Original term ends and residence passes to surviving children, and issue of predeceased child. There will be a taxable termination in that case.

B. May avoid by providing predeceased child with general testamentary power of appointment over his share, or by leaving deceased child's share to his estate. (Predeceased child thus becomes new transferor as to his share)

C. Another solution is to divide residence only among surviving children, and provide for issue of deceased child from other assets.

8. Should Grantor be Trustee?

Although Grantor can be Trustee during original term, he should not be a Trustee afterwards if residence continues in trust.

9. Repurchase of Residence Prior to End of Term

A. Reg 25.2702-5(c)(9), eff 12/23/97, require trust to prohibit sale to grantor, grantor's spouse, or to entity controlled by either, during the original term or thereafter while trust is grantor trust.

B. Purpose of regulation - Avoid step up in basis without capital gain, since transaction with grantor and grantor trust has no tax consequences.

C. Sale to grantor etc. from trust created before effective date of reg.

D. Sale to grantor etc. from trust created after effective date of reg.

E. See preamble to final regs. IRS believes sale to grantor is contrary to intent of congress. Contradictory statements in preamble.

TRUST AGREEMENT dated the ___ day of _____, 2013, made by [CLIENT], as Grantor, and [TRUSTEE], as Trustee (to be known as the **"[CLIENT] 2013 QUALIFIED PERSONAL RESIDENCE TRUST"**).

WHEREAS, the Grantor desires to make a transfer in trust for the purposes and upon the terms and provisions hereinafter set forth,

NOW THEREFORE, in consideration of the premises, the Grantor has transferred, assigned and delivered, and by these presents does hereby transfer, assign and deliver to the Trustee (who, and whose successors in office, are hereinafter sometimes referred to as "Trustee" or "Trustees") all of the property described in Schedule A attached hereto and made a part hereof, the receipt whereof is hereby acknowledged by the Trustees,

TO HAVE AND TO HOLD THE SAME, and any and all other property which may at any time hereafter be held or acquired pursuant to the provisions hereof, (all of which is sometimes hereinafter collectively referred to as the "Trust Estate"), in trust, to be held and administered as hereinafter provided in this Agreement.

FIRST: Qualified Personal Residence Trust

A. The Grantor intends by this Agreement to create a "qualified personal residence trust" within the meaning of Section 2702(a) of the Internal Revenue Code of 1986, as amended (the "Code") and Treas. Reg. '25.2702-5(c). The Grantor shall have the right to the exclusive use, possession and enjoyment of any personal residence held by the Trustees. The Trustees shall hold

and manage the Trust Estate, shall collect any income thereof, and shall pay over or apply the net income at the end of each calendar quarter to or for the benefit of the Grantor. The Trustees shall not pay over or apply any portion of the income or principal of the Trust Estate to or for the benefit of any person other than the Grantor; provided, however, that this sentence shall not be construed to prevent the payment by the Trustees of expenses properly chargeable to the trust estate.

B. The trust held under this Article FIRST shall terminate upon the first to occur of (1) the death of the Grantor or (2) [TERM (__)] years from the date of this Agreement (the "Fixed Term"), and the Trustees shall thereupon distribute the principal of the Trust Estate, as it is then constituted, pursuant to the provisions of Article SECOND.

C. The Trustees shall distribute to the Grantor at the end of each calendar quarter any portion of the Trust Estate which consists of cash in excess of the amount permitted to be held by the Trustees under Treas. Reg. '25.2702-5(c).

D. Notwithstanding the foregoing provisions, upon such time during the term of the trust under this Article FIRST as the residence held by the Trustees ceases to be a personal residence of the Grantor, the principal of the trust, as it is then constituted, shall be transferred, conveyed and paid over to the Trustees, to be managed and disposed of pursuant to Article THIRD, provided however that such cessation shall be deemed to occur only if and when it is

deemed to occur under Treas. Reg. '25.2702-5(c), and only such portion of the principal as is required by Treas. Reg. '25.2702-5(c)(5)(ii) shall be so transferred, conveyed and paid over. If the residence held by the Trustees is sold or destroyed without such cessation being deemed to occur, any sales or insurance proceeds in excess of those used to purchase or build a successor personal residence of the Grantor within the time required by Treas. Reg. '25.2702-5(c) shall be transferred, conveyed and paid over to the Trustees, to be managed and disposed of pursuant to Article THIRD, instead of being paid to the Grantor pursuant to Article FIRST, but only if and to the extent that this is permitted by Treas. Reg. '25.2702-5(c).

SECOND: Termination of Qualified Personal Residence Trust

A. If the Grantor dies prior to the expiration of the Fixed Term, upon the Grantor's death, the principal of the Trust Estate, as it is then constituted, shall be transferred, conveyed and paid over to the Grantor's executor or administrator, to be disposed of as part of the Grantor's estate.

B. If the Grantor survives the Fixed Term, the Trust Estate remaining shall continue IN TRUST on the following terms and conditions:

1. The Trustees may pay such amounts of the income and principal of the trust (including the whole thereof) to or for the benefit of the Grantor's [[husband/wife], [SPOUSE], and] issue living from time to time as the Trustees, in their absolute and

unreviewable discretion, determine, and shall accumulate the balance of income, if any, and add the same to principal.

2. Upon the expiration of the Fixed Term, the Grantor [or the Grantor's spouse] shall have the option to rent a personal residence owned by the Trustees, on the following terms and conditions:

(a) Such option shall be exercised by at least thirty (30) days written notice to the Trustees prior to expiration of the Fixed Term.

(b) The term of such rental may be selected by the Grantor [or the Grantor's spouse, as the case may be,] but, may not exceed five (5) years, unless otherwise agreed by the Trustees.

(c) Rent must be at the fair market value of the premises as determined by a written appraisal from a recognized real estate appraiser selected by the Trustees and paid for by the Grantor[or the Grantor's spouse as the case may be].

3. Upon the death of the [survivor of the] Grantor [and the Grantor's [husband/wife], [SPOUSE]], the Trust Estate remaining shall be divided into equal shares to provide one such share in respect of each of the Grantor's children who is then living and one such share in respect of each of the Grantor's children who is not then living but who leaves one or more issue who are then living (the "Predeceased Child"). Each share in respect to a Grantor's child who is then living shall be held in a separate trust and shall be managed and disposed of as provided in Article

FIFTH hereof. Each share in respect to a Predeceased Child shall be managed and disposed of as follows: The Predeceased Child shall have the power to appoint to the creditors of the Predeceased Child's estate such portion of such property which can be included in the Predeceased Child's estate without increasing the overall transfer taxes (including all federal and state estate, inheritance, generation-skipping transfer and other death taxes payable by reason of the Predeceased Child's death). Such power shall be exercised by a provision of the Predeceased Child's last will and testament duly admitted to probate which expressly refers to the power of appointment granted to the Predeceased Child by this paragraph. Any property the Predeceased Child does not so effectively appoint shall be divided into separate shares in respect of the Predeceased Child's then living issue, per stirpes. Each such share shall be held in a separate trust and shall be managed and disposed of as provided in Article FIFTH hereof.

C. Notwithstanding any other provision of this Article SECOND, if the Grantor survives the Fixed Term, upon the expiration of the Fixed Term, the Trustees shall transfer, convey and pay over to the Grantor any portion of the trust estate which consists of cash held for the payment of expenses, to the extent required by Treas. Reg. '25.2702-5(c).

THIRD: Grantor Retained Annuity Trust

A. All property directed to be disposed of under this Article THIRD shall be held, IN TRUST NEVERTHELESS, for the

following uses and purposes: to manage, invest and reinvest the same, to collect the income thereof, and to pay to the Grantor in each taxable year of the trust the amount (the "annuity amount") set forth below. The first taxable year of the trust shall commence on the earlier of (1) the date of receipt of the proceeds of sale of the personal residence and (2) the cessation of use of the residence as a personal residence of the Grantor, within the meaning of Treas. Reg. '25.2702-5(c). The annuity amount shall be paid in equal quarterly installments, from the income of the trust estate, and, to the extent that the income is not sufficient, from the principal of the trust estate. Any income of the trust estate for a taxable year in excess of the annuity amount shall be added to the principal of the trust estate.

B. The annuity amount shall be the amount determined under Treas. Reg. '25.2702-5(c)(8)(ii)(c), viz., an amount equal to (1) the value of all interests retained by the Grantor (as of the date of the original transfer or transfers), divided by (2) an annuity factor determined as of the date of the original transfer, using the rate determined under section 7520 of the Code as of that date, and for the original term of the Grantors' interest. To the extent permitted under Treas. Reg. '25.2702-5(c)(8)(ii)(c)(3), the annuity amount shall be adjusted in the event that only a portion of the proceeds of the sale of a personal residence becomes subject to this Article THIRD.

C. For purposes of determining the annuity amount, the value of property transferred by the Grantor to the Trustees, shall be its fair market value as finally determined for Federal gift tax purposes. If the fair market value of the property is incorrectly determined, then within a reasonable period after the value is finally determined for Federal gift tax purposes, the Trustees shall pay to the Grantor (in the case of an undervaluation) or shall receive from the Grantor (in the case of an overvaluation) an amount equal to the difference between the annuity amounts properly payable and the annuity amounts actually paid. In determining the annuity amount, the Trustees shall prorate the same on a daily basis for a short taxable year and the taxable year in which the Grantor's interest terminates.

D. The Trustees are prohibited from issuing a note, other debt instrument, option or similar arrangement in satisfaction of the annuity payment obligation.

E. The trust created under this Article THIRD shall terminate upon the first to occur of (1) the death of the Grantor or (2) the expiration of the Fixed Term, and the principal of the trust estate, as it is then constituted, together with any undistributed income, shall be disposed of as follows: any portion of the Trust Estate which under the provisions of the Internal Revenue Code then in effect would be included in the deceased Grantor's estate for Federal estate tax purposes shall be paid to such Grantor's Executor and distributed as part of the Grantor's

estate. The balance of the Trust Estate shall be divided into equal shares in respect of the Grantor's then living issue, per stirpes. Each such share shall be held as a separate trust and shall be managed and disposed of as provided in Article FIFTH hereof.

FOURTH: Provisions Relating to Qualified Personal Residence Trust

A. It is the Grantor's intention by this Agreement to create a qualified personal residence trust within the meaning of section 2702(a) of the Code and Treas. Reg. '25.2702-5(c). Accordingly, the provisions of this Agreement shall be construed and the trusts created hereunder shall be administered solely in accordance with said intention and in a manner consistent with that section of the Code and those proposed regulations and with any successor section or regulations and any revenue rulings, revenue procedures, notices or other administrative pronouncements that may be issued thereunder by the Internal Revenue Service. Should the provisions of this Agreement be inconsistent or in conflict with such section, regulations, any successor section or regulations, or any revenue rulings, notices or other administrative pronouncements, in effect or issued from time to time, then such section, regulations, successor section or regulations, or rulings, notices or administrative pronouncements shall be deemed to override and supersede the provisions which are set forth herein. If such section or regulations, or any successor section or regulations, or

any ruling, notice or other administrative pronouncement issued thereunder at any time requires that agreements creating a trust to hold a personal residence contain provisions that are not expressly set forth herein, such provisions shall be incorporated into this Agreement by reference and shall be deemed to be a part of this Agreement to the same extent as though they had been expressly set forth herein.

B. Except as otherwise provided in paragraph D of this Article, during the term of the trust created under Article FIRST the Trustees are prohibited from holding any asset in that trust other than one residence (or an undivided fractional interest in one residence) to be used as a personal residence by the Grantor.

C. The term "personal residence" as used in this Agreement shall mean a personal residence within the meaning of Treas. Reg. '25.2702-5(c).

D. To the extent permitted by Treas. Reg. '25.2702-5(c):

1. During the term of the trust created under Article FIRST the Trustees may hold cash as part of the Trust Estate but not in excess of the amount required for the payment of trust expenses already incurred or reasonably expected to be incurred within six months of the receipt of the cash by the Trustees, for improvements to the personal residence to be paid for within six months of the receipt of the cash by the Trustees, for purchase of a personal residence within three months of the date of this Agreement, or for purchase of a personal residence within three

months of the receipt of the cash by the Trustees if the Trustees has previously entered into a contract to purchase the personal residence;

2. During the term of the trust created under Article FIRST, the Trustees may hold the proceeds of the sale of the personal residence (including the income thereon) to the extent permitted by Treas. Reg. '25.2702-5(c) for a period of not more than two years from the date of sale if the Trustees intend to use those proceeds within that period to purchase another residence to be used as a personal residence by the Grantor during the Fixed Term and may hold insurance proceeds paid to the Trustees as a result of damage or destruction of the personal residence for a period of not more than two years if the Trustees intend to use those proceeds for repair improvement or replacement of the personal residence.

3. The interest of the Grantor in any trust created hereunder shall not be commuted.

E. Notwithstanding any contrary statute or case law, the Trustees shall not pay to the Grantor or the Grantor's executors any principal of the Trust Estate on account of or in discharge of the Grantor's income tax liability (whether Federal, state or otherwise), if any, in respect of gains realized by any trust created under Article FIRST or Article THIRD and taxable to the Grantor.

F. Notwithstanding anything hereinbefore to the contrary, to the extent required for the trust under Article FIRST to be treated as a "Qualified Personal Residence Trust" within the meaning of '2702(a) of the Code and Treas. Reg. '25.2702-5(c), with respect to each trust hereunder, the Trustees are specifically prohibited from selling or transferring the personal residence held in trust hereunder directly or indirectly to the Grantor, or the Grantor's spouse, or any entity controlled by the Grantor or the Grantor's spouse during the Fixed Term, or any time after the Fixed Term that the trust is a grantor trust. For the purpose of the preceding sentence, a sale or transfer to another grantor trust of the Grantor or the Grantor's spouse shall be considered a sale or transfer to the Grantor or the Grantor's spouse.

FIFTH: Separate Trust for Descendants

Each trust set aside in respect of an issue of the Grantor (the issue of the Grantor in respect of whom such trust was set aside referred to in this Article as the "Beneficiary") and directed to be managed and disposed of as provided in this Article FIFTH, shall be held by the Trustees, IN TRUST, on the following terms and conditions:

A. During the lifetime of the Beneficiary, the Trustees may pay such amounts of the income and principal of the trust (including the whole thereof) to or for the benefit of the Beneficiary as the Trustees, in their absolute and unreviewable

discretion, determine, and shall accumulate the balance of income, if any, and add the same to principal.

B. Upon the death of the Beneficiary, the remaining property in the trust shall be divided into separate shares for the Beneficiary's then living issue, per stirpes, or, if none, into separate shares for the then living issue, per stirpes, of the nearest lineal ancestor of the Beneficiary which nearest lineal ancestor must be the Grantor or a descendant of the Grantor, and the share of each person shall be held in trust for such person under the provisions of this Article as if such person were the Beneficiary of such trust.

C. Unless earlier terminated by the distribution by the Trustee of all of the trust property under the foregoing provisions of this Article, each trust under this Article shall terminate as provided in Article SIXTH.

SIXTH: Rule Against Perpetuities

Unless otherwise provided herein, all trusts created under this instrument shall be perpetual to the fullest extent permitted by law. If any trust created hereunder is deemed to be subject to a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust shall terminate in all events upon the expiration of the longest period that property may be held in trust under this instrument under the law of such jurisdiction (including any applicable period in gross, such as 21 years, 90 years or 110 years); provided, however, that

if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this Article shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust may be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals in being upon the date of this instrument, those individuals shall consist of all of the descendants of the Grantor's parents [and the parents of the Grantor's spouse, [SPOUSE]], who were in being on the date of this instrument. Upon the termination of a trust pursuant to the provisions of this Article, the trust property shall be transferred, conveyed and paid over to the person with respect to whom such trust was established, or if more than one person to such one or more of the current beneficiaries and in such amounts as the Trustees, in the exercise of their sole and absolute discretion, shall determine.

SEVENTH: Appointment of Additional and Successor Trustees

Provided that the Grantor shall not be appointed as Trustee of any trust created by this instrument and subject to the provisions of Paragraph J of this Article:

A. The Grantor may appoint any one or more corporate fiduciary(ies) or any person(s) as additional and/or successor Trustee(s) of any trust created hereunder.

B. [After the Grantor's death or incapacity, if no successor Trustee or additional Trustee(s) has been designated pursuant to the prior provisions of this Article who qualifies to serve and who accepts his appointment when it becomes effective, the Grantor's [husband/wife], [SPOUSE], may appoint any one or more corporate fiduciary(ies) or any person(s) as additional and/or successor Trustee(s) of such trust.]

C. After the death or incapacity of the Grantor [and the Grantor's [husband/wife], [SPOUSE]], if no successor Trustee or additional Trustee(s) has been designated pursuant to the provisions of this Article who qualifies to serve and who accepts his appointment when it becomes effective, each Trustee of a trust created hereunder may appoint any one or more corporate fiduciary(ies) or any person(s) as his or her successor Trustee(s) and the majority of the Trustees may appoint any one or more corporate fiduciary(ies) or any person(s) as additional Trustee(s) of such trust; provided, however, that should the Grantor's [husband/wife], [SPOUSE], be serving as a Trustee of any trust created hereunder, then the Grantor's [husband/wife] shall be the only Trustee of such trust to have this power and the Grantor's [husband/wife]'s co-Trustee, if any, shall not have such power; and further provided however, that should any descendant of the Grantor be serving as Trustee of a trust created hereunder that was established with respect to such descendant and for the benefit of such descendant, then such descendant shall be the only Trustee of

such trust to have this power and his or her co-Trustee, if any, shall not have such power.

D. [If [TRUSTEE] shall fail to qualify or cease to act for any reason, and no successor Trustee or additional Trustee(s) has been designated pursuant to the prior provisions of this Article who qualifies to serve and who accepts his appointment when it becomes effective, [ALTERNATE TRUSTEE] shall serve as Trustee.]

E. [Unless the Grantor's [husband/wife], [SPOUSE], shall have specifically provided by acknowledged instrument that this paragraph shall not apply, each beneficiary who shall have attained or who attains the age of thirty (30) shall become sole Trustee of any separate trust set aside in his or her respect and administered under Article FIFTH and may appoint by acknowledged instrument any one or more corporate fiduciary(ies) or any person(s) as additional and/or successor Trustee(s) of such trust[; provided, however, that any then serving Trustee of such may alter the age at which such appointment shall come into effect by an acknowledged instrument delivered to such beneficiary].]

F. Subject to the prior provisions of this instrument, if each Trustee of a trust created by this instrument designated by or pursuant to the prior provisions of this instrument fails to qualify or ceases to act for any reason, the Grantor authorizes the majority of the current adult beneficiaries of such trust, or, if none, the guardian of the property of the then current

beneficiaries of such trust who are under a legal disability to designate additional and/or successor Trustee(s) of such trust.

G. Any designation made pursuant to the provisions of this Article shall be made by an instrument executed and acknowledged by the person making such designation and by each Trustee designated therein. Such designation shall be delivered to the Grantor, if then living; or, if not then living, [to the Grantor's [husband/wife], [SPOUSE], if then living; or, if not then living,] to the current adult beneficiaries of such trust; or, if none, to the guardian of the property of the current beneficiaries of such trust.

H. Any designation made pursuant to the provisions of this Article may be revoked before the designated Trustee begins serving by an instrument executed and acknowledged by the person who made such designation and delivered to such designated Trustee. Such revocation shall be delivered to the Grantor, if then living; or, if not then living, [to the Grantor's [husband/wife], [SPOUSE], if then living; or, if not then living,] to the current adult beneficiaries of such trust; or, if none, to the guardian of the property of the current beneficiaries of such trust.

I. Any such successor or additional Trustee shall be deemed vested with all the duties, rights, titles and powers, whether discretionary or otherwise, as if originally named as Trustee. No successor or additional Trustee shall be personally liable for any act or failure to act of any predecessor Trustee. The successor or

additional Trustee may accept the account rendered and the property delivered by the predecessor Trustee as a full and complete discharge to the predecessor Trustee, without incurring any liability for so doing.

J. Notwithstanding the foregoing provisions of this Article:

1. If any person has removed a Trustee pursuant to the Article of this Agreement titled "Resignation and Removal of Trustees", any additional or successor Trustee(s) appointed by such person shall not be related to subordinate to such person as such terms are defined in Section 672(a) of the Code.

2. The power of any person to appoint a successor or additional Trustee(s) under the foregoing provisions of this Article shall be limited to the extent, that absent such limitation, as a result of such power(s):

(a) Any such person would be deemed to have a general power of appointment in respect of the assets of any trust established hereunder under applicable Federal or state law;

(b) Any such person would be deemed to have made an incomplete gift;

(c) Any such person would be deemed able to affect the beneficial enjoyment of the assets of any trust established hereunder;

(d) Any such person would be deemed to have retained discretionary control over trust income of any trust established hereunder; or

(e) Any such person would be deemed to have an incident of ownership over any insurance policy on his or her life.

EIGHTH: Resignation and Removal of Trustees

A. Any Trustee may resign at any time by delivering or mailing a notice in writing of such resignation to his co-Trustees, or, if none, to his designated successor, if such designee has indicated his willingness to act. The expenses of his accounting shall be a proper charge against such trust.

B. Provided that the Grantor shall not be appointed as Trustee of any trust created by this instrument and subject to the provisions of paragraph (D) of this Article:

1. The Grantor may remove one or more Trustees or designated successor Trustees from office at any time and for any reason and may appoint one or more persons and/or a bank or trust company (none of whom are the Grantor or any person and/or entity related or subordinate to the Grantor as such terms are defined in Section 672(c) of the Code) in the place and stead of any removed Trustee or designated successor Trustee.

2. [[After the Grantor's death or any time during which the Grantor is unable to remove a Trustee pursuant to paragraph D of this Article or due to the Grantor's disability,] The Grantor's [husband/wife], [SPOUSE], may remove one or more Trustees or designated successor Trustees from office at any time and for any reason and may appoint one or more persons and/or a bank or trust company (none of whom are the Grantor's said [husband/wife] or any

person and/or entity related or subordinate to the Grantor's said [husband/wife] as such terms are defined in Section 672(c) of the Code) in the place and stead of any removed Trustee or designated successor Trustee.]

3. After the death of the Grantor [and the Grantor's [husband/wife]], any descendant of the Grantor who has attained the age of thirty (30) years, may remove one or more Trustees or designated successor Trustees of the trust established in respect of such descendant and for the benefit of such descendant at any time and for any reason and may appoint one or more persons and/or a bank or trust company (none of whom are the Grantor's said descendant or any person and/or entity related or subordinate to the Grantor's said descendant as such terms are defined in Section 672(c) of the Code) in the place and stead of any removed Trustee or designated successor Trustee[; provided, however, that the initial Trustee of such trust [or any successor Trustee appointed pursuant to the provisions of this instrument] may alter the age at which such descendant shall have this authority by an acknowledged instrument delivered to such beneficiary].

C. Any removal and/or appointment pursuant to the provision of this paragraph shall be made by an instrument executed and acknowledged by the person removing the Trustee and by each successor Trustee, if any, so appointed and delivered to the

current Trustee of such trust. The expenses of each removed Trustee's accounting shall be a proper charge against such trust.

D. Notwithstanding the foregoing provisions of this Article:

1. No person shall have the authority to remove and replace a Trustee pursuant to the foregoing provisions of this Article at any time such trust holds life insurance on such person's life.

2. The power of any person to remove and replace a Trustee under the foregoing provisions of this Article shall be limited to the extent, that absent such limitation, as a result of such power(s):

3. Any such person would be deemed to have a general power of appointment in respect of the assets of any trust established hereunder under applicable Federal or state law;

4. Any such person would be deemed to have made an incomplete gift;

5. Any such person would be deemed able to affect the beneficial enjoyment of the assets of any trust established hereunder; or

6. Any such person would be deemed to have retained discretionary control over trust income of any trust established hereunder.

NINTH: Payments to Minors

If at any time, all or a portion of the income or principal of any trust created hereunder shall vest, in absolute ownership in a

person under the age twenty-one (21) years, the Trustees may in their discretion hold the property so vested in such minor, or any part thereof, in a separate fund for the benefit of such minor notwithstanding that such property may consist of investments not authorized by law for trust funds, and to invest and reinvest the same, to collect the income therefrom, and, during the minority of such minor to apply so much of the corpus and so much of the net income thereof to the support, education, and maintenance of such minor, as the Trustees shall see fit, and to accumulate, invest and reinvest the balance of such income until such minor shall attain the age of twenty-one (21) years, and thereupon to pay over the corpus, together with any accumulated and undistributed income, to such minor, and, if such minor shall die before attaining the age of twenty-one (21) years, the corpus together with any accumulated and undistributed income shall be paid over to the estate of such minor. The Trustees shall also be authorized to pay any such income or corpus to a parent of such minor, the guardian of such minor, to a custodian under a Uniform Transfers to Minors Act account for such minor, or the person having the care and custody of such minor without bond and the Trustees shall not be bound to see to the application or use of any payments of income or corpus so made.

TENTH: Miscellaneous Fiduciary Provisions

A. Anything herein to the contrary notwithstanding:

1. No Trustee shall participate in any decision regarding the discretionary distribution of principal or income to himself or for his own benefit. All such decisions shall be made by the other Trustee or Trustees of such trust.

2. No Trustee shall participate in any decision regarding the discretionary distribution of principal or income to any beneficiary of such trust if such participation would be considered a taxable gift by such Trustee. All such decisions shall be made by the other Trustee or Trustees of such trust. Whenever all Trustees of such trust are prohibited from making such distribution, the distribution powers granted to such Trustees hereunder shall be limited to distributions for the health, education, maintenance or support of the beneficiaries of such trust.

3. Whenever there is a Trustee of a trust who is legally obligated to support a beneficiary of such trust, any distribution of principal or income that would satisfy a legal obligation to support such beneficiary shall be made in the discretion of such other Trustees who are not legally obligated to support any beneficiary of such trust.

4. Whenever all Trustees of a trust are legally obligated to support a beneficiary of such trust, no distributions from such trust shall be made to satisfy any legal support obligation to such beneficiary.

B. Except where expressly provided to the contrary, in making any discretionary payment or application of income or principal to any person pursuant to the provisions of this instrument, the Trustee may consider or disregard (1) the interest of any potential remainderman, (2) any other resources available to such person, and (3) the legal obligation of anyone to support such person.

C. In making distributions from the Trust Estate or from any trust, it is not required or necessary that every beneficiary receive equal distributions or any distributions from such trust.

D. In making any distributions from the Trust Estate or from any trust, to make non-prorata payments or distributions composed of cash and of property of different proportions and kinds. In making distributions of principal to any beneficiary from the Trust Estate or from any trust, the Trustees are authorized to include in such distributions such amounts of capital gains, long-term or short-term or both, realized in the year of distribution (including the whole thereof) as the Trustees in their absolute and unreviewable discretion may determine.

E. In making distributions of income or principal to any beneficiary, instead of paying him or her directly, the Trustees may make such distribution for the benefit of such beneficiary or apply the same for the use of such beneficiary.

F. The account (intermediate or final) of the Trustees may be settled by agreement with the adult beneficiaries interested in

the account and a parent or guardian of those beneficiaries who are minors, and such settlement shall be binding upon all persons interested therein, whether then in being or thereafter born. In any judicial proceeding with respect to any trust where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the person under a disability.

G. It is the Grantor's will that no Trustee shall be liable or responsible in any way or manner unless he shall have acted with willful misconduct. In no event shall any Trustee be liable on account of any default of any other fiduciary unless liability may be imposed upon him for his own willful misconduct.

H. No one dealing with any Trustee shall be required to investigate his authority for entering into any transaction or to see the application of the proceeds of any transaction.

I. All decisions regarding any trust shall be made by a majority of the Trustees not disqualified to act thereon. However, the Trustees may from time to time authorize one of their number, or each of them acting singly, to execute instruments of any kind on their behalf (including, but not by way of limitation, any check, order, demand, assignment, transfer, contract, authorization, proxy, consent, notice or waiver). Insofar as third parties dealing with the Trustees are concerned instruments executed and acts performed by one fiduciary pursuant to such authorization shall be fully binding as if executed or performed by

all of them. An authorization shall be valid until those acting in reliance on it receive actual notice of its revocation.

J. No Trustee or donee of a power under this instrument shall be required to furnish any bond or other security for the faithful discharge of his or her duties as such in any jurisdiction whatsoever.

K. The Trustees shall have full and complete discretion in the exercise of the powers given them, and their determination as to matters left to their judgment or decision shall, to the extent permitted by law, be final and conclusive on all persons, and the Trustees may exercise their powers from time to time and in respect of all or any part of such property. However, the powers granted herein are fiduciary and shall not be deemed to confer upon the Trustees or any other person the power to purchase, exchange or otherwise deal with or dispose of the Trust Estate or the income therefrom for less than adequate consideration in money or money's worth.

ELEVENTH: Powers of the Trustees

Subject to the restriction contained in prior provisions hereof and in Treas. Reg. §25.2702-5(c), in addition to all powers conferred upon them by law, the Trustees shall have the following powers, authority and discretion, to be exercised by them without regard to present or future statutory limitations thereon and with respect to all property, real or personal, which may at any time under any of the provisions of this instrument be subject to

administration by them:

1. To retain either temporarily or during the entire trust term any such property as an investment without regard to the proportion which such property or property of a similar character, so held, may bear to the entire amount of the Trust Estate, and even if non-income producing.

2. To sell, exchange, grant options for the sale of, or otherwise dispose of such property at public or private sale, for cash or on credit, and upon such terms and arrangements as they may see fit.

3. To invest and reinvest in property of any character, real or personal, foreign or domestic, including, without limitation, bonds, notes, debentures, mortgages, common and preferred stocks, shares or interests in investment trusts without regard to the proportion which such property or property of a similar character, so held, may bear to the entire amount of the Trust Estate.

4. To vote, consent, grant proxies, discretionary or otherwise, enter into voting trusts or other agreements, and to take any other action in respect of any corporation in which the Trust Estate or any trust hereunder is interested.

5. To manage, contract with respect to, lease, improve, develop and operate such property, either temporarily or during the entire period of administration of any trust and contracts or leases may be made by them for any term that they may deem advisable. The Trustees are specifically authorized to lease such property to the Grantor for a term exceeding the term of the trust on condition that the rental under such lease shall be a fair market rental.

6. To consent to and participate in, or to oppose, any foreclosure, liquidation or plan of reorganization, consolidation, merger, combination, or other similar plan and to consent to any contract, lease, mortgage, purchase, sale, or other action by any corporation pursuant to such plan.

7. To deposit any such property with any protective, reorganization or similar committee, to delegate discretionary power thereto, to pay all or part of its expenses and compensation and any assessments levied with respect to such property and, in their discretion, to charge such expenses, compensation or assessments to corpus or income.

8. To exercise all conversion, subscription, voting, and other rights of whatever nature pertaining to any such property

and to grant proxies discretionary or otherwise, with respect thereto.

9. To manage any real property in the same manner as if the absolute owner thereof, including, without limitation, the power from time to time to lease any such real property for any period of time and with any provisions for renewals thereof even though any such period of time or any such renewal period may extend beyond the term of such trust, without application to any court; to enter into any covenants or agreements relating to the property so leased or to any improvements then or thereafter erected thereon; to make ordinary and extra-ordinary repairs and alterations to any buildings; to raze buildings and to erect new buildings and make other improvements; to insure against loss by fire or other casualty; and to make, partition or enter into any agreements of partition of any real property which, or an interest in which, shall at any time constitute part of the Trust Estate, even though they may hold an interest in the same property.

10. To allocate, in their discretion, in whole or in part, to principal and income, all receipts and disbursements.

11. To borrow money in such amounts and upon such terms and for such purposes as they in their discretion may determine and in connection therewith to execute promissory notes, mortgages or other obligations and to pledge or mortgage any such property as security. To prepay any debt or accept prepayment of any debt.

12. To retain, employ and compensate from the Trust Estate or any trust, in advance of the settlement of the account of any fiduciary hereunder, and without court order, such agents and services (including investment counsel, attorneys-at-law, accountants, custodians, stockbrokers and other agents or services and including any fiduciary who may act in such capacity and any firm of which any fiduciary hereunder may be a member) as they may deem advisable. The Trustees shall be fully protected from all liability in acting upon the advice of such agents or services but shall not be obligated so to do. Notwithstanding the foregoing, any corporate fiduciary shall be entitled to compensation in accordance with its recorded fee schedule.

13. To extend the time of payment of any obligation owing by any trust created hereunder, and to compromise, settle or submit to arbitration upon such terms as to them may seem proper any claim in favor of or against such trust.

14. Subject to any statutory prohibition, to cause any such property to be registered in the name of their nominee or in Street name without disclosure of the Trust Estate or any trust or

to hold the same unregistered and in bearer form, and the liability of the Trustee shall be neither increased nor decreased thereby.

15. To exercise any stock options held by such trust.

16. To lend any assets to any person or entity (including loans to a beneficiary or another trust), with or without security, upon such terms as they shall determine, provided, however, that no individual who is then the sole fiduciary in office may lend any property to himself.

17. To do all such acts, take all such proceedings and exercise all such rights and privileges, although not hereinbefore specifically mentioned, with respect to any property, as if the absolute owner thereof and in connection therewith to make, execute and deliver any instruments and to enter into any covenants or agreements binding such trust.

18. To exercise any of the foregoing powers with respect to any property and to enter into any transaction even though the Trustees are themselves in their individual or in any other capacity directly or indirectly interested in such property or transaction.

19. To do any acts, to exercise any rights, to take any proceedings and to enter into and execute any contracts and other instruments (although not hereinbefore specified) necessary or proper in their opinion in the administration of the Trust Estate and of any trust.

B. In addition to the investment powers conferred above, the Trustees are authorized (but not directed) to acquire and retain investments not regarded as traditional for trusts, including investments that would be forbidden or would be regarded as imprudent, improper or unlawful by the "prudent person" rule, "prudent investor" rule, or any other rule or law which restricts a fiduciary's capacity to make investments. The Trustees, in the exercise of sole and absolute discretion, may invest in or retain any type of property, wherever located, including any type of security or option, improved or unimproved real property, and

tangible or intangible personal property, and in any manner, including direct purchase, joint ventures, partnerships, limited partnerships, limited liability companies, corporations, mutual funds, business trusts or any other form of participation or ownership whatsoever. In making investments, the Trustees may disregard any or all of the following factors:

1. Whether a particular investment, or the trust investments collectively, will produce a reasonable rate of return or result in the preservation of principal.

2. Whether the acquisition or retention of a particular investment or the trust investments collectively are consistent with any duty of impartiality as to the different beneficiaries. The Grantor intends that no such duty shall exist, and hereby waives any such duty which otherwise would exist.

3. Whether the trust is diversified. The Grantor intends that no duty to diversify shall exist, and hereby waives any such duty which otherwise would exist.

4. Whether any or all of the trust investments would traditionally be classified as too risky or speculative for trusts. The entire trust may be so invested. The Grantor intends the Trustees to have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy.

C. The Grantor's purpose in granting the foregoing authority pursuant to paragraph B of this Article is to modify the "prudent person" rule, "prudent investor" rule, or any other rule or law which restricts a fiduciary's ability to invest insofar as any such rule or law would prohibit an investment or investments because of one or more factors listed above, or any other factor relating to the nature of the investment itself. The Grantor does this because the Grantor believes it is in the best interests of the beneficiaries hereunder to give the Trustees broad discretion in

managing the assets of the trusts created hereunder. Accordingly, the Trustees shall not be liable for any loss in value of an investment merely because of the nature of the investment or the degree of risk presented by the investment.

TWELFTH: Close Corporation Provisions

A. The Trustees may receive stock in what is commonly known as a close corporation, or may own one or more interests in business enterprises (operated in the form of a limited liability company, a partnership, a sole proprietorship, as tenants in common with others, or otherwise), hereinafter referred to as the business. Since the Grantor desires to confer upon the Trustees the power and authority to continue to hold and operate each such business as part of such trust, the Grantor hereby vest the Trustees with the following powers and authority, as supplemental to the ones enumerated above, the applicability of which to the business the Grantor confirms, without limitation by reason of specification, and in addition to powers conferred by law, all of which may be exercised with respect to every such business, whether a corporation, limited liability company, a partnership, a sole proprietorship, a tenant in common, or otherwise:

1. To retain and continue to operate the business for such period as the Trustees may deem advisable.

2. To control, direct and manage the business. In this connection the Trustees in their sole discretion, shall determine the manner and extent of their active participation in the operation, and the Trustees may delegate all or any part of their power to supervise and operate, to such person or persons as they may select, including any associate, partner, officer, or employee of the business.

3. To hire and discharge officers and employees, fix their compensation and define their duties; and similarly to employ, compensate and discharge agents, attorneys, consultants, accountants and such other representatives as the Trustees may deem appropriate, including the right to employ any beneficiary and fiduciary (including the Trustees) in any of the foregoing capacities.

4. To invest other trust funds in such business; to pledge other assets of the trust as security for loans made to such business; and to loan funds from the trust to such business.

5. To organize a corporation under the laws of this or any other state or country and to transfer thereto all or any part of the business or other property held in the estate or trust, and to receive in exchange therefor such stocks, bonds and other securities as the Trustees may deem advisable.

6. To take any action required to convert any corporation into another form or entity such as a limited liability company, partnership or sole proprietorship.

7. To treat the business as an entity separate from the trust. In their accountings to any beneficiaries, the Trustees shall only be required to report the earnings and condition of the business in accordance with standard corporate accounting practice.

8. To retain in the business such amount of the net earnings for working capital and other purposes of the business as the Trustees may deem advisable in conformity with sound business practice.

9. To purchase, process and sell merchandise of every kind and description; and to purchase and sell machinery and equipment, furniture and fixtures and supplies of all kinds.

10. To sell or liquidate all or any part of any business at such time and price and upon such terms and conditions (including credit) as the Trustees may determine. The Trustees are specifically authorized and empowered to make such sale to any partner, officer or employee of the business (or to any individual Trustee) or to any beneficiary hereunder.

11. To exercise any of the rights and powers herein conferred in conjunction with another or others.

12. To diminish, enlarge or change the scope or nature of any business.

B. The Grantor is aware that certain risks are inherent in the operation of any business. Therefore, the Grantor directs that the Trustees shall not be held liable for any loss resulting from the retention and operation of any business unless such loss shall result directly from the Trustees' gross negligence or willful misconduct. In determining any question of liability for losses, it should be considered that the Trustees are engaged in a speculative enterprise at the Grantor's express request.

C. If any business operated by the Trustees pursuant to the authorization contained in this instrument shall be unincorporated, then the Grantor directs that all liabilities arising therefrom shall be satisfied first from the business itself and second out of the trust. It is the Grantor's intention that in no event shall any such liability be enforced against the Trustees personally. If the Trustees shall be held personally liable, they shall be entitled to indemnity first from the business and second from the trust.

THIRTEENTH: Grantor Trust Provisions

With respect to the trusts administered pursuant to Articles SECOND B and FIFTH of this Agreement:

A. Provided that the following right to reacquire shall not apply to any life insurance or annuity on the Grantor's life or any voting stock in a controlled corporation (as defined in Section 2036(b) of the Code):

1. The Grantor reserves the right at any time during the Grantor's lifetime to reacquire property transferred to the trust by substituting therefor property of an equivalent value. Such right shall be exercisable by the Grantor in a non-fiduciary capacity and without the approval or consent of any person then serving in a fiduciary capacity hereunder; provided, however, that the Trustees shall ensure the Grantor's compliance with such power by satisfying themselves that the properties reacquired and substituted are in fact of equivalent value; and provided, further, that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries.

2. Anything herein this instrument the contrary notwithstanding, to ensure that the Grantor's right to reacquire cannot be exercised in a manner that can shift benefits among the trust beneficiaries, for all trusts created hereunder, other than such trusts that are administered as a unitrust and other than such trusts where distributions are limited to discretionary distributions of principal and income, the Trustees shall have both the power to reinvest the trust corpus and a duty of impartiality with respect to the trust beneficiaries.

B. During the Grantor's life, the Trustees may apply trust income to the payment of premiums of life insurance held in such trust on the life of the Grantor.

C. At any time, the Grantor may release the powers granted to the Grantor in paragraph (A) of this Article, in whole or in

part, whenever the Grantor may deem it advisable, by an instrument delivered to the Trustees.

D. At any time, the Trustees may release the powers granted to the Grantor in paragraph (A) of this Article and granted to the Trustee in paragraph (B) of this Article, in whole or in part, whenever the Trustees may deem it advisable, by an instrument delivered to the Grantor.

E. Provided that the following discretion would not subject the assets of such trust to the claims of the Grantor's creditors, if the Grantor is treated as the owner of any portion of the trust in any taxable year, the Independent Trustees may, in his absolute discretion, distribute to the Grantor for the taxable year income or principal sufficient to satisfy the Grantor's personal income tax liability attributable to the inclusion of all or part of the trust's income in the Grantor's taxable income.

FOURTEENTH: Survivorship Provisions

In the event that any beneficiary hereunder and any other person upon whose death such beneficiary shall become entitled to receive property hereunder shall die simultaneously or under such circumstances that the order of their deaths cannot be determined with certainty, for all purposes under this instrument, such beneficiary shall be deemed to have predeceased such other person.

FIFTEENTH: Merger, Division and Decanting of Trusts

With respect to the trusts administered under Article SECOND B and Article FIFTH:

A. The Trustees, in order to separate property as to which a deduction, exemption or exclusion from any tax may be allowed from property as to which it may not be allowed, to produce separate trusts one of which totally qualifies for a deduction, exemption or exclusion and one of which does not, or to produce separate trusts so that certain investments may be segregated, to divide any trust created by Article FIFTH of this Agreement into two or more separate trusts having substantially identical terms or the same succession of interests, as defined in Section 2642 (a)(3)(B)(i)(II) of the Code, (even though a result thereof may be to increase the commissions payable to the Trustees). The Trustees need not invest the assets of such trusts in the same manner or make discretionary distributions from such trusts equally or pro rata. No equitable adjustment shall be required by reason of such division.

B. The Trustees may merge any separate but substantially identical trusts, whether or not created under by this instrument, into a single trust, whether for ease of administration or otherwise. The decision of the Trustees shall be binding upon all persons interested in any such trust. No equitable adjustment shall be required by reason of such merger. In case of the merger or consolidation of any corporate fiduciary, or the transfer of substantially all of the assets of such corporate fiduciary to another corporation, the resulting or transferee company shall continue to serve hereunder without notice to any party.

C. The Independent Trustee with discretionary power over principal of a trust may exercise his discretion by appointing such principal in favor of one or more persons to or for whom principal may be distributed, in any proportions, in any lawful estates, and in any interests, whether absolute or in further trust as the Independent Trustee determines; provided, however, that this shall not authorize the Independent Trustee to restrict or curtail any beneficiary's interest in any mandatory payments (such as all or a fraction of the trust income) by an exercise that would not be authorized without this Article. The Independent Trustee may not exercise such power to create another power which may postpone the vesting of any estate or interest in the appointed property or suspend the absolute ownership or power of alienation of the appointed property for a period ascertainable without regard to the perpetuities period otherwise set forth in this instrument. The power may not be exercised so as to: (A) prevent, reduce or invalidate any charitable deduction for which any trust created hereunder has qualified; (B) prevent or invalidate any qualified subchapter S trust or electing small business trust election which any trust created hereunder may have made; and (C) prevent, invalidate or reduce any marital deduction election which any trust created hereunder may have made.

SIXTEENTH: Spendthrift Provisions

A. The interest of a beneficiary in the income or principal of any trust hereunder shall be free from the control or

interference of any creditor of a beneficiary or of any spouse of a beneficiary and shall not be subject to attachment or execution or susceptible of anticipation or alienation.

B. To the extent permitted by law, no interest of any beneficiary in the income or principal of any trust hereby created shall be subject to pledge, assignment, sale, or transfer in any manner, nor shall any beneficiary have power in any manner to anticipate, charge or encumber his or her said interest, nor shall said interest of any beneficiary be liable or subject in any manner while in the possession of the Trustees for the debts, contracts, liabilities, engagements or torts of such beneficiary.

C. To the extent that the Trustees are given discretion hereunder to make distributions to any beneficiary, it is the intention that such distributions not be made:

1. To pay for expenses which would otherwise be paid by any governmental or quasi-governmental authority or by insurance;

2. To the extent that such distribution would disqualify such beneficiary from receiving any governmental or quasi-governmental or insurance benefit or would substantially diminish the amount of such benefit.

SEVENTEENTH: Definitions and Other Provisions

A. All references in this instrument to "Trustee" or "Trustees" shall include the Trustee or Trustees from time to time acting hereunder.

B. All references in this instrument to "Code" are to the United States Internal Revenue Code of 1986, as the same may hereafter be amended from time to time, or any future Internal Revenue Code, and each reference to a chapter or section of the Code shall be deemed to include future amendments to such chapter or section as well as corresponding provisions of any subsequent Federal tax laws.

C. All references in this instrument to "Fixed Term" are to the number of years from the date of this Agreement to its expiration.

D. All references in this instrument to "issue" shall mean descendants (in any degree) of the ancestor designated, and descendants shall include a person who has been legally adopted and the issue (whether by blood or by legal adoption) of such person, but shall not include a person who was legally adopted during such time as such person was age eighteen (18) or over and the issue (whether by blood or by legal adoption) of such person. A child in gestation, who is later born alive, shall be regarded in this instrument as a child in being during the period of gestation in determining whether any person has died without leaving issue surviving him or her, and in determining, on the termination of any trust hereunder, whether such child is entitled to share in distributions of principal.

E. Property directed to be divided, allocated, given or paid (collectively "allocated") per stirpes to the issue of any person

shall be divided into the number of equal shares that total: (a) the number of children of such person then living, plus (b) the number of children of such person not then living who shall have issue then living. One share of such property shall be allocated to each then living child of such person; and one share shall be allocated collectively to the then living issue of each child not then living, to be allocated, per stirpes, among such deceased child's issue in the same manner. For example, assume that a person died leaving property to his "surviving issue, per stirpes."

1. If such person is survived by children A and B and by grandchildren G-1 and G-2 from predeceased child C, A and B will each be allocated one-third of the property, and G-1 and G-2 will each be allocated one-sixth.

2. If B also is predeceased, leaving grandchildren G-3, G-4 and G-5, each of them will be allocated one-ninth, A will be allocated one-third, and G-1 and G-2 will each be allocated one-sixth.

3. If A also is predeceased, leaving grandchildren G-6, then G-6 (A's child) will be allocated one-third, G-3, G-4 and G-5 (B's children) will each be allocated one-ninth, and G-1 and G-2 (C's children) will each be allocated one-sixth.

4. If G-4 also is predeceased, leaving great-grandchildren GG-1 and GG-2, each would be allocated one-eighteenth, and the balance of the property would be allocated as in (iii).

F. [In the event the Grantor and the Grantor's [husband/wife] divorce, effective upon the date of such divorce, the Grantor's [husband/wife] (i) shall be deemed to have resigned as Trustee of any trust created hereunder without appointing any successor Trustee, (ii) shall have no authority, including the right to remove and replace any Trustee, with respect to any trust

created hereunder, (iii) shall be deemed deceased and cease to have a beneficiary of any trust created hereunder.]

G. The neuter gender herein shall be deemed to include the masculine and/or feminine and vice versa, the masculine gender shall be deemed to include the feminine and vice versa, and the singular shall be deemed to include the plural and vice versa wherever necessary or appropriate or required by the context.

H. If any part or portion of this instrument or any trust created hereunder is held invalid or unenforceable, all other provisions hereof shall nevertheless continue valid, enforceable, and shall be given full force and effect as if the invalid or unenforceable provision or provisions were not contained herein.

I. The captions of the various Articles used herein are solely for convenience and shall not in any way affect the construction or interpretation of the Articles or this instrument.

EIGHTEENTH: Irrevocable Trust

This instrument is expressly declared to be irrevocable, and the Grantor reserves no right to alter or amend it in whole or in part.

NINETEENTH: Governing Law

This Agreement shall be construed and regulated by the laws of the State of [New York]. However the situs of any trust created hereunder may be maintained in any jurisdiction (including outside the United States), as the Trustees, in the exercise of sole and absolute discretion, may determine, and thereafter transferred at

any time or times to any jurisdiction selected by the Trustees. Upon any such transfer of situs, the trust estate may thereafter, at the election of the Trustees 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. If the Trustees of any trust created hereunder elect to change the situs of any such trust, the Trustees of said trust are hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

TWENTIETH: Execution in Counterparts

This instrument may be executed in one or more counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

[CLIENT] Grantor	[TRUSTEE] Trustee

STATE OF NEW YORK)
ss.:
COUNTY OF)

On the ____ day of _____, 2013, before me, the undersigned, personally came [CLIENT], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that [he/she] executed the same in [his/her] capacity and that by [his/her] signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
NOTARY PUBLIC

STATE OF NEW YORK)
ss.:
COUNTY OF)

On the ____ day of _____, 2013, before me, the undersigned, personally came [TRUSTEE], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that [he/she] executed the same in [his/her] capacity and that by [his/her] signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
NOTARY PUBLIC

SCHEDULE "A"

[address]

[Section ____, Block ____, Lot ____]

5. Grantor Retained Annuity Trusts (GRATs)

THE [CLIENT] 20__ GRAT

TRUST AGREEMENT made as of this ____ day of _____, 20__ by and between [CLIENT], as Grantor (hereinafter the "Grantor"), and [TRUSTEE 1] and [TRUSTEE 2], as Trustee(s) (hereinafter the "Trustee" or "Trustees").

W I T N E S S E T H:

WHEREAS, the Grantor wishes to create a trust for the purposes hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the Grantor does hereby irrevocably give, convey and deliver to the Trustees the property described on Schedule A, IN TRUST, to hold such property (hereinafter the "Trust Principal") for the following uses and purposes and subject to the following terms and conditions:

FIRST: Name.

The trust created by this instrument shall be known as "THE [CLIENT] 20__ GRAT."

SECOND: Administration During the Trust Term.

(A) During each year of the Trust Term, as defined below, the Trustees shall pay the Annuity Amount defined below to the Grantor during the Grantor's life and after the Grantor's death to the Grantor's estate (hereinafter referred to as the "Recipients").

(B) The Trust Term shall begin on the date on which the property listed on Schedule A has been transferred, for federal gift tax purposes, by the Grantor to the Trustees (the "Trust Creation Date") and shall expire upon the later of the second (2^{nd}) anniversary of that date

or the earliest later anniversary as shall be necessary in order that the Annuity Amount will constitute a "qualified annuity interest" within the meaning of Reg. § 25.2702-3(b)(1).

(C) (1) The Annuity Amount shall be that amount which, if not exactly a whole dollar amount, shall be rounded up to the nearest whole dollar, expressed as a percentage of the fair market value as finally determined for federal gift tax purposes of the property initially contributed to the GRAT, paid as provided herein, [such that by increasing the Annuity Amount in each succeeding year of the Trust Term by twenty percent (20%),][1] the value of the remainder interest, as finally determined for federal gift tax purposes, shall equal the greater of (x) zero and one thousandths percent (0.001%) of the fair market value of the property initially contributed to the GRAT, as finally determined for Federal gift tax purposes, at the time of such initial contribution (or, if it is not mathematically possible for the remainder to equal exactly zero and one thousandths percent (0.001%), then that percentage that can be mathematically determined which is closest to but less than zero and one thousandths percent (0.001%)) and (y) the smallest amount such that the Annuity Amount will constitute a "qualified annuity interest" within the meaning of Reg. § 25.2702-3(b)(1). The Annuity Amount to be distributed in each succeeding year of the Trust Term shall be [one hundred and twenty percent (120%) of the Annuity Amount for the immediately preceding year].[2] The Annuity Amount shall be paid to the Recipients on each anniversary of the Trust Creation Date up to and including the date on which the Trust Term expires (as such expiration is set forth in paragraph (B) of this Article). A list of the estimated Annuity Amounts and the payment dates for such Annuity Amounts is attached hereto as Schedule B solely for illustrative purposes.

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[1] If using non-variable annuity, delete bracketed language.

[2] If using non-variable annuity, delete bracketed language and replace with: "as set forth on Schedule B of this instrument."

(2) Notwithstanding the foregoing, if the Grantor's spouse survives the Grantor, any Annuity Amount paid after the Grantor's death shall be the greater of the Annuity Amount as set forth above and the income of the GRAT. It is the Grantor's intention that if the Grantor dies during the Trust Term and the Grantor's spouse survives the Grantor, any portion of the GRAT included in the Grantor's gross estate shall qualify for the federal estate tax marital deduction in the Grantor's estate, and the Grantor directs that this provision be construed to carry out that intention. In accordance with the foregoing, and notwithstanding any other provision contained in this Agreement, the Grantor directs that any payment to the Grantor's estate shall be made in such manner and at such time to carry out that intent.

(D) (1) The Annuity Amount shall be paid from trust income and, to the extent income is insufficient, from Trust Principal. In accordance with Reg. § 25.2702-3(b)(4), each payment of the Annuity Amount (and, if applicable because of the death of the Grantor during the Trust Term, the income of the GRAT) must be made no later than one hundred five (105) days after the payment date to which it relates. Any income of the trust for a taxable year in excess of the Annuity Amount shall be added to Trust Principal.

(2) The Trustees may not issue a note, other debt instrument, option or other similar financial arrangement in satisfaction of the Annuity Amount.

(3) In determining the Annuity Amount for any short taxable year and for the taxable year in which the trust term ends, the Trustees shall prorate the Annuity Amount on a daily basis.

(E) If the initial net fair market value of the Trust Principal is incorrectly determined by the Trustees, then within a reasonable period after the value is finally determined for federal tax purposes, the Trustees shall pay to or for the benefit of the Grantor (or the

executors or administrators of the Grantor's estate, as the case may be), in the event of an undervaluation, or shall receive from the Grantor (or the executors or administrators of the Grantor's estate, as the case may be), in the event of an overvaluation, an amount equal to the difference between the Annuity Amounts properly payable and the Annuity Amounts actually paid, plus, if required by the Code, interest, compounded annually, computed for any period at the rate of interest that the federal income tax Treasury Regulations prescribe for the trust for such computation for such period.

(F) The taxable year of the trust shall be the calendar year.

(G) No additional contributions may be made to the trust after the initial contribution of the property described in Schedule A. If the Grantor, notwithstanding this provision, makes any transfer to the trust other than the transfer of the property described in Schedule A, the Trustees shall promptly return to the Grantor the property that was the subject of such subsequent transfer or an amount equal to the fair market value of the property that was the subject of such subsequent transfer.

(H) No distribution shall be made from the trust to or for the benefit of any person other than the Grantor or the executors or administrators of the Grantor's estate, as the case may be, at any time before the trust terminates.

(I) The Grantor's interest shall not be subject to commutation.

(J) If any portion of the Annuity Amount payable to the Grantor or the Grantor's estate, as the case may be, on a particular date is not distributed in its entirety by the Trustees to the Grantor or the Grantor's estate, as the case may be, by the end of the last day (the "Annuity Amount due date") on which it must be paid in order for the Annuity Amount to be treated as a qualified annuity for purposes of Section 2702 of the Internal Revenue Code,

including any applicable grace period (such unpaid portion of the Annuity Amount being hereinafter sometimes referred to as the "undistributed Annuity Amount"), then, at the end of the Annuity Amount due date, the Annuity Property (as hereinafter defined) held by the Trustees shall vest absolutely in the Grantor or the Grantor's estate, as the case may be. The trust shall immediately terminate as to the Annuity Property, and the Trustees, in the Trustees' capacity as Trustees, shall have no further duties, power, authority or discretion to administer the Annuity Property notwithstanding any provision of applicable law or this Agreement to the contrary. If the Annuity Property shall remain in the hands of the Trustees after the Annuity Amount due date, the Trustees shall hold such property exclusively as nominee and agent for the Grantor or the Grantor's estate, as the case may be. The Grantor hereby authorizes the Trustees, but only as nominee and agent for the Grantor or the Grantor's estate, as the case may be, to invest the Annuity Property on the Grantor's behalf or on behalf of the Grantor's estate, as the case may be, with the same authority as the Grantor or the Grantor's estate, as the case may be, could individually. The Trustees, both as Trustees and as such nominee and agent, are hereby relieved of any liability for commingling assets that have vested absolutely in the Grantor or the Grantor's estate, as the case may be, with assets that remain part of the trust estate under this Article. Any Annuity Property that shall have vested in the Grantor as hereinbefore provided shall, upon the Grantor's subsequent death, vest in the Grantor's estate. For purposes of this Article, the term "Annuity Property" shall mean that portion of the trust estate (i) having a fair market value as finally determined for federal gift tax purposes equal to the lesser of (x) all property held by the Trustees, in the Trustees' capacity as Trustees, at the end of the Annuity Amount due date or (y) the undistributed Annuity Amount, and (ii) if the fair market value as finally determined for federal gift tax purposes of the property then held by the Trustees is

greater than the undistributed Annuity Amount at the end of the Annuity Amount due date, consisting of those assets having the lowest income tax basis as finally determined for Federal income tax purposes compared to their current fair market values as finally determined for federal income tax purposes, and (iii) if more than one asset has the lowest basis for federal income tax purpose, consisting of a proportionate share of each such asset, and (iv) shall include all income, appreciation and depreciation on such assets and all other incidents of ownership attributed thereto.

(K) The trust shall terminate upon the expiration of the Trust Term. The Trustees shall thereupon administer the then remaining Trust Principal after payment of the final Annuity Amount (the "Trust Remainder") as follows:

(1) If the Grantor is then living, the Trustees shall [divide the Trust Remainder into such number of equal shares as is necessary to satisfy the following and each such share shall be disposed of as follows:][3]

(a) One such share shall be distributed to the then serving Trustees of THE [CHILD] 20__ TRUST, created by a Trust Agreement dated as of the date hereof, between [CLIENT], as Grantor, and [TRUSTEE], as Trustee. If such trust is not then in existence, the Trustees shall distribute such property to the Grantor's [child], [CHILD], if [he/she] is then living, or if [he/she] is not then living but leaves one or more descendants who are then living, to the executors or administrators of [his/her] estate.

(b) One such share to the then serving Trustees of THE [CHILD] 20__ TRUST created by Trust Agreement dated as of the date hereof, between

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[3] If leaving property to children outright, insert the following language and delete the bracketed language and delete subparagraphs (a) and (b): "distribute the Trust Remainder to the Grantor's children who are then living and to the executors or administrators of the estates of the Grantor's children who are not then living but who leave one or more descendants who are then living."

[CLIENT], as Grantor, and [TRUSTEE], as Trustee. If such trust is not then in existence, the Trustees shall distribute such property to the Grantor's [child], [CHILD], if [he/she] is then living, or if [he/she] is not then living but has descendants who are then living, to the executors or administrators of [his/her] estate.

(2) If the Grantor is not living upon the expiration of the Trust Term, the Trustees shall set apart a fractional share of the Trust Remainder, wherein the numerator of said fraction is equal to the amount of the Trust Remainder which is includable in the Grantor's gross estate for federal estate tax purposes, as determined without regard to this paragraph (K)(2), and the denominator of said fraction is equal to the value of the Trust Remainder as finally determined for federal estate tax purposes in the Grantor's federal estate tax proceeding. [If the Grantor's spouse, [GRANTOR'S SPOUSE], is then living, the Trustees shall administer such property in further trust in accordance with the provisions of Article THIRD of this instrument. If the Grantor's spouse is not then living, the Trustees shall distribute such property to the executors or administrators of the Grantor's estate.] The balance of the Trust Remainder, if any, shall be distributed in accordance with the provisions of paragraph (K)(1) of this Article, as if the Grantor was living upon the expiration of the Trust Term and as if the Trust Remainder consisted only of such property.

(3) Anything hereinabove to the contrary notwithstanding, any distribution hereunder shall be subject to an obligation to repay to the Trustees any amount that the Trustees are required to pay to the Grantor (or the executors or administrators of the Grantor's estate, as the case may be) pursuant to paragraph (E) of this Article.

THIRD: Grantor's Death During Trust Term – Trust for Grantor's Spouse.

(A) The Trustees shall hold the property to be administered in accordance with the provisions of this Article, IN TRUST, for the benefit of the Grantor's spouse.

(B) The Trustees shall distribute the net income of such trust to the Grantor's spouse at least quarter-annually.

(C) At any time the Trustees may distribute all or any part of the principal of such trust to the Grantor's spouse, as the Trustees, other than the Grantor's spouse, may determine.

(D) The Trustees may but need not take into account the Grantor's spouse's other resources and [his/her] other actual or potential sources of support.

(E) Upon the Grantor's spouse's death such trust shall terminate. The Trustees shall thereupon distribute the then principal, if any, of such trust, together with all net income on hand or accrued of such trust, as follows:

(1) If some or all of the principal is included in the Grantor's spouse's gross estate for federal estate tax purposes, the Trustees shall pay to the executors or administrators of the Grantor's spouse's estate, if such Taxes (as hereinafter defined) are payable from [his/her] estate, or, if not, to the appropriate taxing authorities, from such principal or, if only a portion of such principal is so included, from such portion, the lesser of (i) such amount as such executors or administrators certify to be equal to the difference between (A) the sum of all estate, inheritance and other death taxes (other than generation-skipping taxes) payable by reason of the Grantor's spouse's death, together with any interest and penalties thereon (herein this paragraph, collectively "Taxes"), and (B) the sum of all Taxes which would have been payable if such principal were not included in the Grantor's spouse's estate for estate tax purposes, or

(ii) such amount as the Grantor's spouse directs by a provision of [his/her] last will and testament duly admitted to probate and expressly referring to this Article. The Trustees shall have no duty to participate in any proceeding for the assessment, calculation or apportionment of any such Taxes and shall rely upon the certification of such executors or administrators. The action of the Trustees in making such payment shall be conclusive upon all persons.

(2) The Trustees shall distribute the balance of such property in accordance with the provisions of Article SECOND (K)(1) of this instrument, as if the Grantor was living upon the death of [his/her] spouse and upon the expiration of the Trust Term and as if the Trust Remainder consisted only of such property.

(F) Anything in this instrument to the contrary notwithstanding, during the Grantor's spouse's lifetime, the Grantor's spouse shall have the power, by an instrument executed by [him/her] and delivered to the Trustees, to direct the Trustees to make productive or to convert into productive property within a reasonable time any property which shall be an asset of such trust and which shall be or become unproductive.

(G) Anything in this instrument to the contrary notwithstanding, as used in this Article the term "net income" shall include all of the income that may be required to be distributed to the Grantor's spouse in order to qualify the property passing pursuant to the provisions of this Article for the federal estate tax marital deduction available to the Grantor's estate.

(H) Anything in this instrument to the contrary notwithstanding, any power (other than the power to refrain from electing the marital deduction) granted to the Trustees shall be void to the extent that such power or the exercise thereof shall interfere with the allowance to the Grantor's estate of the federal estate tax marital deduction.

FOURTH: Qualified Interest.

(A) The Grantor intends that [his/her] interest in the trust shall be a "qualified annuity interest" as defined in Section 2702(b)(1) of the Code and Section 25.2702-3 of the Treasury Regulations. Accordingly, no authorization or direction or other provisions contained in this instrument that would prevent the trust created herein from so qualifying shall apply to this trust, it being the Grantor's intention that any court having jurisdiction over this instrument construe it accordingly.

(B) The Independent Trustee (as such term is defined in Article TWELFTH of this instrument), shall have the power, acting alone, to amend the trust in any manner required for the sole purpose of ensuring that the Grantor's interest qualifies and continues to qualify as a "qualified annuity interest" as defined in Section 2702(b)(1) of the Code and Section 25.2702-3 of the Treasury Regulations.

FIFTH: Disposition of Otherwise Undisposed of Property.

(A) If, upon the Grantor's death or the termination of any trust created by this instrument, any property is not effectively disposed of by the foregoing provisions of this instrument, such property shall be distributed [to the persons who would have been entitled to inherit it in accordance with the laws of the State of [New York] then in force, as if the Grantor had then died, intestate, a resident of such state, only owning such property, and as if all of such property were situated in said state.]

(B) Any provision of the Grantor's Will or of the Grantor's spouse's Will stating that the Grantor's spouse shall be deemed to have survived or predeceased the Grantor shall not apply to this Article.

SIXTH: Removal and Replacement of Trustees.

(A) Anything in this instrument to the contrary notwithstanding, the Grantor may remove one or more Trustees or designated successor Trustees from office at any time and for any reason and may appoint one or more persons and/or a bank or trust company (none of whom is the Grantor or any person and/or entity related or subordinate to the Grantor as such terms are defined in Section 672(c) of the Code) in the place and stead of any removed Trustee or designated successor Trustee.

(B) Any removal and/or appointment pursuant to the provisions of this Article shall be made by an instrument executed and acknowledged by the Grantor and by each successor Trustee, if any, so appointed and delivered in person, or mailed by certified or registered mail, to each Trustee that is being removed and to each then potential income beneficiary of such trust. The expenses of each removed Trustee's accounting shall be a proper charge against such trust.

SEVENTH: Appointment of Successor and Additional Trustee(s).

Subject to the provisions of Article SIXTH of this instrument:

(A) Whenever there is only one Trustee in office, such Trustee is authorized to appoint his or her own successor or successors, who shall serve only if no successor to such Trustee has been appointed by or pursuant to the prior provisions of this instrument who qualifies to serve and who accepts his appointment when it becomes effective; provided, however, that neither the Grantor nor the then potential income beneficiary of such trust may be appointed as a Trustee of such trust.

(B) A majority of the Trustees acting hereunder shall be authorized to appoint one or more persons and/or a bank or trust company to serve as additional Co-Trustees, who

shall serve only if no such Co-Trustee has been appointed by the prior provisions of this instrument who qualifies to serve and who accepts his appointment when it becomes effective.

(C) Whenever all Trustees then in office of any trust created by this instrument are prohibited herein from making discretionary distributions, such Trustees are authorized to appoint one or more Co-Trustees who are not prohibited herein from making such discretionary distributions, who shall serve only if no such Trustee has been appointed by the prior provisions of this instrument who qualifies to serve and who accepts his appointment when it becomes effective.

(D) Subject to the prior provisions of this instrument, if each Trustee appointed pursuant to the prior provisions of this instrument ceases to act for any reason, the Grantor, if then living and not under a legal disability, or, if the Grantor is not then living or is under a legal disability, the then potential income beneficiary or beneficiaries of such trust who are not under a legal disability, or, if none, the Guardian of the property of the then potential income beneficiary or beneficiaries of such trust who are under a legal disability shall promptly appoint one or more Trustees of such trust.

(E) Any appointment made pursuant to the provisions of this instrument shall be made by an instrument executed and acknowledged by each person who made such appointment and by each Trustee appointed therein and delivered in person, or mailed by certified or registered mail, to the Grantor, if [he/she] is then living, or, if the Grantor is not then living, to such of the Grantor's children as are then living.

(F) Any appointment made pursuant to the provisions of this instrument may be revoked before it becomes effective by an instrument executed and acknowledged by each person who made such appointment and delivered in person, or mailed by certified or registered

mail, to each Trustee whose appointment is thereby revoked and to the Grantor, if [he/she] is then living, or, if the Grantor is not then living, to such of the Grantor's children as are then living.

(G) Any appointment made pursuant to the provisions of this instrument shall be accepted by an instrument executed and acknowledged by each Trustee accepting such appointment and delivered in person, or mailed by certified or registered mail, to the Grantor, if [he/she] is then living, or, if the Grantor is not then living, to such of the Grantor's children as are then living.

EIGHTH: Bond; Limitation of Liability; Waiver of Prudent Investor Rule; Resignation.

(A) No Trustee shall be required to post a bond or other security in any jurisdiction.

(B) No Trustee shall be liable for the acts or defaults of any other Trustee. No Trustee shall be liable for making or not making any election permitted by law. Each Trustee shall be deemed to have acted within the scope of his or her authority, to have exercised reasonable care, and to have acted prudently, diligently and impartially as to all interested persons, unless the contrary is proven by affirmative evidence.

(C) (1) In addition to the investment powers conferred below, the Trustees are authorized (but not directed) to acquire and retain investments not regarded as traditional for trusts, including investments that would be forbidden or would be regarded as imprudent, improper or unlawful by the "prudent person" rule, "prudent investor" rule, or any other rule or law which restricts a fiduciary's capacity to make investments. The Trustees, in the exercise of sole and absolute discretion, may invest in or retain any type of property, wherever located,

including any type of security or option, improved or unimproved real property, and tangible or intangible personal property, and in any manner, including direct purchase, joint ventures, partnerships, limited partnerships, limited liability companies, corporations, mutual funds, business trusts or any other form of participation or ownership whatsoever. In making investments, the Trustees may disregard any or all of the following factors:

(a) Whether a particular investment, or the trust investments collectively, will produce a reasonable rate of return or result in the preservation of principal.

(b) Whether the acquisition or retention of a particular investment or the trust investments collectively are consistent with any duty of impartiality as to the different beneficiaries. The Grantor intends that no such duty shall exist, and hereby waives any such duty which otherwise would exist.

(c) Whether the trust is diversified. The Grantor intends that no duty to diversify shall exist, and hereby waives any such duty which otherwise would exist.

(d) Whether any or all of the trust investments would traditionally be classified as too risky or speculative for trusts. The entire trust may be so invested. The Grantor intends the Trustees to have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy.

(2) The Grantor's purpose in granting the foregoing authority in paragraph (C)(1) of this Article is to modify the "prudent person" rule, "prudent investor" rule, or any other rule or law which restricts a fiduciary's ability to invest insofar as any such rule or law would prohibit an investment or investments because of one or more factors listed above, or any other factor relating to the nature of the investment itself. The Grantor does this because the Grantor believes it is in the best interest of the beneficiaries of the trusts created hereunder to

give the Trustees broad discretion in managing the assets of the trusts created hereunder. Accordingly, the Trustees shall not be liable for any loss in value of an investment merely because of the nature of the investment or the degree of risk presented by the investment.

(D) Any Trustee may resign from office without court permission at any time and for any reason by delivering his or her resignation, or by mailing it by certified or registered mail, to each other Trustee then in office, if any, and to the Grantor, if he is then living, or, if the Grantor is not then living, to the Grantor's spouse, if the Grantor's spouse is then living, or, if the Grantor's spouse is not then living, to such of the Grantor's children, as are then living. The expenses of the resigning Trustee's accounting shall be a proper charge against such trust.

NINTH: Commissions.

No Trustee shall be entitled to receive commissions or other compensation for his services as Trustee, but each person serving as a Trustee hereunder shall be entitled to reimbursement for such expenses as he may reasonably incur as Trustee.

TENTH: Limitation on Disposition of Trust Property.

(A) So long as held by the Trustees, neither the income nor the principal of the trust shall be subject to sale, transfer, pledge, assignment, anticipation or encumbrance by any beneficiary, nor shall such income or principal be subject to attachment, garnishment, execution, or other seizure or to being taken by a beneficiary's creditors by any process whatsoever.

(B) Except in the event of a demonstrated abuse of discretion by the Trustees, no court may direct the Trustees to make any discretionary distribution of income or principal from the trust created by this instrument to or for the benefit of any beneficiary of such trust.

ELEVENTH: Administrative Powers.

The Trustees are authorized to exercise, without prior authority from any court, with respect to any property forming part of the trust created by this instrument, all powers conferred upon Trustees by applicable law or expressed in this instrument. Such powers shall include the following and shall be construed in the broadest possible manner:

(A) To determine whether to pay administration expenses from income or from principal. No equitable adjustment shall be required due to any such determination.

(B) To invest or reinvest, whether as sole owner, limited partner, shareholder or otherwise, in such securities or other property, real or personal, within or outside of the United States, or such interest therein, as they shall determine, including, without limitation, index and/or other mutual funds (provided, however, that no investment may be made in a mutual fund affiliated with any corporate fiduciary unless any charges by such fund are offset by a reduction in the commissions payable to such corporate fiduciary), money market funds, savings accounts, certificates of deposit, limited liability companies and common trust funds, and without any duty to diversify investments, and fully free of any and all restrictions imposed by law upon the investment of funds held by a fiduciary.

(C) To retain, acquire, hold, exchange, manage, insure against fire or other risk, repair, improve, alter, demolish, subdivide, partition, develop, sell, mortgage, abandon, dedicate to public use, lease, sublease, assign, adjust boundaries with respect to, grant options with respect to, grant conservation and/or other easements with respect to, extend, foreclose, prepay, subordinate, renew or otherwise modify mortgages with respect to, convert to cooperative or condominium ownership or otherwise deal with any real property or interest in real property as they shall determine, and to test for, incur and/or recover from any person or entity liable for the same the cost of any cleanup resulting from contamination of any such property, as they shall determine. They shall not be bound by any statutory restrictions on the duration of a lease.

(D) To retain for such period as they shall determine any property at any time received or acquired by them.

(E) To sell any interest in any property at public or private sale, for cash or upon credit, to such purchaser or purchasers and upon such terms as they shall determine.

(F) To employ and to compensate from such trust, without court approval, custodians, investment advisors, attorneys (for the preparation of accountings and for any other appropriate purposes), agents, accountants, appraisers, brokers and such other persons and firms as they shall determine.

(G) To borrow such sums for such periods, from such sources (including, without limitation, themselves) and upon such terms as they shall determine, and to secure any such loan by mortgage or pledge.

(H) To lend any assets to any person or entity upon such terms as they shall determine; provided, however, that no individual who is then the sole fiduciary in office may lend any property to himself or herself; provided, further, that such loan is for adequate interest and adequate security.

(I) To make distributions in cash, in kind or partly in each, as they shall determine, even if shares are composed differently, and without regard to income tax bases.

(J) To apply any property for the benefit of the beneficiary thereof by the payment of any or all of their expenses. Each such distribution or payment may be made without the intervention of any guardian or other fiduciary and without any obligation to see to the use or application thereof. No bond or other security shall be required with respect to any such distribution or payment.

(K) To make any election permitted by any tax law without making any equitable adjustment as a result thereof, and to make any allocation of basis under any tax law, to any asset whether passing under the Grantor's Will, under this instrument, or otherwise, without regard to the income tax consequences of such election or allocation.

(L) To renounce or release, in whole or in part, any interest in any property or any power created by this instrument.

(M) To compromise, settle, litigate, submit to arbitration, modify, subordinate, assign, release or abandon claims in favor of or against such trust.

(N) To sell or lend, on such terms as the Trustees shall determine, any property to, or purchase or borrow, on such terms as the Trustees shall determine, any property from the executors or administrators of any estate or the Trustees of the trust, whether or not created by the Grantor, and whether or not such executors, administrators or Trustees are also the Trustees of the trust created by this instrument.

(O) Whenever there is more than one Trustee in office, to delegate any rights, powers or duties to one another, and to revoke any such delegation at any time; provided, however, that no such rights, powers or duties may be delegated to any Trustee precluded from exercising the same.

(P) To retain for such period as they shall determine any interest which the Trustees may own at any time in any closely-held company, or in any successor entity, and to purchase additional interests in any such entity, even though as a result such trust is invested largely or entirely in such entity.

(Q) To retain, acquire, commence, continue or permit the continuation of any business, incorporated or unincorporated, for such period, or to sell or liquidate any business, in whole or in part, upon such terms as they shall determine, including, without limitation, power (1) to invest any part or even all of the assets of such trust in any business; (2) to select any person or persons as directors, officers or other employees of any such business, and to compensate such persons from such business for services rendered without regard to any other compensation to which any such person may be entitled, whether or not any such person is also serving as and is thus also compensated as a Trustee; (3) to guaranty the obligations of any business which is owned solely by such trust; and (4) to make such other arrangements with respect thereto as they shall determine. They shall have no personal liability for any losses resulting from any action taken or not taken by them in good faith with respect to any such business.

(R) To enter into, terminate, comply with or modify any shareholders' agreement, limited partnership agreement, limited liability company agreement, buy-sell agreement or option agreement, to obtain, exercise, not exercise, grant or transfer options or rights of first refusal, and to take such action as they shall determine in connection with subscription, voting, conversion or other rights or any reorganization, recapitalization, merger, liquidation or other similar action.

TWELFTH: Definitions.

Throughout this instrument:

(A) The terms "Trustee" and "Trustees" and pronouns relating thereto are used to denote the fiduciary or fiduciaries (including successor and additional fiduciaries) who shall be acting under this instrument from time to time;

(B) Where appropriate, the use of any gender encompasses the other genders, and the use of either the singular or the plural encompasses the other;

(C) The terms "descendants" and "issue" have the same meaning;

(D) References to descendants of any degree include adopted persons if adopted prior to attaining majority, but not otherwise;

(E) Except as expressly otherwise provided in this instrument, any disposition or distribution to persons described as descendants of any person shall be per stirpes;

(F) Except as expressly otherwise provided in this instrument, each determination by the Trustees shall be made by them in their sole and absolute discretion;

(G) References in this instrument to sections of the Code are to sections of the Internal Revenue Code of 1986, as amended, as in effect at the relevant time, or to the equivalent provisions of any successor statute in effect at the relevant time; and

(H) The term "Independent Trustee" shall mean any individual or institution other than the Grantor, any descendant of the Grantor, or anyone legally obligated to support any beneficiary of the trust, none of whom are related or subordinate to the Grantor as such terms are defined in Section 672(c) of the Code. If at any time there is more than one Independent Trustee in office, the powers granted to the Independent Trustee in this instrument shall be exercised by majority vote of the then acting Independent Trustees.

THIRTEENTH: Stock Dividends.

Any dividend or other distribution payable in the stock of the corporation declaring or distributing the same shall be principal.

FOURTEENTH: Exemption from Certain Requirements.

No Trustee shall be required to render any reports, inventories or periodic accounts to any court.

FIFTEENTH: Informal Accountings.

At any time the Trustees of the trust created by this instrument (and/or the legal representatives of any former Trustee of such trust) may render an account from the date of this

instrument or from the date of the last previous accounting of such Trustee or of any prior Trustee of the trust, as the case may be. The written and acknowledged approval of such account by all of the persons, if any, who, on the closing date of such account, are potential income beneficiaries of such trust and are not under a legal disability, and by all of the persons who are not under a legal disability and who would be remaindermen of the trust if the trust terminated upon such closing date, or, if the principal is to be distributed to one or more other trusts, who would be potential income beneficiaries of such other trust or trusts, as the case may be, shall be binding and conclusive upon all persons. Such approval shall constitute a complete discharge and release of such Trustee (and of each former Trustee for whom such account is rendered) with respect to all matters set forth in such account and so approved, with the same force and effect as if a judgment of a court having jurisdiction had been entered judicially settling such account in an action in which such Trustee and all persons having or claiming any interest in the trust were parties. Nothing in this Article shall preclude any Trustee from having his or her account judicially settled if he or she so desires or from having his or her account informally settled in any other manner.

SIXTEENTH: Grantor Trust Status; Tax Reimbursement.

Anything contained in this instrument to the contrary notwithstanding:

(A) The Grantor appoints the Grantor, or if the Grantor for any reason fails or ceases to serve, then the Grantor appoints the Grantor's spouse, as the Substitutor. During the Grantor's lifetime, the Substitutor shall have the power exercisable at any time and from time to time during the Trust Term to reacquire property transferred to the trust by the Grantor by substituting therefor property of an equivalent value, determined as of the date of such substitution. Such right shall be exercisable by the Substitutor in a non-fiduciary capacity and

without the approval or consent of any person then serving in a fiduciary capacity hereunder. This power to substitute property may not 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 Trustees 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 forgoing 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 by delivery of an acknowledged instrument in writing to the Trustees. Any Substitutor may cease to act as Substitutor by delivery of a written and acknowledged notice to the Trustees. If the Substitutor should cease to act for any reason without having fully released the power to substitute property as provided under this Article, the successor Substitutor shall be such individual (other than the Grantor or any person who is a related or subordinate party within the meaning of Code Sec. 672(c) with respect to the Grantor) as shall be designated by a written and acknowledged instrument executed by the Trustees. If at any time prior to the complete release of the power of substitution, there is no Substitutor acting hereunder, the Trustees (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.

(B) Anything in Article ELEVENTH to the contrary notwithstanding, any time or from time to time, the Trustee may lend all or any portion of the Trust Principal to the Grantor without adequate security but with adequate interest.

(C) At any time, the Trustees may extinguish the powers granted to the Substitutor in paragraph (A) of this Article and may release the powers granted to the Trustees in paragraph (B) of this Article, in whole or in part, temporarily or permanently, whenever the Trustees may deem it advisable, by an instrument executed and acknowledged by the Trustees and delivered in person, or mailed by certified or registered mail, to the Grantor.

(D) The Trustees shall not pay to the Grantor or the personal representative of the Grantor any income or principal of the trust hereunder on account of or in discharge of the income tax liability (whether federal, state, or otherwise) of the Grantor, if any, with respect to property held in the trust and taxable to the Grantor including, but without limitation, tax realized on capital gains.

SEVENTEENTH: Representation of Certain Persons by Certain Others.

In any proceeding relating to the trust created by this instrument, if a party to the proceeding has the same interest as one or more persons under a legal disability, it shall not be necessary to serve any person who has such interest and who is under a legal disability. Moreover, informal settlement of any account of the proceedings of any Trustee by all persons interested in the fund accounted for not under a legal disability shall be binding upon all persons under a legal disability having the same interest in such fund. Nothing in this Article shall be deemed to limit the effectiveness of the foregoing provisions of this instrument.

EIGHTEENTH: Irrevocability.

(A) This instrument shall be irrevocable, and the Grantor shall have no power to revoke, alter, amend, modify or terminate the same.

(B) The Grantor acknowledges that [he/she] is aware of the difference between a revocable trust and an irrevocable trust and that the trust created by this instrument cannot be changed by [him/her] once this instrument has been executed.

NINETEENTH: Governing Law.

This instrument shall be construed and governed in all respects by and in accordance with the law of the State of New York.

TWENTIETH: Titles.

The titles of the Articles of this instrument are inserted for reference purposes only and shall have no effect whatsoever on the meaning or interpretation of this instrument.

TWENTY-FIRST: Acceptance of Trust.

The Trustees accept the trust created by this instrument in accordance with the terms of this instrument.

IN WITNESS WHEREOF, the Grantor and the Trustee have executed this instrument in quadruplicate as of the date first hereinabove written.

_____

[CLIENT], Grantor [and Trustee]

_____

[TRUSTEE 1], Trustee

_____

[TRUSTEE 2], Trustee

STATE OF)
: ss.:
COUNTY OF)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared [CLIENT], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity as the Grantor [and Trustee] and that by [his/her] signature on the instrument, the individual executed the instrument.

_____
Notary Public

STATE OF)
: ss.:
COUNTY OF)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared [TRUSTEE 1], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity as the Trustee and that by [his/her] signature on the instrument, the individual executed the instrument.

_____
Notary Public

STATE OF)
: ss.:
COUNTY OF)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared [TRUSTEE 2], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity as the Trustee and that by [his/her] signature on the instrument, the individual executed the instrument.

_____
Notary Public

Schedule A

Property Transferred to Trust on [DATE]:

Schedule B

Annuity Payment Date	Annuity Amount

6. Charitable Lead Trusts (CLATs)

Charitable Lead Trust ("CLT")

I. Basic Elements of a Charitable Lead Trust

a. A CLT is a split interest trust in which one or more charities is the current beneficiary that receives the initial payments (i.e., the lead interest) from the trust, and one or more non-charitable beneficiaries are the remaindermen of the trust.

b. The lead interest can last for a term of years, for the life or lives of one or more individuals, or a combination of these.

c. Additionally, the lead interest can be structured as a charitable lead unitrust ("CLUT"), where the charity receives a specified percentage of the trust's assets each year (e.g., 7% of the value of the trusts assets, revalued annually), or a charitable lead annuity trust ("CLAT"), where the charity receives a specified percentage of the initial value of the trust's assets each year (e.g., 7% of the initial fair market value of the trust's assets).

d. In a basic CLUT, the amount passing to charity each year varies only to the extent the assets of the trust appreciate or depreciate, and in a basic CLAT, the amount passing to charity is a fixed amount each year.

II. Distributions from the CLT

a. The charitable lead interest can pass to any charity, including the grantor's private family foundation, provided that the grantor does not control the funds received by the private foundation from the CLT. This can be accomplished by simply providing for a sub-account within the private foundation to receive the CLT payments and prohibiting the grantor from exercising control over these assets.

b. The remainderman of a CLT can be any one or more individuals the grantor wishes to benefit, including the grantor's descendants; however, in the case of a CLAT (but not a CLUT), generation-skipping transfer tax exemption cannot be allocated to the trust until the termination of the charitable lead term.

III. Creation and Structure of a CLT

a. CLTs can be created during the grantor's lifetime by an inter vivos trust agreement or upon the grantor's death pursuant to the terms of his or her will, and unlike a GRAT, there are no adverse transfer tax consequences if the grantor dies during the charitable lead term.[1]

[1] See footnote 3 for a discussion of the income tax consequences if the grantor dies during the charitable lead term of a grantor trust CLT.

b. To qualify as a CLT, the trust document must satisfy the applicable statutory and regulatory requirements which mandate the inclusion of certain provisions and the prohibition of certain transactions. Although a CLT can hold a variety of investments such as stocks, bonds, notes, hedge funds, real estate, etc., CLTs are governed by the private foundations rules so care must be taken to ensure compliance with these rules.

c. A CLT created during the grantor's life can be structured as either a grantor trust or a non-grantor trust. In the case of a grantor CLT, the grantor is treated as the owner of the trust for income tax purposes and must report on his or her personal return all gains/losses realized by the CLT during the year, and thus, be responsible for any income tax due.

d. Upon the funding of a grantor CLT, the grantor receives an immediate income tax charitable deduction equal to the value of the charitable lead interest.[2] Because the grantor receives this entire income tax charitable deduction in the year the CLT is funded, he or she does not receive subsequent income tax charitable deductions as the annuities are paid to charity each year.

e. In contrast, a non-grantor CLT is its own separate taxpayer and must pay its own income tax liability from assets within the trust. The grantor does not receive any immediate income tax charitable deduction upon funding a non-grantor CLT, however, the trust does receive an income tax charitable deduction each year as it pays the required annuity to the designated charity.[3]

f. Regardless of whether a CLT is a grantor trust or a non-grantor trust, the grantor will receive ***an immediate gift tax charitable deduction*** (for an inter vivos CLT) or ***an estate tax charitable deduction*** (for a testamentary CLT) equal to the value of the charitable lead interest.

g. The value of the charitable lead interest is calculated by using the applicable §7520 rate, which is the §7520 rate in effect on the date of funding or the taxpayer or estate may elect to use the §7520 rate in effect for either of the immediately preceding two months. Thus, the grantor can take advantage of the lowest §7520 rate over a three month period.

h. A CLAT (but not a CLUT) can be "zeroed out," such that the present value of the charitable lead interest is equal to the fair market value of the

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[2] A contribution to a CLT is considered "for the use of" a charity and subject to the percentage limitations on charitable deductions that apply to contributions to private foundations. Additionally, the amount of the charitable deduction will vary depending on the type of property transferred to the CLT. For example, the charitable deduction for a contribution of cash or qualified appreciated stock in a publicly traded company to a CLT would be limited to 30% of the grantor's adjusted gross income; the charitable deduction for a contribution of appreciated artwork by a collector to a CLT would be limited to the collector's basis in the artwork.

[3] If the grantor dies during the charitable lead term of a grantor CLT, it ceases to be a grantor CLT and becomes a non-grantor CLT. As a non-grantor CLT, the trust will receive income tax deductions as annuity payments are made to charity each year; however, to prevent a double charitable deduction, a portion of the initial income tax charitable deduction that the grantor initially received will be realized as income by the grantor in the year of his death.

property contributed to the CLAT, leaving the present value of the non-charitable remainder interest equal to zero. As a result, the grantor's entire contribution to a "zeroed out" CLAT will qualify for the gift (or estate) tax charitable deduction, and the transfer to the CLAT will not be subject to gift (or estate) tax.

IV. Back-Ended CLAT Structure (or "Shark-Fin CLATs")

a. In the 2007, the Internal Revenue Services issued sample forms for inter vivos CLATs and testamentary CLATs in Rev. Proc. 2007-45 and Rev. Proc. 2007-46, respectively. These revenue procedures expressly provide that the annuity paid to charity may increase every year, provided that the payment to charity is ascertainable at the time the CLAT is funded.

b. In contrast to a traditional CLAT, where the payments to charity are the same each year, these CLATs are structured so that the amount passing to charity in the first year of the CLAT is small and gradually increases each year over the term of the CLAT.

c. By making only small distributions to charity in the initial years of the CLAT, the trust principal has more time to grow before larger distributions must be paid out to charity.

d. Shark-fin CLAT and Life Insurance:

1. The basic strategy of the shark-fin CLAT using life insurance involves the contribution of cash to an inter vivos CLAT, which is structured as a "grantor trust" for income tax purposes. The CLAT uses most of the cash contribution to purchase a single-premium life insurance policy on the life of the settlor, the proceeds of which are payable to the CLAT on the death of the settlor, which also triggers the termination of the CLAT.

2. A portion of the life insurance proceeds are used to make a final substantial balloon payment to charity, with the remaining insurance proceeds distributed to the noncharitable remainder beneficiaries. The portion of the cash contribution that is not used by the trust to purchase life insurance is used to purchase a tax-exempt municipal bond, which is used to make fixed nominal annual payments to a designated charity.

3. Because the trust is a grantor trust, the settlor obtains an upfront income tax deduction. Furthermore, because the only income earned by the CLAT is tax-exempt municipal bond income, the settlor is not subject to tax on that income.

V. Optimal Time for CLATs

a. With §7520 rates at near historic lows, it is an opportune time for CLATs. In a "zeroed out" inter vivos CLAT, any appreciation of trust assets in excess of the §7520 rate will pass to the remaindermen free of gift tax.

b. By structuring a CLAT as a grantor trust and by "back-ending" the payments to charity, assets remain in the CLAT for a longer period with the taxpayer being responsible for any income tax. Presumably, this gives the assets within the CLAT more time to appreciate and thereby increase the amount that may ultimately pass free of gift tax to the non-charitable remaindermen.

c. Further, by structuring the CLAT as a grantor trust, the grantor can take an immediate income tax deduction in the year the CLAT is funded without having to immediately pay the assets over to charity.[4] An immediate income tax deduction is particularly attractive to any individual with substantial income to offset.

d. The chart below illustrates the effectiveness of a "back-ended" CLAT. The chart assumes a 20 year CLAT funded with $5,000,000, a §7520 rate of 3.2%, a 5% growth rate and an annuity that increases by 20% each year. As detailed below, by structuring the CLAT as a grantor trust, and by increasing the annuity payments by 20% each year, nearly $3,000,000 would pass to the remaindermen free of gift tax at the end of the 20 year charitable term.

Year	Beginning Principal	Annuity to Charity	Balance Assuming 5.00% Growth
1	5,000,000.00	43,256.97	5,206,743.03
2	5,206,743.03	51,908.36	5,415,171.82
3	5,415,171.82	62,290.04	5,623,640.37
4	5,623,640.37	74,748.04	5,830,074.35
5	5,830,074.35	89,697,65	6,031,880.42
6	6,031,880.42	107,637.18	6,225,837.26
7	6,225,837.26	129,164,62	6,407,964.50
8	6,407,964.50	154,997.54	6,573,365.19
9	6,573,365.19	185,997.05	6,716,036.40
10	6,716,036.40	223,196.46	6,828,641.76
11	6,828,641.76	267,835.76	6,902,238.09
12	6,902,238.09	321,402.91	6,925,947.08
13	6,925,947.08	385,683.94	6,886,560.94
14	6,886,560.94	462,820.19	6,768,068.80
15	6,768,068.80	555,384.23	6,551,088.01

[4] To the extent the grantor does not have gains to offset, the grantor should be permitted to carry forward his charitable income tax deduction for five years.

16	6,551,088.01	666,461.07	6,212,181.34
17	6,212,181.34	799,753.28	5,723,037.13
18	5,723,037.13	959,703.94	5,049,485.05
19	5,049,485.05	1,151,644.73	4,150,314.57
20	4,150,314.57	1,381,973.67	2,975,856.63
Total to Charity		$8,075,557.18	
Total to Remaindermen			$2,975,856.63

VI. Private Foundation Provisions, Excess Business Holdings, and Other Self-Dealing Concerns

a. CLTs are subject to many of the private foundation provisions contained in Code §507-termination tax; Code §508(e)-governing instrument language; Code §4941-self-dealing; and Code §4945-taxable expenditures.

b. Code §507 termination tax should not be applicable if drafted properly.

c. Code §4941, contains the prohibitions against self-dealing. The prohibited acts of self-dealing are: 1) the sale, exchange, or lease of property between a CLT, and a disqualified person; 2) the lending of money or other extension of credit between a CLT, and a disqualified person; 3) the furnishing of goods, services, or facilities between a CLT, and a disqualified person; 4) the payment of compensation (or payment or reimbursement of expenses) by a CLT to a disqualified person; 5) the transfer to, or for the benefit of, or use by, a disqualified person of the income or assets of a CLT; and 6)the agreement by a CLT to make any payment of money or other property, to a government official.

d. The provisions of Code §4945 imposes an excise tax on each "taxable expenditure" made by a CLT that includes, in part, amounts paid or incurred by a CLT: 1) to influence legislation; 2) to influence the outcome of a public election or carry on voter registration drives; or 3) for any purpose that is not within the usual religious, charitable, scientific, literary, and educational purposes as contemplated in the Code.

e. With respect to excess business holdings (Code §4943), and jeopardy investments (Code §4944), the rules contain a significant exception that is important for wealth transfer planning. A CLT has excess business holdings to the extent that it, together with all disqualified persons, own in the aggregate more than 20% of the voting stock of the incorporated business enterprise (or corresponding interests in non-incorporated business enterprises). In general, where a CLT acquires excess business holdings by gift or bequest, the CLT has five years from the date it acquires such holdings to dispose of them.

f. Code §4944 imposes an excise tax on a CLT for investing any amount in such a manner as to jeopardize the carrying out of its exempt purposes. However, Code §4947(b)(3)(A) provides that a CLT does not have to comply with the excess business holdings or jeopardy investments requirements if: 1) all of the "income interest," and none of the remainder interest of the CLT is devoted solely to the general charitable purposes described in Code §170(c)(2)(B); and 2) the value of the charitable lead interest (i.e., the amount of the charitable deduction) at the time of the creation of the CLT is not more than 60% of the value of the assets transferred at such time to the CLT.

VII. Generation Skipping Transfer Taxation of CLTs

a. The impact of the generation skipping transfer (GST) tax must be carefully considered in the use of any wealth transfer plan.

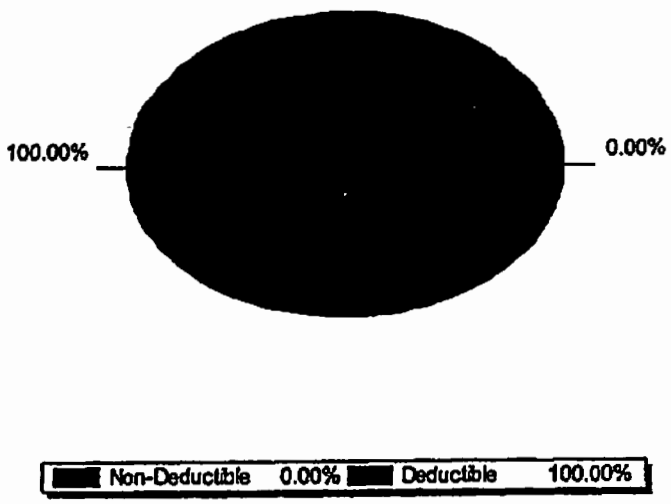
b. The allocation of the GST exemption to CLUTs is governed by the same set of rules governing the allocation of the GST exemption to charitable remainder trusts, and most other transfers. That is, the donor can allocate the GST exemption to a CLUT that is created intervivos, and is a completed gift for gift tax purposes at the time the gift tax return for the transfer is filed or thereafter.

c. The CLAT is not effective for GST Planning due to the ETIP rules.

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$10,000,000.00
Growth of Trust:	5.00%
Percentage Payout:	10.787%
Payment Period:	Annual
Payment Timing:	End
Term:	10
Total Number of Payments:	10
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$1,078,700.00
Annual Payment:	$1,078,700.00
Term Certain Annuity Factor:	9.2712
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$10,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$10,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred



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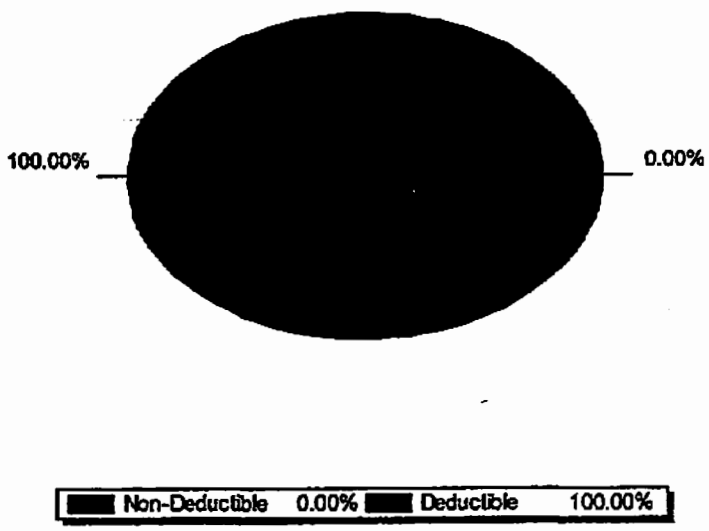
Year	Beginning Principal	5.00% Growth	Payment	Remainder
1	$10,000,000.00	$500,000.00	$1,078,700.00	$9,421,300.00
2	$9,421,300.00	$471,065.00	$1,078,700.00	$8,813,665.00
3	$8,813,665.00	$440,683.25	$1,078,700.00	$8,175,648.25
4	$8,175,648.25	$408,782.41	$1,078,700.00	$7,505,730.66
5	$7,505,730.66	$375,286.53	$1,078,700.00	$6,802,317.19
6	$6,802,317.19	$340,115.86	$1,078,700.00	$6,063,733.05
7	$6,063,733.05	$303,186.65	$1,078,700.00	$5,288,219.70
8	$5,288,219.70	$264,410.99	$1,078,700.00	$4,473,930.69
9	$4,473,930.69	$223,696.53	$1,078,700.00	$3,618,927.22
10	$3,618,927.22	$180,946.36	$1,078,700.00	$2,721,173.58
Summary:	$10,000,000.00	$3,508,173.58	$10,787,000.00	$2,721,173.58

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$10,000,000.00
Growth of Trust:	10.00%
Percentage Payout:	10.787%
Payment Period:	Annual
Payment Timing:	End
Term:	10
Total Number of Payments:	10
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$1,078,700.00
Annual Payment:	$1,078,700.00
Term Certain Annuity Factor:	9.2712
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$10,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$10,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred



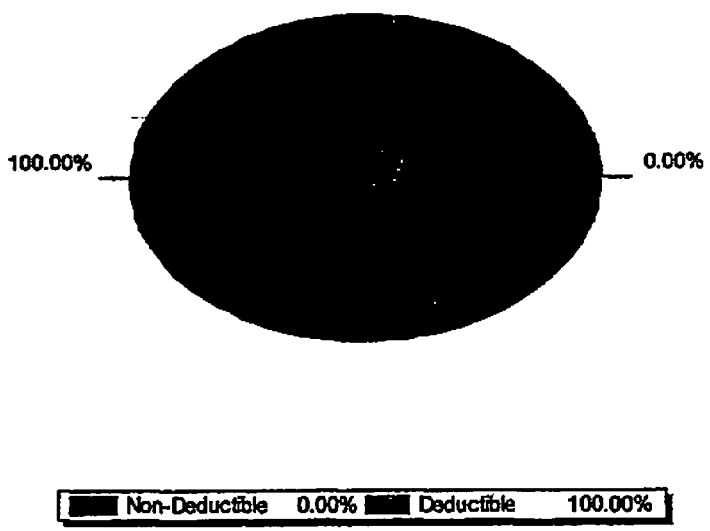
05-9041

Year	Beginning Principal	10.00% Growth	Payment	Remainder
1	$10,000,000.00	$1,000,000.00	$1,078,700.00	$9,921,300.00
2	$9,921,300.00	$992,130.00	$1,078,700.00	$9,834,730.00
3	$9,834,730.00	$983,473.00	$1,078,700.00	$9,739,503.00
4	$9,739,503.00	$973,950.30	$1,078,700.00	$9,634,753.30
5	$9,634,753.30	$963,475.33	$1,078,700.00	$9,519,528.63
6	$9,519,528.63	$951,952.86	$1,078,700.00	$9,392,781.49
7	$9,392,781.49	$939,278.15	$1,078,700.00	$9,253,359.64
8	$9,253,359.64	$925,335.96	$1,078,700.00	$9,099,995.60
9	$9,099,995.60	$909,999.56	$1,078,700.00	$8,931,295.16
10	$8,931,295.16	$893,129.52	$1,078,700.00	$8,745,724.68
Summary:	$10,000,000.00	$9,532,724.68	$10,787,000.00	$8,745,724.68

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$10,000,000.00
Growth of Trust:	5.00%
Percentage Payout:	7.438%
Payment Period:	Annual
Payment Timing:	End
Term:	15
Total Number of Payments:	15
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$743,800.00
Annual Payment:	$743,800.00
Term Certain Annuity Factor:	13.4453
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$10,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$10,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred

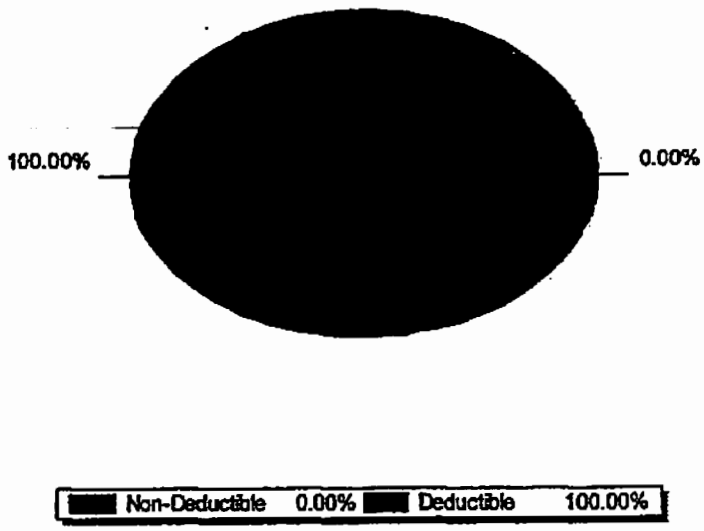


Year	Beginning Principal	5.00% Growth	Payment	Remainder
1	$10,000,000.00	$500,000.00	$743,800.00	$9,756,200.00
2	$9,756,200.00	$487,810.00	$743,800.00	$9,500,210.00
3	$9,500,210.00	$475,010.50	$743,800.00	$9,231,420.50
4	$9,231,420.50	$461,571.03	$743,800.00	$8,949,191.53
5	$8,949,191.53	$447,459.58	$743,800.00	$8,652,851.11
6	$8,652,851.11	$432,642.56	$743,800.00	$8,341,693.67
7	$8,341,693.67	$417,084.68	$743,800.00	$8,014,978.35
8	$8,014,978.35	$400,748.92	$743,800.00	$7,671,927.27
9	$7,671,927.27	$383,596.36	$743,800.00	$7,311,723.63
10	$7,311,723.63	$365,586.18	$743,800.00	$6,933,509.81
11	$6,933,509.81	$346,675.49	$743,800.00	$6,536,385.30
12	$6,536,385.30	$326,819.26	$743,800.00	$6,119,404.56
13	$6,119,404.56	$305,970.23	$743,800.00	$5,681,574.79
14	$5,681,574.79	$284,078.74	$743,800.00	$5,221,853.53
15	$5,221,853.53	$261,092.68	$743,800.00	$4,739,146.21
Summary:	$10,000,000.00	$5,896,146.21	$11,157,000.00	$4,739,146.21

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$10,000,000.00
Growth of Trust:	10.00%
Percentage Payout:	7.438%
Payment Period:	Annual
Payment Timing:	End
Term:	15
Total Number of Payments:	15
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$743,800.00
Annual Payment:	$743,800.00
Term Certain Annuity Factor:	13.4453
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$10,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$10,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred

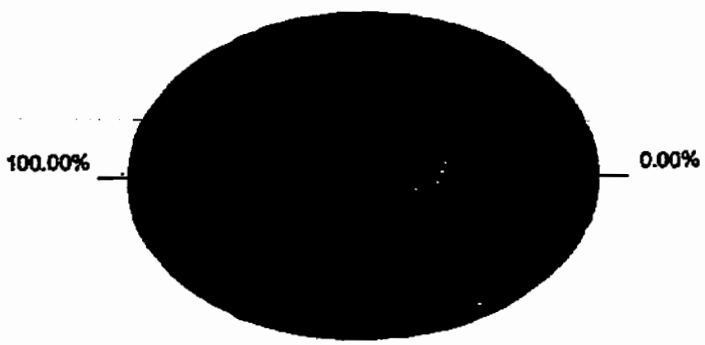


Year	Beginning Principal	10.00% Growth	Payment	Remainder
1	$10,000,000.00	$1,000,000.00	$743,800.00	$10,256,200.00
2	$10,256,200.00	$1,025,620.00	$743,800.00	$10,538,020.00
3	$10,538,020.00	$1,053,802.00	$743,800.00	$10,848,022.00
4	$10,848,022.00	$1,084,802.20	$743,800.00	$11,189,024.20
5	$11,189,024.20	$1,118,902.42	$743,800.00	$11,564,126.62
6	$11,564,126.62	$1,156,412.66	$743,800.00	$11,976,739.28
7	$11,976,739.28	$1,197,673.93	$743,800.00	$12,430,613.21
8	$12,430,613.21	$1,243,061.32	$743,800.00	$12,929,874.53
9	$12,929,874.53	$1,292,987.45	$743,800.00	$13,479,061.98
10	$13,479,061.98	$1,347,906.20	$743,800.00	$14,083,168.18
11	$14,083,168.18	$1,408,316.82	$743,800.00	$14,747,685.00
12	$14,747,685.00	$1,474,768.50	$743,800.00	$15,478,653.50
13	$15,478,653.50	$1,547,865.35	$743,800.00	$16,282,718.85
14	$16,282,718.85	$1,628,271.88	$743,800.00	$17,167,190.73
15	$17,167,190.73	$1,716,719.07	$743,800.00	$18,140,109.80
Summary:	$10,000,000.00	$19,297,109.80	$11,157,000.00	$18,140,109.80

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$20,000,000.00
Growth of Trust:	5.00%
Percentage Payout:	10.787%
Payment Period:	Annual
Payment Timing:	End
Term:	10
Total Number of Payments:	10
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$2,157,400.00
Annual Payment:	$2,157,400.00
Term Certain Annuity Factor:	9.2712
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$20,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$20,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred

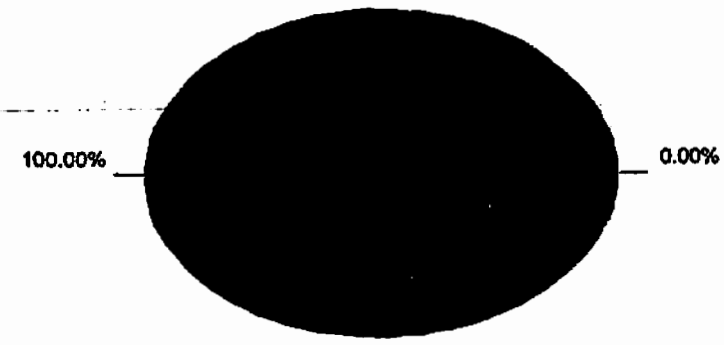


Year	Beginning Principal	5.00% Growth	Payment	Remainder
1	$20,000,000.00	$1,000,000.00	$2,157,400.00	$18,842,600.00
2	$18,842,600.00	$942,130.00	$2,157,400.00	$17,627,330.00
3	$17,627,330.00	$881,366.50	$2,157,400.00	$16,351,296.50
4	$16,351,296.50	$817,564.83	$2,157,400.00	$15,011,461.33
5	$15,011,461.33	$750,573.07	$2,157,400.00	$13,604,634.40
6	$13,604,634.40	$680,231.72	$2,157,400.00	$12,127,466.12
7	$12,127,466.12	$606,373.31	$2,157,400.00	$10,576,439.43
8	$10,576,439.43	$528,821.97	$2,157,400.00	$8,947,861.40
9	$8,947,861.40	$447,393.07	$2,157,400.00	$7,237,854.47
10	$7,237,854.47	$361,892.72	$2,157,400.00	$5,442,347.19
Summary:	$20,000,000.00	$7,016,347.19	$21,574,000.00	$5,442,347.19

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$20,000,000.00
Growth of Trust:	10.00%
Percentage Payout:	10.787%
Payment Period:	Annual
Payment Timing:	End
Term:	10
Total Number of Payments:	10
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$2,157,400.00
Annual Payment:	$2,157,400.00
Term Certain Annuity Factor:	9.2712
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$20,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$20,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred

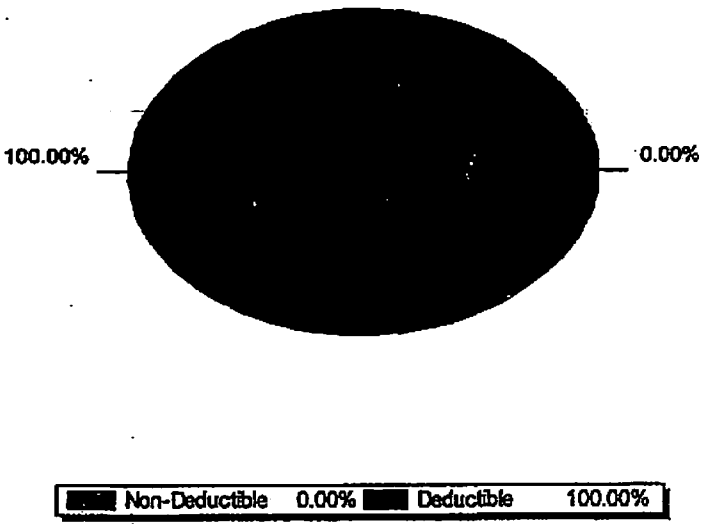


Year	Beginning Principal	10.00% Growth	Payment	Remainder
1	$20,000,000.00	$2,000,000.00	$2,157,400.00	$19,842,600.00
2	$19,842,600.00	$1,984,260.00	$2,157,400.00	$19,669,460.00
3	$19,669,460.00	$1,966,946.00	$2,157,400.00	$19,479,006.00
4	$19,479,006.00	$1,947,900.60	$2,157,400.00	$19,269,506.60
5	$19,269,506.60	$1,926,950.66	$2,157,400.00	$19,039,057.26
6	$19,039,057.26	$1,903,905.73	$2,157,400.00	$18,785,562.99
7	$18,785,562.99	$1,878,556.30	$2,157,400.00	$18,506,719.29
8	$18,506,719.29	$1,850,671.93	$2,157,400.00	$18,199,991.22
9	$18,199,991.22	$1,819,999.12	$2,157,400.00	$17,862,590.34
10	$17,862,590.34	$1,786,259.03	$2,157,400.00	$17,491,449.37
Summary:	$20,000,000.00	$19,065,449.37	$21,574,000.00	$17,491,449.37

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$20,000,000.00
Growth of Trust:	5.00%
Percentage Payout:	7.438%
Payment Period:	Annual
Payment Timing:	End
Term:	15
Total Number of Payments:	15
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$1,487,600.00
Annual Payment:	$1,487,600.00
Term Certain Annuity Factor:	13.4453
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$20,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$20,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred

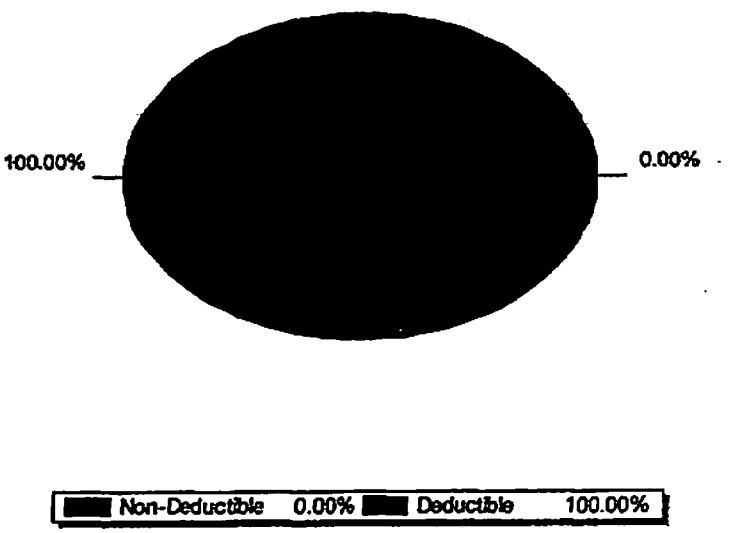


Year	Beginning Principal	5.00% Growth	Payment	Remainder
1	$20,000,000.00	$1,000,000.00	$1,487,600.00	$19,512,400.00
2	$19,512,400.00	$975,620.00	$1,487,600.00	$19,000,420.00
3	$19,000,420.00	$950,021.00	$1,487,600.00	$18,462,841.00
4	$18,462,841.00	$923,142.05	$1,487,600.00	$17,898,383.05
5	$17,898,383.05	$894,919.15	$1,487,600.00	$17,305,702.20
6	$17,305,702.20	$865,285.11	$1,487,600.00	$16,683,387.31
7	$16,683,387.31	$834,169.37	$1,487,600.00	$16,029,956.68
8	$16,029,956.68	$801,497.83	$1,487,600.00	$15,343,854.51
9	$15,343,854.51	$767,192.73	$1,487,600.00	$14,623,447.24
10	$14,623,447.24	$731,172.36	$1,487,600.00	$13,867,019.60
11	$13,867,019.60	$693,350.98	$1,487,600.00	$13,072,770.58
12	$13,072,770.58	$653,638.53	$1,487,600.00	$12,238,809.11
13	$12,238,809.11	$611,940.46	$1,487,600.00	$11,363,149.57
14	$11,363,149.57	$568,157.48	$1,487,600.00	$10,443,707.05
15	$10,443,707.05	$522,185.35	$1,487,600.00	$9,478,292.40
Summary:	$20,000,000.00	$11,792,292.40	$22,314,000.00	$9,478,292.40

Trust Type:	Term
Transfer Date:	11/2011
§7520 Rate:	1.40%
FMV of Trust:	$20,000,000.00
Growth of Trust:	10.00%
Percentage Payout:	7.438%
Payment Period:	Annual
Payment Timing:	End
Term:	15
Total Number of Payments:	15
Exhaustion Method:	IRS
Vary Annuity Payments?	No

Annual Payout:	$1,487,600.00
Annual Payment:	$1,487,600.00
Term Certain Annuity Factor:	13.4453
Payout Frequency Factor:	1.0000
Present Value of Annuity Limited by §7520 Regs:	$20,000,000.00
Remainder Interest = FMV of Trust less PV of Annuity:	$0.00
Charitable Deduction for Income Interest:	$20,000,000.00
Donor's Deduction as Percentage of Amount Transferred:	100.000%

Deduction as Percentage of Amount Transferred



Year	Beginning Principal	10.00% Growth	Payment	Remainder
1	$20,000,000.00	$2,000,000.00	$1,487,600.00	$20,512,400.00
2	$20,512,400.00	$2,051,240.00	$1,487,600.00	$21,076,040.00
3	$21,076,040.00	$2,107,604.00	$1,487,600.00	$21,696,044.00
4	$21,696,044.00	$2,169,604.40	$1,487,600.00	$22,378,048.40
5	$22,378,048.40	$2,237,804.84	$1,487,600.00	$23,128,253.24
6	$23,128,253.24	$2,312,825.32	$1,487,600.00	$23,953,478.56
7	$23,953,478.56	$2,395,347.86	$1,487,600.00	$24,861,226.42
8	$24,861,226.42	$2,486,122.64	$1,487,600.00	$25,859,749.06
9	$25,859,749.06	$2,585,974.91	$1,487,600.00	$26,958,123.97
10	$26,958,123.97	$2,695,812.40	$1,487,600.00	$28,166,336.37
11	$28,166,336.37	$2,816,633.64	$1,487,600.00	$29,495,370.01
12	$29,495,370.01	$2,949,537.00	$1,487,600.00	$30,957,307.01
13	$30,957,307.01	$3,095,730.70	$1,487,600.00	$32,565,437.71
14	$32,565,437.71	$3,256,543.77	$1,487,600.00	$34,334,381.48
15	$34,334,381.48	$3,433,438.15	$1,487,600.00	$36,280,219.63
Summary:	$20,000,000.00	$38,594,219.63	$22,314,000.00	$36,280,219.63

DRAFTING SUPPLEMENTAL AND SPECIAL NEEDS TRUSTS

By

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DRAFTING SUPPLEMENTAL AND SPECIAL NEEDS

TRUSTS

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I. INTRODUCTION

Elder Law and Special Needs attorneys often draft SNTs for clients and advise clients who serve as the Trustee of a Supplemental (third party) or Special Needs (first party) Trusts. The attorney draftsperson must be knowledgeable about the drafting requirements concerning these Trusts. The attorney and Trustee must be knowledgeable about government entitlements, accounting requirements, tax issues and the needs of the beneficiary. Those trustees who have been appointed by a court must also know how to comply with court oversight.

The following is a discussion of drafting issues as well of the interrelationship between the use of the trust and eligibility for government entitlements.

II. DRAFTING SNTS

A. THIRD PARTY TRUSTS:

1. Matter of Escher

When a person not legally responsible for the support of a disabled recipient of government entitlements wishes to provide for his or her needs, a trust fund is an

appropriate vehicle to assure a lifetime of comforts not provided through government entitlements.

The seminal case in which third party trust funds were declared to be good public policy to provide comforts, services and luxuries for disabled individuals to supplement rather than supplant their government benefits is Matter of Escher, 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Surr. 1978), aff'd mem. 75 A.D.2d 531 (1st Dept. 1980), aff'd. 52 N.Y. 1006, 438 N.Y.S.2d 293 (1981). Escher involved an accounting proceeding to judicially settle the account of a testamentary trustee. The New York State Department of Mental Hygiene claimed reimbursement for the care it had provided to the testator's daughter, who had resided in a State psychiatric facility for approximately 30 years. Mr. Escher had executed his Will in the 1930's and had directed that the income must be paid to his daughter at least quarterly. With respect to principal, the trustees had discretion to pay out such sums as necessary to provide for her maintenance and support incurred by reason of illness or accident or other emergency. 407 N.Y.S. 2d at 108. Any assets remaining in the trust upon the death of Marie Escher would be distributed to her distributees.

The court looked to the express terms of the trust to see whether Mr. Escher's intent in creating the trust was to provide for his daughter's support and maintenance in the State psychiatric facility. Based upon the testator's knowledge of his daughter's disability, his intent to leave assets to her distributees, and the economic reality that paying the corpus to the State in 1978 would not leave any other assets from which the income beneficiary could benefit during her remaining years, the Bronx Surrogate held that the trust intent directed that the State's claim be rejected. The Court of Appeals upheld this decision.

The principles enunciated in Escher are those that underlie all third party Supplemental Needs Trust Funds. The desire to supplement the loved one's standard of living so that the vulnerable are not wholly dependent upon the benevolence of the law results in a third party's empowering the aged, blind and disabled. The government entitlement becomes a floor rather than a ceiling upon which they can attain a standard of living above the poverty level.

2. EPTL § 7-1.12: The Codification of Escher

In July, 1993, the New York State legislature enacted a statute to encourage third parties to establish Supplemental Needs Trust Funds for their disabled loved ones. EPTL § 7-1.12. This statute codified the principles announced in Matter of Escher, 52 N.Y. 2d 1006(1981).

Supplemental needs that the draftsperson may provide include transportation, vocational training, insurance coverage, computers, specially equipped vans, personal care givers, vacations, a home, and any luxury or need including health care not provided through government entitlements or private insurance.

This New York State legislation encourages third parties to establish trust funds to pay for items of need not covered by governmental programs. Drafting suggestions for conforming trusts are included. EPTL § 7-1.12(a)(5), (e). Among the drafting guidelines is language that clearly states the settlor's intent in establishing the trust fund. Further suggested language includes the following: "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." Id. at (e)(3). Clarification that "the beneficiary does not have the

power to assign, encumber, direct, distribute or authorize distributions from this trust" is also suggested. Id. at (e)(4). Despite giving this suggested language, the legislature explicitly provides that the statutory language is not required. Id. at (e)(1). **Sample Testamentary Third Party Supplemental Needs Trust included in Appendix.**

3. The following should be noted when drafting statutory third party snts:

a. EPTL 7-1.6 does not apply

New York law provides that a court having jurisdiction of a trust may direct that the principal be invaded for the benefit of an income beneficiary whose support or education is not sufficiently provided for. EPTL § 7-1.6. For trusts created prior to 1966, the income beneficiary must have an indefeasible interest in the principal or the remaindermen must all consent. EPTL § 7-1.6(a). For trusts created after 1966, the court may order such an invasion even without the remaindermen's consent if the court determines that the trust's original purpose cannot be accomplished without such invasion. This invasion may be made even if the income beneficiary is not entitled to any part of the principal, unless the trust fund explicitly limits the court's discretion. EPTL. § 7-1.6(b).

EPTL § 7-1.6 does not apply to SNTs established pursuant to EPTL § 7-1.12 to the extent that the beneficiary's government entitlements would be reduced or eliminated by application of 7-1.6. EPTL § 7-1.12(b)(2). Hence, no court will be empowered to order the invasion of the trust corpus to supplant government entitlements.

b. There is no payback upon death

These trust funds, established by third parties, are not subject to any claim or lien upon the death of the Medicaid recipient. N.Y. Soc. Serv. Law § 104(3).

c. Who May Establish the Third Party Trust?

Any person may establish a testamentary trust for the benefit of a disabled person. For inter-vivos trusts, the creator can be a person or entity other than the beneficiary's spouse, EPTL 7-1.12(a)(5)(iv), or a person with a legal obligation to support the beneficiary, id. at § 7-1.12(c)(1)(i). Family members or interested friends may provide for the disabled and then designate remaindermen to whom remaining trust assets will pass upon the death of the disabled beneficiary.

The above limitations on who may be the creator of a third party trust would appear to preclude parents from funding inter-vivos trusts for disabled infants. This limitation, however, specifically referencing spouses, would rather prevent a legally responsible relative from discarding extra funds into a nonpayback trust to potentially eliminate financial responsibility to the disabled individual. Thus, although parents are legally obligated to support children, it would appear that the prohibition against parents' funding an inter-vivos trust while the child is a minor would not apply to children who do not receive any government benefits, as the parents are legally obligated to support the disabled children for medical needs only while the children are under 18. In addition, children covered by a waivered Medicaid program in which the parents' assets and income are not considered when reviewing the child's eligibility for benefits also would be able to have parents establish these trusts, as such parents are absolved from any financial responsibility for the Medicaid services provided.

d. This Trust May Provide for a Termination Prior to the Death of the Beneficiary: In some instances, it is not clear that the disabled beneficiary will remain disabled or will receive government entitlements based upon need. The trust may provide for the termination prior to death if either of these situations occurs. **Suggested Language:**

The Trust may be partially terminated prior to the death of the beneficiary under the following circumstances:

1) BENEFICIARY is substantially gainfully employed for a continuous period of two years or otherwise loses eligibility for government entitlements and,

2) HIS/HER attending physician certifies in writing that the disability no longer limits him/her from being substantially gainfully employed and,

3) The Trustee, in his sole discretion, determines that the facts warrant early termination.

The above factors "1" and "2" shall be considered conditions precedent and the Trustee shall not partially terminate the Trust unless both conditions shall have been fulfilled. Nevertheless, the Trustee is not obligated to partially terminate the Trust if the conditions have been met; the Trustee is merely granted sole discretion in such case. The decision of the Trustee as to whether or not to terminate the Trust shall be final and binding upon BENEFICIARY.

If the Trustee chooses to exercise his discretion, said discretion shall be further limited as follows:

At the time the Trustee so elects, 10% of the then existing principal shall be distributed absolutely to the beneficiary. For each consecutive year of substantial gainful employment, an additional 10% of the original amount of principal may, at the Trustee's discretion, be distributed absolutely to the beneficiary. If there is a break in consecutive employment, this distribution test will be reinvoked and the requirements of subparagraphs 1 and 2 must be met anew. If there is no break in consecutive employment, in the last distribution year, the Trust shall terminate with the distribution of all accumulated income and principal to the beneficiary, as the purposes of the Trust will have been fulfilled.

e. Coordination with Self-Settled First Party Payback Trusts

If a parent establishes a third party trust with no payback to the State upon death, but the disabled child has a payback SNT, language may be included in the parent's trust directing that the trustee of the third party trust use trust assets to the extent that the payback trust is not available to provide the same goods and services.

4. Spousal Testamentary Trusts

OBRA 1993's rules for self-settled trusts apply only to inter-vivos trusts. 42 U.S.C. § 1396p(d)(2)(A). Hence spouses can establish testamentary trusts that provide for the surviving spouse's supplemental needs. The trust may allow the discretionary invasion of principal. The trust may direct that all of the income shall be provided to the surviving spouse in order to have the trust qualify for the marital exclusion and/or QTIP

status. The trust may even contain a trigger provision, preventing the payment of income or principal should the surviving spouse beneficiary become a nursing home resident. See EPTL 7-3.1(c), applicable only to inter vivos trusts. Upon the death of the beneficiary, there would be no estate recovery even if the beneficiary is a Medicaid recipient upon death.

PRACTICE TIP: As a trust does not satisfy the right of election, EPTL 5-1.1A, the surviving spouse may be forced to elect an outright distribution of assets if s/he is a Medicaid recipient upon the death of the "well" spouse. If a surviving spouse makes an election pursuant to EPTL 5-1.1-A, then that spouse shall be treated as having predeceased the testator for remaining probate assets. Id. at § 5-1.1-A(a)(4)(A). If the intent of the testator is to provide a trust with all of the estate assets so as to give the surviving spouse economic security with the testamentary trust, then the Will should provide explicitly that if the spouse exercises the right of election, then the trust shall be formed, and the remainder of the estate shall not be treated as if the surviving spouse had predeceased the testator. **SUGGESTED LANGUAGE TO AVOID HAVING A TESTAMENTARY TRUST DISSOLVED AND THE REMAINDER DISTRIBUTED AS IF THE SURVIVING SPOUSE HAD PREDECEASED THE TESTATOR: If my spouse should make an election pursuant to EPTL 5-1.1A, the trust created herein and administered pursuant to Paragraph FIFTH of this Last Will and Testament shall, after the distribution of the statutory share to my spouse, continue for the benefit of my spouse, and the election pursuant to EPTL 5-1.1A shall not result in the termination of such Trust as if my spouse has predeceased me, EPTL 5-1.1A(a)(4)(A) to the contrary notwithstanding.**

PRACTICE TIP: OBRA 1993 rules DO apply for inter-vivos trusts. Caution should be taken in using a revocable living trust to distribute assets if the intent is to provide a discretionary SNT for the surviving spouse, as it will not be established in the Last Will and Testament of the decedent.

5. Inter-vivos versus Testamentary Third Party Trusts:

Clients often call asking to establish an SNT for their disabled child. Should the Elder Law attorney recommend that a free standing trust be established, or should the client's customary estate plan (either a Last Will and Testament or a Revocable Living Trust) merely provide that distribution to the disabled child be paid over to the Trustee named in that instrument to hold as an ongoing SNT?

The easiest manner in which to create a third party SNT is either in a Last Will and Testament or as the remainder provision of a revocable trust which becomes irrevocable upon the death of the grantor. Free standing third party SNTs, however, are also useful:

1. When many family members wish to provide for the disabled relative, they may all execute wills which have the distribution for the disabled niece, granddaughter or daughter pour over into a free standing SNT funded with $100 upon its establishment.

2. When a parent wishes to transfer assets to the adult children, one of whom is disabled, the trustee of an inter vivos SNT with no payback may hold the share of the disabled son or daughter. The parent would not be the Trustee in this case, as the transfer is made for the purpose of divesting the parent of the asset for Medicaid purposes. PLEASE NOTE: This is NOT intended to be a "sole benefit trust" which would NOT subject the parent to a period of ineligibility for the parent's own Medicaid eligibility.

3. The parent of an adult disabled child wishes to know that s/he has set aside a certain amount of money for the disabled child, no matter what else might happen to the parent's assets. TIP: Now that the gift tax exclusion is $5,250,000, the need to include Crummey Powers in a trust to use annual gift tax exclusions is reduced for many clients. Families with nontaxable estates may wish to find SNTS that do not have Crummey powers, even if they must file gift tax returns.

4. Second to die life insurance is often used to fund a Supplemental Needs Trust for the benefit of the disabled child. Once again, the new estate/gift tax laws may encourage SNTS funded with annual gifts, even if there is no annual gift tax exclusion, because the families will not make taxable gifts during their lifetimes.

5. An SNT is named as the beneficiary of an IRA or pension plan.

B. "ESTABLISHING" SELF-SETTLED PAYBACK TRUSTS

1. Incapacitated Adult Beneficiary and Article 81:

The federal statute provides that the payback trust must be established by a parent, grandparent, legal guardian or through court order. 42 U.S.C. § 1396p(d)(4)(A). When an adult incapacitated individual's assets will fund a trust, Article 81 is often the forum utilized in which an incapacitated person's legal guardian will obtain authority to establish a trust. The Petition for Guardianship should include the application for a Supplemental Needs Trust. In most circumstances this application will be considered together with the application for the appointment of a Guardian.

Cognizant of the court's responsibility to monitor the use made of an incapacitated person's assets, the Article 81 courts will often require that the

Trustee/Guardian provide annual accountings to Court Examiners like any other Guardian. When the Guardian and Trustee are different individuals, the courts will often require that the Trustee provide an accounting to the Guardian, who will include this accounting in his/her report to the Court Examiner. Guardians serving as Trustees will execute and file a Guardian/Trustee bond, and those serving only as Trustees will file a Trustee bond unless they are financial institutions. See Matter of Morales, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.), which required a Guardian/Trustee to account annually and file a consent, designation and bond. **SAMPLE MORALES TRUST ANNEXED.**

2. Adult Beneficiary with Capacity:
a. Parent-Established Trust:

In cases in which a guardian is not needed and a parent is available, the parent can "establish" the trust fund**. The trust would read that it is being created by "A" as parent of "B", a person with a disability.** The employer ID number would read, however, that the individual with a disability's own assets are being placed into the trust fund for IRS purposes. The payback provision remains unchanged, as is the requirement that the State regulations be followed.

As there is no Article 81 Guardian, however, this trust should not require annual accountings to the court and the final accounting to be judicially settled as in the Morales trust. Accountings may be made available to the local social services district when recertification for Medicaid is made. In addition, the other regulatory requirements of notification to the social services district also must be followed, as " a social services district or the department may commence a proceeding under section 63 of the Executive Law against the trustee of a ... ("payback") trust if the district considers any acts,

omissions, or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations ... or contrary to the fiduciary obligations of the trustee." 18 NYCRR § 360-4.5(b)(5)(iv).

b. Special Proceeding to Establish a Payback Trust:

For competent adults without parents alive, a Special Proceeding may be utilized to seek a Court Order to establish the Trust. These may be brought by Petition with Order to Show Cause or Notice of Motion in Supreme Court, or by Citation in Surrogate's Court, usually with approval of the SNT by the government agency attached.

3. Termination Prior to Death

The federal and state statutes authorizing payback special needs trusts are silent as to what happens if the trust terminates prior to the death of the beneficiary, either due to his/her no longer being disabled or because he/she no longer wants a trust or because he/she has relocated to another state. In particular, as the statute required the payback to the State only upon the death of the beneficiary, did that mean that the trust could dissolve during the beneficiary's lifetime and disburse remaining funds to him/her without paying back the State?

In October, 2010, the Social Security Administration issued POMS SI 01120.199 that addresses these issues. The following are provisions that must be followed in order for the trust not to be considered an available resource:

1. The Trust may not be terminated prior to the death of the beneficiary unless the State is paid back for an amount up to the total Medicaid provided the beneficiary during his/her lifetime; AND

2. The beneficiary cannot direct that the trust be terminated; AND

3. If the trust is terminated, the beneficiary, rather than others such as relatives or friends of the beneficiary, must receive remaining trust assets. SI 01120.199(F)(1).

4. The same payment of expenses permitted upon the death of the beneficiary may be paid by the trustee upon the trust's termination prior to the death of the beneficiary, i.e., taxes due from the trust and administration expenses. SI 01120.199(F)(3).

ADVICE TO TRUSTEES:

Trusts that do not comply with this POMS provision OR with POMS SI 01120.200-203 will be given 90 days to cure the provision before being counted as an available resource so long as the trust had been considered excepted from consideration as a resource before application of the POMS. The 90 days begin upon notification to the Representative Payee or the SSI recipient. SI 01120.199(A).

4. Termination of Trust Upon Death of Beneficiary

The 2009 and 2010 POMS clarified certain outstanding issues concerning the disposition of trust assets upon the death of the trust beneficiary. Taxes due <u>from the trust</u> to the state or federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate such as accountings to the court, and completing and filing of documents may be paid prior to reimbursement to the State for Medicaid. SI 01120.203B(e)(a). Emphasis supplied. Reimbursement to the State must occur prior to payment of taxes due from the estate of the beneficiary. SI 01120.203B(3)(b). However, taxes arising from inclusion of the trust assets in the estate MAY be paid prior to reimbursement to the State. <u>Id</u>.

Funerals, debts owed to third parties, inheritance taxes due for remainder beneficiaries and payment to remainder beneficiaries must be paid after reimbursement to the State. Id. The Trust agreement may not limit reimbursement to a specific state or for Medicaid expenditures made only after the trust account was funded or established. SI 01120.203B(2)(g).

C. SOLE BENEFIT TRUSTS

When a Third Party's assets fund a trust for a person with a disability under the age of 65 or a trust for a child with a disability of any age so that the Third Party will receive Medicaid benefits immediately, that trust must be used for the SOLE BENEFIT of the person with a disability, as two generations, in essence, will be receiving benefits without any transfer penalty. 42 U.S.C. § 1396p(c)(2)(B)(iv); N.Y. Soc. Serv. Law § 366(5)(d)(3)(ii)(D); 18 NYCRR § 360-4.4(c)(2)(iii)(c)(iv).

Pursuant to CMS State Medicaid Manual §3257(B)(6) at 3-3-109.1(Nov. 1994) [CMSTransmittal 64], www.cms.hhs.gov, and New York Administrative Directive 96 ADM-8 at 7-8, a "sole benefit trust" must either provide a payout over the life expectancy of the disabled individual or a payback to the State upon the death of the beneficiary for Medicaid expended during his/her lifetime. It must be used SOLELY for the benefit of the disabled beneficiary during lifetime.

State laws requiring that a sole benefit trust, established with the assets of one person for the sole benefit of a person with a disability under the age of 65 in which both generations receive Medicaid, provide a payback to the State or be used on an actuarially sound basis for the beneficiary during his/her lifetime, consistent with CMS State Medicaid Manual §3257(B)(6) at 3-3-109.1(Nov. 1994) [HCFA Transmittal 64]

are more restrictive than the SSI POMS, which merely require that no one else during the lifetime of the beneficiary benefits from the trust. SI 01120.201F(2).

ADVICE TO TRUSTEE: If the trust was established by a Medicaid applicant for the benefit of another person with a disability under the age of 65, this is a sole benefit trust. The trust assets must be used only for the benefit of the beneficiary, and the use of the trust assets should be limited to items that directly are for the beneficiary and only the beneficiary.

III. ISSUES IN THE DRAFTING AND ADMINISTRATION OF SNTS

A. The Guardian/Trustee

In Matter of Morales, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.), the Kings County Supreme Court addressed the dual role of a court-appointed Guardian and Trustee. The court required a Guardian/Trustee to account annually pursuant to Mental Hygiene Law. The court required the Trustee to file a consent, designation and bond. The court even published a sample SNT that it would authorize, and which the State and City had approved. Indeed, but for the Medicaid and SSI statutes' requiring an SNT, the Morales trustee is a trustee in name only, serving in essence as an Article 81 guardian.

What happens when the Order and Judgment is silent as to the responsibilities of a trustee? In that case, the language of the trust will determine the scope of the trustee's authority, even if the trustee is acting in a manner not authorized for guardians – i.e., paying attorneys without a court order. See Matter of Hawwa A, 9 A.D. 3D 362 (App. Div. 2 Dept. 2004).

1. If the Trustee is also the Guardian for Property Management, then the Order and Judgment Appointing Guardian likely requires the trustee to act like his/her alter ego Guardian and include the finances in the initial and annual accounts.

2. If the Trustee is not the Guardian, however, and is, for example, a financial institution, the Order and Judgment should be examined to see whether the court intended that the trust assets be included in the initial and annual reports. If the Order and Judgment is silent, and if the Trust document sets forth the requirements for accountings, then that document will control.

3. The same will apply to Trustees' Commissions. Court-ordered SNTs often require that commissions be taken only after annual accountings have been examined, upon court order. Others authorize corporate trustees to take their commissions as they customarily do.

B. Use of Third Party Trusts May Affect Benefits:

Effective in July, 1993, EPTL 7-1.12 provided a statutory framework for third party trusts to give security to families planning for the economic security of their loved ones with disabilities. The assets and income in these trusts will not be considered available to supplant government entitlements. However, although the state has no remainder interest in these trusts, the use of these trust assets MAY affect eligibility for government entitlements based on need. Drafting language may be included to reduce discretion of trustee to provide income in cash rather than in kind and may also preclude the use of trust assets for food and shelter if beneficial in a particular case.

C. SNTS and MEDICAID: INCOME AND RESOURCES

1. Excess Income

A Medicaid recipient residing in a nursing facility will pay all income but $50/month to the facility to offset the cost of care. A Medicaid recipient residing in the community may retain

income of $800/month. Although generally cash income above the Medicaid allowable income must be "spent down" on medical needs, Special Needs Trusts may be funded monthly with the excess income and used to pay the nonmedical bills of the Medicaid recipient who receives Community Medicaid.

Income that cannot be irrevocably assigned into a Special Needs Trust, even if one is under the age of 65, will be counted as available income when the Medicaid applicant/recipient is budgeted for chronic care Medicaid. Wong v. Doar, 571 F. 3d 247 (2nd Cir. 2009). Income that can be irrevocably assigned into the SNT is NOT income of the Medicaid recipient and should not be considered available when computing a budget for chronic care Medicaid.

2. Distribution of Trust Income May Affect Medicaid

Although EPTL 7-1.12 shelters the assets of a conforming third party supplemental needs trust from being counted for purposes of government entitlements, the income provided by the trustee to the beneficiary or for the benefit of the beneficiary may result in a diminution of these benefits. Income distributed in cash to the Medicaid recipient will reduce the benefit dollar for dollar. In-kind disbursements made by the trustee for the benefit of the beneficiary are not countable for Medicaid purposes. 18 NYCRR 360-4.3(e).

D. SNTS and SSI ELIGIBILITY RULES: INCOME AND RESOURCES

SSI, 42 U.S.C. § 1381, is a federal program that provides a cash stipend to the aged, blind and disabled whose available resources and income do not exceed the guidelines of the program. An individual eligible for SSI automatically qualifies for Medicaid in New York State. The resource level for SSI is $2000 for a single individual and $3000 for a couple or family.

For 2013, the federal benefit level for SSI for an individual residing in his own household is $710/month. New York State provides an optional state supplement of

$87/month, bring the amount to $797/month. When computing the monthly SSI payment, the Social Security Administration considers other income received by the SSI recipient. Unearned income, such as that provided by a trust, given in cash to the SSI recipient, will be deducted from the SSI stipend. 20 C.F.R. § 416.1123. However, bills paid directly to the supplier of services other than food and shelter will not result in a reduction of the SSI benefit. 20 C.F.R. § 416.1103(g).

When a third party pays for an SSI recipient's food and shelter, that results in a reduction in the SSI payment of either the dollar amount paid for the food and shelter OR, in the presumed value rule, 1/3 of the SSI amount, whichever is LESS.

ADVICE TO TRUSTEE:

1. Payments made by a trustee to third parties or entities providing the beneficiary anything other than food and shelter for the beneficiary will NOT affect SSI.

2. As with Medicaid, income from the Trust paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar. See SI 01120.203B(1)(c).

3. Use of the Trust to pay for food and shelter will result in in-kind income to the beneficiary, reducing the SSI payment by up to 1/3 of the federal benefit amount. An SNT Trustee MAY provide food and shelter for the beneficiary, but must decide whether the consequent reduction in the SSI is beneficial to the beneficiary, in the trustee's discretion, depending upon the terms of the SNT.

4. Paying for restaurants is considered food rather than recreation by the Social Security Administration. POMS SI 01120.201I(1)(d). www.ssa.gov.

E. SNTS AND MEDICAID REGULATIONS:

1. New York State regulations require that the Trustee of a "Special Needs Payback " trust

a. notify the social services district of the creation or funding of the trust, id. at (iii)(a);

b. notify the social services district of the death of the beneficiary of the trust, id. at (iii)(b);

c. notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust whose corpus exceeds $100,000, i.e., 5% for trusts between $100,000 and $500,000; 10% for trusts between $500,000 and $1,000,000; and 15% for trusts over $1,000,000, id. at (iii)(c);

d. notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value; id. at (iii)(d);

e. provide the social services district with proof of bonding if the assets exceed $1,000,000, unless waived by a court of competent jurisdiction, and provide proof of funding if the trust assets are less than $1,000,000 if required by a court of competent jurisdiction. id. at (iii)(e);

2. In-kind income provided by a third party not legally obligated to support an individual receiving Medicaid does not result in countable income for Medicaid purposes. 18 NYCRR 360-4.3(e).

3. A social services district of the department may commence a proceeding under section 63 of the Executive Law against the trustee of the trust if the government considers any acts, omissions or failures of the trustee to be inconsistent with

the terms of the trust, contrary to applicable laws or regulations or contrary to the fiduciary obligations of the trustee. Id. at (iv).

4. Payments made from a trust created under a will TO the Medicaid recipient/beneficiary results in countable income in the month received. In-kind benefits received from the trust are not counted as available income or resources for purposes of determining Medicaid eligibility. 18 NYCRR 360-4.5(c).

ISSUES FOR THE TRUSTEE BASED ON THESE REGULATIONS

1. Based on the regulation, notification to the local Department of Social Services does not have to be given prior to the funding of the trust.

2. Trusts established by parents or grandparents and not subject to court oversight having assets of less than $1,000,000 do not have to have a bond in place.

3. Prior notification to the Department of Social Services in advance of transactions tending to deplete trust principal does not mean approval by the Department of Social Services.

4. What are transactions for less than fair market value? Gifts? Purchasing exempt assets that will be held outside of the trust?

5. Money paid from the trust for the benefit of the beneficiary does not result in countable income for Medicaid purposes for the beneficiary.

6. Money paid from the trust TO the beneficiary, whether it is a first party trust or a third party trust, results in countable income for Medicaid purposes.

F. SSI POMS

1. An SNT may be funded with accumulated SSI. A Representative Payee may transfer SSI benefits to an SNT or fund an existing SNT. GN 00602.075(A), so long as

these are not retroactive SSI benefits for a child under 18, as these must be held in dedicated accounts. GN 00603.025(B).

2. When the Representative Payee is funding an SNT, the Representative Payee must determine that the trust is in the best interest of the beneficiary, and that it will be used exclusively for him/her and that s/he is the sole beneficiary during lifetime. GN 00602.075c(1).

3. Income irrevocably assigned to the trust from an annuity or support payments made when the beneficiary was less than 65 and which continue after the age of 65 remain protected by the trust. SI 01120.200G(1))(b).

4. Disbursements that are not cash and which do not result in in-kind support and maintenance are not income. Examples given by the POMS include payments to third parties for education, therapy, medical services not covered by Medicaid, recreation, entertainment and phone bills. Payments made to third parties for items such as household goods that are not considered a resource do not result in income for the beneficiary in the month that they are paid for. SI 01120.200E(1)(c). See also SI 01120.201I(c).

5. Additions to trust principal made directly to the trust are not income to the beneficiary if such payments have been irrevocably assigned to the SNT. SI 01120.200G(1)(b).

6 Income that, by its own provisions, may not be irrevocably assigned to the SNT include monthly payments from Social Security, public assistance (TANF or AFDC), Veterans benefits, federal employee retirement payments, and ERISA private pensions. SI 01120.200G(1)(c).

7. Payments for credit card bills are not income if the credit card was used to pay for items other than food or shelter or countable assets. SI 01120.201I(1)(d).

8. Credit card bills paid by the trust for restaurants will result in in-kind support and maintenance, subject to a 1/3 reduction. Id.

9. If the trust assets are used to pay for gift cards and gift certificates, this will be considered unearned income in the month of receipt, even if the gift certificate is to a store that does not sell food or shelter items if the individual could sell/exchange the card for cash. SI 01120.201I(1)(e).

10. Household goods, i.e., items of personal property found in or near the home used on a regular basis, are not countable resources. 20 C.F.R. 416.1216(a)(1). These items include, but are not limited to furniture, appliances, electronic equipment such as personal computers and televisions, dishes, cooking equipment, etc. 20 C.F.R. 416.1216(a)(2).

11. Personal effects include items of personal property ordinarily worn or carried by the SSI recipient, such as personal jewelry, educational or recreational items such as books or musical instruments. 20 C.F.R. 416.1216(b)(2).

12. Items acquired or held for their value, such as collectibles, gems and jewelry that is not worn or owned due to family significance are countable resources. Id.

13. Credit cards issued to the beneficiary enable the trust to be used for the benefit of the beneficiary without the trustee's going shopping with the beneficiary for all items.

G. MUST THE TRUST BE USED FOR THE BENEFIT OF THE BENEFICIARY OR FOR THE SOLE BENEFIT OF THE BENEFICIARY

The permissible use of trust assets vis a vis the Medicaid agency often turns on whether the trust must be used for the benefit of the beneficiary, a broad view, or

a more restrictive use of assets, for the sole benefit of the beneficiary. The federal statute, 42 U.S.C. 1396p(d)(4)(A), and New York State statute, N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(A) both direct that a self-settled "payback" trust must be established for the benefit of the beneficiary NOT for the sole benefit of the beneficiary. In contrast, the federal statute, 42 U.S.C. 1396p(d)(4)(C)(iii) and New York State statute, N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(B), direct that the individual accounts in the pooled trusts must be maintained for the SOLE benefit of the beneficiary.

While New York State's ADM, 96 ADM-8, is consistent with the statute, the CMS interpretation of the federal statute, CMS TRANSMITTAL 64, State Medicaid Manual Section 3259.7**,** www.cms.hhs.gov and the SSI POMS, www.ssa.gov as well as litigation positions taken by local Departments of Social Services objecting to some expenditures because they are not for the SOLE benefit of the beneficiary are not consistent with the statute or our New York State ADM.

H. WHAT DISCRETION MAY THE TRUSTEE EXERCISE?

1. Court supervised trusts: Is court approval of expenditures dispositive as to actions of the Trustee?

Trusts often are established in Guardianship proceedings pursuant to Article 81 of the Mental Hygiene Law for an infant who will be incapacitated past age 18 or an incapacitated adult. In Matter of Morales, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.), the court addressed the dual role of a court-appointed Guardian and Trustee. The court required a Guardian/Trustee to account annually pursuant to Mental Hygiene Law. The court required the Trustee to file a consent, designation and bond. The court even published a sample SNT that it would authorize, and which the State and City had approved. Indeed, but for the Medicaid and

SSI statutes' requiring an SNT, the Morales trustee is a trustee in name only, serving in essence as an Article 81 guardian.

Following the reasoning of Morales and cognizant of the court's responsibility to monitor the use made of an incapacitated person's assets, the Article 81 courts will often require that the Trustee/Guardian provide annual accountings to Court Examiners like any Guardian. When the Guardian and Trustee are different individuals, the courts will often require that the Trustee provide an accounting to the Guardian, who will include this accounting in his/her report to the Court Examiner. Guardians serving as Trustees will execute and file a Guardian/Trustee bond, and those serving only as Trustees will file a Trustee bond unless they are financial institutions.

ADVICE TO TRUSTEE: Approval by the court for expenditures does not mean that the Department will not challenge the expenditures in examining annual accountings. However, reliance on a court order, particularly if notice had been given to the Department, should be cited as a defense to challenges to the Trustee's actions.

2. May the Trustee supplant and not supplement government entitlements?

May the trustee of an SNT utilize trust assets to provide goods and services that might otherwise be paid for by the government or which may reduce government benefits if the Trustee determines that such use of trust assets is beneficial to the beneficiary? In New York, a state statute originally enacted for third party trusts to protect their assets from being considered available resources by the government for government benefits, EPTL 7-1.12(b), provides construction standards to be applied to a conforming Supplemental Needs Trust Fund. There is a presumption that the creator of the trust intends that neither principal nor income will be used to pay for any expense that would otherwise be paid by a government entitlement, "notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care." Id. at (b)(1).

This limitation, however, should be read in conjunction with EPTL 7-1.6(b), which allows a court to order the use of trust principal for an income beneficiary who is likely to become a public ward. This statute had been utilized prior to the enactment of EPTL 7-1.12 by government officials to force the use of trust assets to supplant rather than supplement government entitlements. EPTL 7-1.12 explicitly exempts SNTs compliant with the statute from EPTL 7-1.6(b).

The limitation against supplanting government entitlements, then, should be enforced against the government but should not preclude the trustee from exercising discretion to provide needs that supplant government benefits but are beneficial to the beneficiary because they may be provided expeditiously or are of superior quality.

A trustee in an individual case may, thus, choose to expend moneys in a manner that could reduce SSI benefits, such as for food and shelter, in his/her own discretion, if the trustee determines that the benefit of purchasing food or shelter outweighs the cost to the beneficiary of a reduced SSI monthly stipend. The Trustee likewise may wish to hire caregivers who are not Medicaid workers due to their reliability thus supplanting a Medicaid benefit if a Trustee determines this use of trust assets to be beneficial to the beneficiary. The SNT should explicitly give this discretion to the trustee.

I. Effect of SNT's Home Ownership on SSI and Medicaid Benefits

A home owned by an SNT is not a countable resource for SSI or Medicaid purposes, even if the beneficiary does not reside in the home, as it is a trust asset. SI 01120.200F(1). If a third party, such as the SNT, pays for shelter costs of the beneficiary, that will result in in-kind support and maintenance that will reduce the monthly SSI benefit, up to 1/3 of the monthly SSI payment. Shelter costs include mortgage costs, including property insurance required by the mortgage holder, real property taxes,

heating fuel, gas, electricity, water, sewer and garbage removal. SI 00835.465D(1). See 20 C.F.R. 416.1133(c).

If the trust owns the home but does not pay for housing costs, there is no reduction in SSI monthly benefits. SI 01120.200F(2). However, the purchase of the home by the trust will be considered in-kind support and maintenance (1/3 reduction of SSI) in the month of purchase. SI 01120.200F(3). The use of trust assets to purchase a home will not reduce Medicaid benefits.

If the SNT purchases a home subject to a mortgage, and the monthly mortgage payments are made by the SNT, these monthly payments result in in-kind support and maintenance, providing Shelter expenses that reduce the SSI monthly benefit by 1/3 each month in which they are made. SI 01120.200F(3)(b). If the SNT pays for shelter or household operating expenses or household costs, this results in in-kind support and maintenance. SI 01120.200F(3)(c).

If the SNT pays for accommodations to the home to make it handicapped accessible or for renovations that increase the value of the home, this does not result in in-kind support and maintenance that results in a 1/3 reduction of the SSI monthly benefit. Id. Extra mortgage payments to reduce the principal owed and extra insurance coverage not required by the mortgagee are not household costs resulting in in-kind support and maintenance when paid by the SNT. SI 00835.465D(2),(3).

J. Allocation of Household Costs

New York has no statute that mandates that the family members contribute pro rata to the cost of a home. When parents and siblings are living in a home owned by an SNT for a disabled child, the trustee should seek a court order that directs what expenses, if any, are to be borne by the parents. Successful advocates often show that the services

rendered to the child for which the other household members are not being paid far outweigh rent that could be paid to the trust. If the trust beneficiary is an adult for whom no guardian has been appointed, objections made by the Department as to the lack of rent may also be countered by showing that the beneficiary could not live alone in the house without the family's support, even if Medicaid is paying for aides.

If the Department argues that the trust must be used for the sole benefit of the beneficiary, and that having family members live rent free is not a proper use of the trust, the Trustee should counter with the argument that the trust must merely be used for the benefit of the beneficiary and that having companionship around is in the best interest of the beneficiary and hence is a proper use of the trust.

ISSUE: Must the Trustee appointed pursuant to Article 81 follow RPAPL in the purchase or sale of real property, or is the Trustee to use his/her discretion and not seek court approval?

Trustees appointed pursuant to Article 81 should bring RPAPL 17 applications unless the court order or SNT specifically exempts that provision. When there is no court order establishing the trust and/or no ongoing court oversight, no RPAPL would have to be brought as long as the Trustee exercises due diligence in the purchase or sale of real property owned by the Trust.

K. Renovations to a Family Home Not Owned by the Trust: Who Pays?

May the trust be used to make accommodations to the family home to meet the needs of the disabled beneficiary if the trust does not own the home? If the Department of Social Services objects to the expenditures, demonstrate what percentage of the construction costs will inure to the benefit of the owners (usually not dollar for dollar)

and what the benefit to the beneficiary will be to have these renovations. If the modifications will increase the taxes, an application to a court may be made to have the trust pay the increase in the taxes. If the trust beneficiary does not pay rent to the owners, demonstrate how the renovations have benefited the beneficiary and what the cost of comparable housing would be. If a child would otherwise be in a facility, demonstrate the cost savings to the Department by having the home renovated.

L. CAR

If the trust purchases a car, having the trust own the car will greatly increase the cost of insurance. Having the trust own the car may also make the entire trust assets vulnerable if there were an accident and insurance coverage did not meet all of the damages for which the car owned by the trust is liable.

ADVICE TO TRUSTEE: Obtain agreement from the Department that the car will not be owned by the trust, but if the car is sold, that the proceeds will be paid to the trust and that if the beneficiary dies, then the car will be considered a trust asset for payback purposes.

ADVICE TO TRUSTEE: With respect to insurance and gasoline: obtain court authorization for the use of trust assets and any allocation between an infant and family members if the car is used for anyone but the child/beneficiary. Demonstrate the benefit to the child to have the car (comfort, expanded horizons, easier transportation than public transportation) and the time the parent or family member expends in meeting the child's obligations. If the family owns another car, demonstrate that the family would not have purchased this car absent the special needs of the child.

M. VACATIONS

The cost of a vacation generally will not reach the threshold for which prior notification to the Department is required. Nonetheless, the Department may object to "family vacations" , insisting that the trust should be used for the sole benefit of the beneficiary.

ADVICE TO TRUSTEE: Demonstrate that the proposed vacation is to a place suitable for the beneficiary. If the family members will be acting as de facto caregivers, note their importance to the beneficiary. Also note the emotional benefit to the beneficiary to have family members with him/her, and the likelihood that there would be no vacation if the trust could not pay for the nuclear family.

ADVICE TO TRUSTEE: In Matter of Marmol, 640 N.Y.S.2d 969 (Sup. Ct. N.Y. Co. 1996), the court analyzed requests for expenditures of an infant's funds in a Guardianship proceeding that did not contain an SNT. The court required that parental income and assets be revealed in order to determine whether an infant's funds should purchase a home. The court decided that necessities remained the responsibility of the parents, but that extraordinary needs due to the child's disability would be provided through the Guardianship funds.

N. CAREGIVERS NOT PAID BY MEDICAID

If Medicaid has approved only a certain number of hours of care, the trustee should be able to use the assets to supplement the number of hours of care. In cases where RNs are needed, it is often very difficult to obtain the RNs for the approved number of hours. Approval should be obtained for trusts with court oversight that will allow non Medicaid workers to be paid by the trust.

ADVICE TO TRUSTEE: Paying oneself as a caregiver without court approval or approval by the Department is a breach of fiduciary duty.

Obtain advice from an accountant as to withholding and/or whether or not the worker will be an independent contractor. Do not pay the worker in cash.

O. MAY GIFTS BE MADE FROM SNTS?

May the Trustee provide gifts for loved ones from the SNT? What about Christmas gifts for caregivers or other personnel? The regulations require prior Notice to DSS in advance of transactions for less than fair market value. This regulation appears to contemplate the use of trust assets to make gifts, or to purchase items not owned by the trust, such as a car.

P. MAY THE TRUST ASSETS BE USED TO SATISFY AN OBLIGATION OF SUPPORT OF THE BENEFICIARY TO MINOR CHILDREN? MUST IT? WHAT ABOUT DISCRETIONARY SPENDING FOR A MINOR CHILD OF THE BENEFICIARY? WHAT ABOUT PRE-EXISTING DEBTS?

In Matter of Hope Graham, Index No.: 14581-96 (Sup. Ct. Suff. Co.), the court denied an application by the Guardian/Trustee of an institutionalized parent who expressed a desire to have SNT funds utilized for her teenage daughter, a minor. The Trustee sought to apply a "Rule of Thirds", in which SNT proceeds would be spent 1/3 for her daughter, 1/3 for the beneficiary during a period of private pay in the nursing home, and 1/3 to be retained in the extant SNT. The Trustee asked the court to apply the doctrine of substitute judgment under N.Y. Ment. Hyg. L. 81.21 to the Incapacitated Person/SNT beneficiary. Petitioner argued that 81.21(a) and (b) set forth the statutory framework for the court's analysis as to whether or not the gift should be made. The Guardian/Trustee argued that the minor child was a dependent of the institutionalized parent/IP/SNT beneficiary. The IP constantly expressed a desire to provide for her daughter. The SNT was in the form of Morales.

The County opposed the application, arguing that the Petition violated the terms of the trust, which directed that it be used for the sole benefit of the beneficiary. The County asserted

that an SNT Trustee may never make gifts, notwithstanding the State's own regulations, as gifts would be violative of the terms of the SNT and EPTL 7-1.12. The County argued that even though the beneficiary would be a private paying individual during the ineligibility period, that the County must protect the County's remainder interest. The County further asserted that the Trustee/Guardian should not listen to an Incapacitated Person who is prohibited from directing the use of trust assets pursuant to EPTL 7-1.12. The County asked the court not only to deny the application for the gift but also to deny legal fees fore the application.

The court agreed with the County and held that the terms of the trust itself forbade the use of funds in this manner. The judge denied attorney's fees sought for the application, and the trustee was not able to use the trust assets for the daughter of the incapacitated beneficiary as was the wish of the IP.

May the trustee of an SNT use trust assets of the disabled parent to pay for college costs of the son or daughter? What about support to an ex-spouse pursuant to a decree issued before the trust was funded and before a lawsuit was settled? What about child support that is in arrears and that was ordered prior to a lawsuit recovery that now funds the trust? As a self-settled trust, are prior debts of the beneficiary subject to the same rules as any self-settled trust? May/must the Trustee pay debts of the beneficiary that existed prior to the funding of the Trust?

IV. SNTS AND OTHER GOVERNMENT ENTITLEMENTS

A. SOCIAL SECURITY DISABILITY

Social Security provides a monthly income to workers who have paid into the Social Security program through the FICA tax. The monthly benefit depends upon one's earnings. Individuals who have worked and paid into the Social Security Trust Fund through the Federal Insurance Contributions Act (FICA) tax, 42 U.S.C. § 409, may

acquire insured status by having paid sufficiently into the Social Security system for the requisite number of quarters per year prior to becoming disabled. 20 CFR § 404.132. After receiving Social Security Disability for 2 years, one qualifies for Medicare.

To receive Social Security Disability benefits, one must be "currently insured". Workers disabled after the age of 31 must have 20 quarters of coverage within the 10 year period immediately preceding the onset of their disability. 20 CFR § 404.130(d). Those disabled under the age of 31 require fewer quarters of coverage but never fewer than 6. 20 CFR § 404.130(c). Individuals over the age of 31 who become disabled after they have left work and who do not have 20 quarters of coverage within the 10 years prior to becoming disabled will not be "currently insured" and will not be able to receive Social Security Disability.

N.B.:

1. Social Security Disability pays regardless of one's resources and unearned income. It is not "means-tested", and a lawsuit recovery will not affect ongoing eligibility for Social Security Disability benefits. If one receives only SSD, an SNT is not necessary to preserve eligibility for benefits.

2. When one receives SSD for 2 years, one also receives Medicare.

3. An SNT may be used to shelter SSD income above $761/month for community Medicaid in New York. However, for chronic care budgeting, the Social Security Disability income will be NAMI, paid to offset the cost of care.

4. There is no lien against a lawsuit recovery for SSD that the plaintiff has received, and payback to the government for SSD upon the death of the beneficiary from remaining trust assets.

B. ADULT CHILD BENEFITS

If a child becomes disabled prior to age 22 and if his/her parent is deceased, disabled, or retired, the child will be eligible for Adult Disabled child benefits based upon the parent's earnings. After two (2) years, the adult child will receive Medicare. The Disabled Adult Child may not be married. These are not means tested.

C. MEDICARE

Individuals 65 years of age or older who are entitled to receive Social Security, widows or Railroad Retirement benefits are eligible for Medicare, 42 C.F.R. § 406.5, as are disabled individuals who have received Social Security Disability benefits for 25 months, 42 C.F.R. § 406.12 or those with Adult Disabled child benefits. Those with end-stage renal disease who require dialysis or a kidney transplant also are eligible for Medicare, regardless of age, 42 C.F.R. § 406.13, as well as those with ALS.

SNTs are often used to shelter assets for those who are dually eligible for both Medicare and Medicaid.

D. OFFICE OF MENTAL HEALTH BENEFITS

In New York, those under the age of 21 and over the age of 65 in a State psychiatric hospital eligible for Medicaid will have their stays paid for by Medicaid. Those between the ages of 21 and 65 unable to pay will have their stays paid for by the State of New York. This is a means-tested program.

New York State law, EPTL 7-1.12 specifically directs that SNTs apply to all New York State entitlements for persons with disabilities, not just Medicaid. Hence, an SNT is available to preserve assets for those who enter a state facility while continuing ongoing eligibility for OMH State benefits.

E. SECTION 8 HOUSING

The Department of Housing and Urban Development provides a rental subsidy for disabled individuals. 24 CFR 982.505. The amount of subsidy is calculated by determining the family's contribution based on income and family size, taking into consideration the actual cost of the housing. The family share is calculated by subtracting the amount of housing assistance payment from the gross rent. 24 CFR 982.515. Countable income for Section 8 housing subsidies include periodic payments, income from assets based on current passbook savings rate, as well as assets gifted away 2 years prior to the application or recertification for Section 8 housing. 24 CFR 5609(b).

Certain exclusions from income apply. These include gifts received, inheritances, insurance payments, and settlements for personal or property losses. 24 CFR 5.609(c). Thus, the receipt of a lawsuit settlement itself is not income calculated to reduce Section 8 housing subsidy. The interest income from that recovery, however, is not explicitly excluded. In addition, the in-kind income from an SNT may be countable income for Section 8 purposes, even though payments excluded by other federal laws are excluded as countable income for Section 8 housing subsidies, as the Medicaid and SSI programs are not listed in the regulation. Id. Sporadic distribution of assets rather than fixed distributions would insulate the income from being countable for Section 8 purposes.

If a person with a disability gifts assets to family members, the income that the gifted money would have generated will be imputed to the individual, reducing the Section 8 subsidy, for 2 years. The regulations do not address whether the transfer of assets into a Supplemental Needs Trust will result in a reduction of the Section 8 subsidy and seem to vary from local district to local district.

F. FOOD STAMPS

Food Stamps are based upon assets tied to the SSI resource level and income that may exceed the poverty level by 150%. Pursuant to New York State law, if one transfers assets into an SNT, the transfer will not affect eligibility for Food Stamps, and the assets in the trust, as well as income accruing in the trust, if any, are not countable resources for Food Stamps. 01 INF-8. Federal law requires that the Trust be established by Court Order but New York State authorizes non-Court Ordered Trusts. Disbursements from the trust made directly to the trust beneficiary for normal household living expenses, such as rent or mortgage, or food eaten at home are counted as income. Id. A disbursement to a third party who has provided goods and services other than shelter, medical costs or childcare will not result in countable income for the Food Stamps Household.

G. HEAP

An SNT is not considered an available resource when determining eligibility for emergency HEAP. 01 INF-8. Income spent for a specific purpose is exempted from being considered countable income for HEAP unless it is used to pay for everyday living expenses, which are considered available income for eligibility for HEAP. Id.

XI CONCLUSION

EPTL 7-1.12 and OBRA 93 are now 20 years old. These statutes have helped countless individuals with disabilities preserve their benefits while retaining the benefit of funds either left to them via a third party trust or which they fund themselves. Understanding the interrelationship between the entitlement programs and the trusts helps the attorney draft documents to meet the client's needs.

Morales trust
TRUST AGREEMENT

This TRUST AGREEMENT made this ____ day of _____, 2013, by and between GUARD, as Guardian of the Property of AIP, and GUARD and CO-TRUSTEE, as Co-Trustees, is established pursuant to an Order of the Supreme Court, State of New York, Bronx County. The Guardian and Co-Trustee, GUARD, currently resides at. Her telephone number is . The Co-Trustee, CO-TRUSTEE, maintains offices at

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the AIP Supplemental Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is AIP. The purpose of the Trust is that the Trust's assets be used to supplement, 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. The Trust is intended to conform with New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law §366, and 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C. § 1382b(e).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked without Court approval.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Co-Trustees' discretion, the payment or application of the trust principal to or for the benefit of AIP, or any beneficiary for any reason whatsoever.

USE OF TRUST INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Co-Trustees shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Co-Trustees deems advisable in her sole and absolute discretion subject to the limitations set forth below. The Co-Trustees shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Co-Trustees shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Co-Trustees, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving, unless the Co-Trustees, in their sole and absolute discretion determines that such use of trust assets is beneficial to the beneficiary..

2.3 Power to Execute or Assign Distributions: The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food, and Shelter: Notwithstanding the above provisions, the Co-Trustees may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Co-Trustees determine that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best

interests, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 Nullification of § 2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Co-Trustees actually exercise this discretion, the preceding paragraph (2.4) shall be null and void and the Co-Trustees' authority to make these distributions shall terminate and the Co-Trustees' authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Co-Trustees' consent, any person may, at any time, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Co-Trustees shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this trust.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY. The Co-Trustees shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust.

3.1 Reimbursement to the State: The New York State Department of Health, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to AIP during the lifetime of the beneficiary, as consistent with Federal and State Law. If AIP received Medicaid in more than one State, then the amount distributed to each State shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary.

3.2 Distribution after Reimbursement to State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the Beneficiary.

CO-TRUSTEES

4.0 Co-Trustees: GUARD and CO-TRUSTEE are appointed Co-Trustees of this Trust.

4.1 Consent of Co-Trustees: The Co-Trustees shall file with the Clerk of the court, Bronx County, a "Consent to Act" as Co-Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The Co-Trustees shall be required to execute and file a bond and comply with all applicable law, as determined by the Supreme Court, Bronx County.

4.3 Resignation: A Co-Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, --County; (ii) the Guardian of the Beneficiary, if any; (iii) the Successor Trustee; (iv) the Beneficiary; (v) the surety; and (vi) the LOCAL DEPARTMENT OF SOCIAL SERVICES. The Trustee's resignation is subject to approval of the Supreme Court, ---County.

4.4 Discharge and Final Accounting of Co-Trustees: No Co-Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and in the manner required by §81.33 of the Mental Hygiene Law, and obtaining judicial approval of same. The Final Accounting shall be delivered to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.5 Annual Accounting: The Co-Trustees shall file during the month of May in the Office of the Clerk of the County of---, an annual report in the form and manner required by §81.31 of the Mental Hygiene Law, and such annual accountings shall be examined in the manner

required by §81.32 of the Mental Hygiene Law. Such annual accounting shall also be sent to the LOCAL DEPARTMENT OF SOCIAL SERVICES and, TO THE LOCAL Social Security Administration OFFICE, If the Co-Trustees do not receive written objections to the annual accounting within 90 days of its service upon DSS, such accounting shall be deemed approved by the DSS.

4.6 Continuing Jurisdiction: The Supreme Court, ---County, shall have continuing jurisdiction over the interpretation, administration and operation of this Trust, and all other related matters.

4.7 Powers of Co-Trustees: In addition to any powers which may be conferred upon the Co-Trustees under the law of the State of New York in effect during the life of this Trust, the Co-Trustees shall have all those discretionary powers mentioned in EPTL §11.1.1 et. seq., or any successor statute or statutes governing the discretion of a Co-Trustees, so as to confer upon the Co-Trustees the broadest possible powers available for the management of the Trust assets. In the event that the Co-Trustees wish to exercise powers beyond the express and implied powers of EPTL Article 11, the Co-Trustees therefor shall seek and must obtain judicial approval.

4.8 Appointment of a Successor Trustee: Appointment of a successor Trustee not named in this Trust shall be upon application to the Supreme Court, ---County, with Notice to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.9 Commissions of Co-Trustees: The Co-Trustees shall be entitled to commissions pursuant to SCPA 2309 upon the review of the annual accounting each year.

MISCELLANEOUS PROVISIONS

5.0 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.1 Notifications to Social Services District: The Co-Trustees shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the trust, the death of the beneficiary, and in the case of trusts exceeding $100,000, in advance of transactions that tend to substantially deplete the trust principal (as defined in that section), and in advance of transactions for less than fair market value. For all required notification and each time court approval is sought for any matter hereunder, the Co-Trustees shall give written notice to the Department of Social Services at least 30 days in advance of required notification and requests for court approval.

5.2 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.3 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.4 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.5 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Co-Trustee, and upon any Successor Trustee.

TRUST AGREEMENT
PARENTAL TRUST IN MORALES FORMAT
PAYBACK BUT NO COURT ORDER: ADULT BENEFICIARY

This TRUST AGREEMENT made this ___ day of _____, 2013, is established by and **between _____, as Parent of NAME, as Grantor *[EITHER PARENT HAS PART OWNERSHIP OF FUNDS OR POA TO AUTHORIZE FUNDING]* and _____, as Trustee**. The Grantor currently resides at _____. The Trustee currently resides at _____. The Beneficiary currently resides at _____.

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the NAME Supplemental Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is NAME. The purpose of the Trust is that the Trust's assets be used to supplement, 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. The Trust is intended to conform with New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law § 366, 42 U.S.C. § 1396p(d)(4)(A), and 42 U.S.C. § 1382b(e).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Trustee's discretion, the payment or application of the trust principal to or for the benefit of NAME, or any beneficiary for any reason whatsoever.

USE OF TRUST INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in their sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for

which the beneficiary may be eligible or which the beneficiary may be receiving, unless the Trustee, in his sole and absolute discretion, shall determine that such use of trust assets is beneficial to the beneficiary.

2.3 Power to Execute or Assign Distributions: The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food and Shelter: Notwithstanding the above provisions, the Trustee may make distributions to meet the Beneficiary's need for food, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance, if the Trustee determines that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interest, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 Nullification of § 2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Trustee's consent, any person may, at any time, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this Trust.

2.7 Employment of Professionals and Other Caregivers: The Trustee shall have discretion, if necessary, to use income and/or principal from the Trust to hire professionals to assist BENEFICIARY. It is contemplated that the class of professionals and other caregivers that may be needed to assist BENEFICIARY will be social workers, custodians, legal counsel, aides, housekeepers, accounting professionals, feeders, therapists and any medical professionals or personnel who would not otherwise accept or be paid for fully by government entitlements, vocational and rehabilitation workers, and investment counsel.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death of Beneficiary: The Trust shall terminate upon the death of NAME and the Trustee shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust.

3.1 Reimbursement to the State: The New York State Department of Health, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to NAME during the lifetime of the Beneficiary, as consistent with Federal and State Law. If NAME received Medicaid in more than one state, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary.

3.2 Distribution After Reimbursement to the State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the Beneficiary.

TRUSTEE

4.0 Trustee: _____ shall serve as Trustee of this Trust. _____ is appointed Successor Trustee.

4.1 Bond: The Trustee shall be required to execute and file a bond at such time as the corpus of the Trust exceeds $1,000,000.

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; (ii) the Guardian of the Beneficiary, if any; (iii) and any Successor Trustee, and (iv) the local Department of Social Services.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing of a Final Accounting and delivering same to the surety and to the Beneficiary and, to the local Department of Social Services.

4.4 Annual Accounting: The Trustee shall file during the month of May with the local Department of Social Services, with the Beneficiary, and with the local Social Security Administration Office, an annual accounting of all expenditures made and income earned herein.

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee shall have all those discretionary powers mentioned in EPTL §11.1.1 et. seq., or any successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving hereunder may name a Successor Trustee.

4.7 Compensation of Trustee: A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

5.0 MISCELLANEOUS PROVISIONS

5.1 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.2 Notifications to Social Services District: The Trustee shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the trust, the death of the beneficiary in advance of transactions for less than fair market value, and in the case of trusts exceeding $100,000, in advance of transactions that tend to substantially deplete the trust principal (as defined in that section).

5.3 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.4 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.5 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.6 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Trustee, and upon any Successor Trustee.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year of the first above written.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ---

----------X

In the Matter of the Application of

PETITION TO CREATE A SPECIAL NEEDS TRUST

To Create a Special Needs Trust
Pursuant to NY EPTL § 7-1.12 and
Soc. Serv. Law §366 (2)(b)(2)(iii)(A)

Index No.

----------X

TO THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF --- :

The Petition of --- respectfully alleges:

PETITIONER

FIRST: --- resides at---

SECOND: Petitioner was born on ---and is currently --- years old.

DISABILITY

THIRD: Petitioner suffers from ---and is a disabled person pursuant to the Social Security Act. She is unable to perform substantial gainful activity. She receives Supplemental Security Income as a person with a disability. Social Security notice annexed hereto as Exhibit A.

FOURTH: Although Petitioner has a physical disability, she has no cognitive impairments.

GOVERNMENT BENEFITS

FIFTH: Petitioner receives SSI, Medicaid and Food Stamps.

NEED FOR A SUPPLEMENTAL NEEDS TRUST IN ORDER TO MAINTAIN ELIGIBILITY FOR GOVERNMENT BENEFITS BASED ON NEED

SIXTH: Petitioner is a legatee of the Trust created by her father, ---now deceased. The Trust assets consist of --- FAMILY TRUST annexed hereto as Exhibit B.

SEVENTH: Petitioner seeks this Court's authority to establish a Supplemental Needs Trust that complies with New York Law and Federal Law, 42 U.S.C. §1396p(d)(4)(A); N.Y. Soc. Serv. Law §366 (2)(b)(2)(iii)(A) in order to maintain eligibility for benefits based on need. As this trust must be established by a parent, grandparent, guardian, or a Court, Petitioner seeks this Court's order to establish the trust. *See* id. She has no parent or grandparent alive and has no need of a Legal Guardian.

EIGHTH: The proposed Supplemental Needs Trust contains a "payback" provision by which Medicaid will be reimbursed, upon the death of the beneficiary, for medical services provided to the beneficiary during her lifetime. There will be annual accountings to the --- County Department of Social Services. A copy of the proposed Special Needs Trust is annexed hereto as Exhibit C.

PROPOSED TRUSTEE

NINTH: Petitioner nominates ---as Co-Trustees of the Special Needs Trust

TENTH: ---is a college graduate employed as---. ---is a college graduate employed as---. They are the Co-Executors of the Estate of their father,---.

REQUEST THAT A BOND BE DISPENSED WITH

ELEVENTH: Petitioner requests that a Trustee Bond be dispensed with, as the trust corpus is less than $1,000,000.00. New York State Law requires bonding only in Trusts with a Corpus that exceeds $1,000,000.00. 18 N.Y.C.R.R. 360-4.5(b).

PERSONS ENTITLED TO NOTICE

TWELFTH: The following persons are entitled to notice in this proceeding. Their names, telephone numbers, and their addresses are as follows:

THIRTEENTH: That no request for this relief has previously been made to this or any court of competent jurisdiction.

WHEREFORE, Petitioner prays:

1. That this Court establish the Special Needs Trust annexed to this Petition;
2. That this Court dispense with the filing of a bond;
3. That the Petitioner have such other, further or different relief in the premises as may be just.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

In the Matter of the Application of

ARTICLE 81
PETITION TO APPOINT GUARDIAN and asking for Expenditures AND CREATION OF SNT

For the Appointment of a Guardian for Personal Needs and Property Management of

Index No.

An Alleged Incapacitated Person

TO THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

The Petition of --- respectfully alleges:

PETITIONER

FIRST: --- resides at

SECOND: --- is the mother of ---.

ALLEGED INCAPACITATED PERSON

THIRD: --- was born on and is 8 years of age. She lives with the Petitioner at

FOURTH: --- suffers from a birth injury which manifests itself in physical, cognitive and emotional impairments. She has seizure disorder, cannot sit upright or walk, and has problems with digestion of food. She requires assistance with all activities of daily living. As she cannot participate in these proceedings, the Petitioner asks that her presence at any proceeding be dispensed with. She attends school at UCP. IEP annexed hereto as Exhibit A.

POWERS SOUGHT

EIGHTH: Petitioner seeks the following Property Management Powers pursuant to § 81.21(a):

NINTH: Petitioner seeks the following Personal Needs powers pursuant to N.Y. Mental Hygiene Law § 81.22(a).

PROPOSED EXPENDITURES

NINETEENTH: Petitioner seeks to make the following expenditures on behalf of --- to enhance her life:

A. Vehicle – An accommodated van or SUV is needed to transport --- to school, physicians' appointments, and activities. Given ---'S restrictions and allowing for future growth,

B. Insurance, gas, and maintenance for vehicle is needed.

C. Monthly stipend of $2,500.00 per month to --- as the primary caregiver of ---. Because of the unpredictability and frequency of ---'S seizures and the general frailty of her

health, --- has found it increasingly difficult to maintain stead employment. She works for a window distributor but is often absent due to --- health needs

--- must constantly monitor --- because she has seizures at least 2-3 times per week. She then must pick her up from school and thus cannot maintain steady employment. --- is completing her Associate's Degree in Business Administration. Every day, --- performs all activities of daily living for ---, due top her special needs. She must bathe her, prepare her meals and snacks and feed her, dress her, toilet her and perform all activities of daily living. She may never be left alone. If these services were not provided by ---, the cost to --- would greatly exceed $2,500.00 per month. Personal Statement on ---'S care annexed hereto as Exhibit D.

D. Vacations to visit family and other destinations suitable for ---, including travel to the therapies, set forth herein below. $5,000.00 per year.

E. Oxygen Treatment in hyperbaric chamber. This therapy is not covered by Medicaid, but is a valuable and necessary therapy for --- as it stimulates activity in the brain. $125/oxygen session, one or two sessions per day, five times per week equals 20-40 sessions, $2,500.00 to $5,000.00, plus $150.00 to consult with MD.

F. Three-week annual session at Therapy, Inc.'s for --- to undergo their intensive therapy program. The program consists of innovative physical and occupational therapy, along with generating plans of care and a home exercise program.

G. HIPPO Therapy (physical therapy through horses) and equestrian lessons.

H. Aqua Therapy and swimming lessons.

I. Adaptive Equipment such as a gait trainer, adaptive stroller, tricycle, seat cushions, corner sitter, bed, wheelchair, recreational equipment.

J. Health insurance for --- who has no coverage of her own; ---'S well-being is dependent on her mother.

Estimates annexed hereto as Exhibit E.

PAYBACK SNT WITHIN INFANT COMPROMISE ORDER

This TRUST AGREEMENT made this_____ day of _____, 2013, by and between ---, as Parent of ---, as Grantor, pursuant to an Order of the Supreme Court, State of New York, ---County, NAME OF CASE., Index No., dated _____, and between _____BANK, as Trustee. The beneficiary, ____, currently resides at ---. Trustee _____BANK currently maintains offices at ---

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the ____ SPECIAL NEEDS TRUST.

1.1 Purpose of Trust: The Beneficiary of the Trust is ---. The purpose of the Trust is that the Trust's assets be used to supplement, 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. The Trust is intended to conform with New York EPTL §7-1.12, New York Soc. Serv. Law §366, 42 U.S.C. §1396p(d)(4)(A) and 42 U.S.C. §1382b(e).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Trustees' discretion, the payment or application of the trust principal to or for the benefit of ---, or any beneficiary for any reason whatsoever.

USE OF INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the beneficiary, and the Trustee shall collect income and ***shall apply for the benefit of the beneficiary, in-kind, so much of the income and principal as set forth in the annexed ICO or as the Trustee deems advisable and in the best interests of the beneficiary in its sole and absolute discretion for the supplemental needs of the beneficiarysubject to the limitations set forth below.*** The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustees shall consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible. The Trustees, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the beneficiary.

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving.

2.3 Power to Execute or Assign Distributions: The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food, and Shelter: Notwithstanding the above provisions, the Trustees may make distributions to meet the beneficiary's need for food, shelter, health care, or other personal needs, even if those distributions will impair or diminish the beneficiary's receipt or eligibility for government benefits or assistance only if the Trustees determines that the distributions will better meet the beneficiary's needs, and it is in the beneficiary's best interests, notwithstanding the consequent effect on the beneficiary's eligibility for, or receipt of benefits. ***Any expenditure in excess of $10,000 shall be subject to the approval of the Supreme Court, ___ County which authorized this Trust or the court, if any, having jurisdiction over the legal guardian of the beneficiary. [N.B. Some courts may set this standard; others give total discretion]***

2.5 Nullification of § 2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the beneficiary's entitlement program benefits, regardless of whether the Trustees actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustees authority to make these distributions shall terminate and the Trustees authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Trustees consent, any person may, at any time, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Trustees shall execute documents necessary to accept additional property and indicate such additions on an amended Schedule A of this trust.

2.7: Purchase of annuity or life insurance policies: The Trustees shall not purchase an annuity or life insurance policies with trust principal or income unless the applicable instrument names the trust as the annuitant of the annuity(ies) and names the trust as the beneficiary of any such annuity(ies) and life insurance policy(ies).

2.8 Purchase of a Structured Settlement: The Trustees shall not purchase structured settlement with trust principal or income unless the applicable instrument names the trust as the payment recipient, and names the trust as the beneficiary of any such structured settlement.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of beneficiary and the Trustees shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust.

3.1 Reimbursement to the State: The New York State Department of Social Services, or other appropriate Medicaid entity within New York State, shall be reimbursed for the total Medical Assistance provided to beneficiary during the lifetime of the beneficiary, as consistent with Federal and State Law, **less $40,000 paid in satisfaction of the lien imposed against the lawsuit ____..** If the beneficiary received Medicaid in more than one State, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the beneficiary.

3.2 Distribution after Reimbursement to State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the beneficiary.

TRUSTEE

4.0 Trustees: ____BANK is appointed Trustee of this Trust

4.1 Consent of Trustee: The Trustee shall file with the Clerk of the Supreme Court, ____County, a "Consent to Act" as Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The filing and execution of a bond is hereby dispensed with so long as ---BANK is serving as Trustee.

4.3 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, ---County; (ii) the Guardian of the beneficiary, if any; (iii) the beneficiary; (iv) the Successor Trustee; (v) the local Department of Social Services; and (vi) the court, if any, having jurisdiction over the legal Guardian, if any, of the beneficiary. The resignation is subject to the approval of the Supreme Court, ---County or the court if any having jurisdiction over the legal guardian of the beneficiary..

4.4 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and manner required by §1719 of the New York State Surrogate's Court Procedure Act with the local Department of Social Services.

4.5 Annual Accounting: ____BANK as Trustee shall file an initial accounting and annual accountings during the month of May for the preceding year of all money or other property belonging to ____which has funded the Trust, in the form and manner required by §1719 of the New York State Surrogate's Court Procedure Act, with the local Department of Social Services and with the Social Security Administration ***and with_____who is appointed Referee/Court Examiner to review the Annual Accounting.***

4.6 Continuing Jurisdiction: The Supreme Court, ---County, or the court, if any, having jurisdiction over the legal Guardian of the beneficiary, shall have continuing jurisdiction over the

performance of the duties of Trustees, the interpretation, administration and operation of this Trust, the appointment of a successor Trustees and all other related matters.

4.7 Powers of Trustees: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustees shall have all those discretionary powers mentioned in EPTL §11.1 *et. seq*., of any successor statute or statutes governing the discretion of a Trustee so as to confer upon the Trustees the broadest possible powers available for the management of the Trust assets. Purchase of an interest in real property shall be upon application to a court of competent jurisdiction pursuant to RPAPL Section 17. In the event that the Trustees wish to exercise powers beyond the terms of this Trust Agreement, the Trustees shall seek and must obtain judicial approval therefor. The Trustees shall be held to a standard of reasonable care, diligence, and prudence.

4.8 Appointment of a Successor Trustee: Appointment of a successor Trustee not named in this Trust shall be upon application to the Court with Notice to the local Department of Social Services. In the event the corporate Trustee, ____BANK, is unable to serve or, having served, is no longer able to serve, then the Court shall appoint a corporate trustee licensed to do business in the State of New York as successor trustee upon notice to all interested parties. The corporate - Trustee shall continue to serve until a successor corporate Co-Trustee or independent Co-Trustee is appointed and accepts such appointment and is approved by the Court to which application shall be promptly made.

4.9 Commission of Trustees: ____BANK as Trustee shall be entitled to commissions as set forth in its published rates in effect from time to time without further Order of the court.

MISCELLANEOUS PROVISIONS

5.0 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.1 Notifications to Social Services District: The Trustees shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the trust, proof of bond, if required, the death of the beneficiary, and in the case of trusts exceeding $100,000, in advance of transactions that substantially deplete the trust principal (as defined in that section), and in advance of transactions for less than fair market value. For all required notification and each time court approval is sought for any matter hereunder, the trustee shall give written notice to the Department of Social Services at least 30 days in advance of required notification and requests for court approval.

5.2 Notification to State Department of Social Services: Notification shall be given to the Commissioner of the New York State Department of Social Services of the funding of the Trust Fund and of the death of the beneficiary.

5.3 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.4 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.5 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.6 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Trustees, and upon any Successor Trustees.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year of the first above written.

Dated: GRANTOR

_____

____, as Parent of ____

Dated: TRUSTEE:

_____

SOLE BENEFIT TRUST

This TRUST AGREEMENT made this ___ day of _____, 2013, is established by and between GRANTOR, as Grantor and TRUSTEE, as Trustee. The Grantor currently resides at _____. The Trustee currently resides at _____ The Beneficiary, BENEFICIARY, currently resides in _____.

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the BENEFICIARY Supplemental Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is BENEFICIARY. The purpose of the Trust is that the Trust's assets be used to supplement, 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. The Trust is intended to conform with New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law §366, and 42 U.S.C. § 1396p(c)(2)(B)(iv).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Trustee's discretion, the payment or application of the trust principal to or for the benefit of BENEFICIARY, or any beneficiary for any reason whatsoever.

USE OF TRUST INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in his sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust**. Notwithstanding the discretion given to the Trustee, the Trustee shall each year expend ____% of the Trust assets for the benefit of the Beneficiary such that all disbursements shall be actuarially sound based upon a ____year life expectancy of the Beneficiary who is ___**

years of age at the date of the establishment of this Trust.

2.1 Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving unless, in the sole and absolute discretion of the trustee, such use of income and/or principal is beneficial to the beneficiary.

2.3 The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Notwithstanding the above provisions, the Trustee may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Trustee determines that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interests, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Trustee's consent, any person may, at any time, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this trust.

2.7 Use of Trust Income and Principal for Comforts, Luxuries, Necessities and Service Providers: It is the intent of the grantor that the trust assets be utilized to maximize the potential and enjoyment of life of the beneficiary. The trustee may utilize trust assets for the sole benefit of the beneficiary by providing education, services, vacations, transportation, recreation, aides not otherwise provided through government entitlements, accountants, attorneys, social workers not otherwise provided through government entitlements, medical personnel and treatments not otherwise provided through government entitlements, equipment not otherwise provided through government entitlements, companions and feeders. This list is intended to be illustrative rather than exclusive, and the grantor gives to the trustee discretion as to the use of these funds so as to enhance the life of the beneficiary.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY and the Trustee, after paying any estate tax, income tax or gift tax which may be due for the trust and/or the Beneficiary, and after paying the funeral expenses of the Beneficiary, shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraph 3.1 of this Trust.

3.1 All remaining principal and accumulated income shall be **paid to the legal representative of the Estate of the Beneficiary QUERY: ANY OTHER NAMED BENEFICIARY??? OR if NO actuarially sound distribution then prior to payment to legal representative of the estate of the beneficiary, reimbursement be made to the Department of Health or the Medicaid agency of the State or States that provided Medicaid to the beneficiary for an amount up to the total Medicaid expended during lifetime of the beneficiary.**

TRUSTEE

4.0 Trustee: TRUSTEE shall serve as Trustee of this Trust. SUCCESSOR TRUSTEE shall serve as Successor Trustee.

4.1 Bond: The Trustee shall not be required to execute and file a bond.

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; and (ii) any Successor Trustee.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office except upon filing of a Final Accounting and delivering same to the legal representative of the Estate of the Beneficiary.

4.4 Annual Accounting: The Trustee shall file during the month of May with the Successor Trustee and with the beneficiary an annual accounting of all expenditures made and income earned herein. The income tax return filed for the trust shall be acceptable as such accounting. The fees for such accounting shall be properly payable by the Trustee from trust income and/or principal.

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee shall have all those discretionary powers mentioned in EPTL §11.1.1 et. seq., or any successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving shall appoint a Successor Trustee.

4.7 Compensation of Trustee: The Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

5.0 MISCELLANEOUS PROVISIONS

5.1 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.2 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.3 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.4 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.5 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Trustee, and upon any Successor Trustee.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year of the first above written.

TESTAMENTARY SPOUSAL SNT

THIRD: If my spouse, ___, should survive me, then I give, devise and bequeath all of the rest, residue and remainder of my estate, both real, personal, and mixed whatsoever the same may be, and wheresoever located to my spouse, ___, in Trust, however, to be held, administered pursuant to paragraph FIFTH of this Last Will and Testament.

FOURTH: If my spouse should make an election pursuant to EPTL 5-1.1A, the trust created herein and administered pursuant to Paragraph FIFTH of this Last Will and Testament shall, after the distribution of the statutory share to my spouse, continue for the benefit of my spouse, and the election pursuant to EPTL 5-1.1A shall not result in the termination of such Trust as if my spouse has predeceased me, EPTL 5-1.1A(a)(4)(A) to the contrary notwithstanding.

FIFTH: The Trust so established by paragraph THIRD shall be known as the "___ TRUST" and shall be administered subject to the following instructions:

a) Testamentary Purpose: Because of the nature of the age and needs of my spouse, ___, hereinafter referred to as "the beneficiary", at the time of the execution of this Will, it is my intent that the special provisions of this Trust be strictly enforced. It is my intent that the beneficiary shall receive all government entitlements for which the beneficiary would otherwise be entitled but for the bequests hereunder. I recognize that in view of the vast costs involved in caring for an aging person, a direct bequest to the beneficiary would be rapidly dissipated. It is in awareness of this reality that I create this testamentary trust. I intend this Trust to conform with EPTL 7-1.12. To the extent possible, I intend that this Trust supplement rather than supplant government entitlements.

It is my intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York Estates, Powers and Trusts Law. I intend that, **to the extent possible**, the trust assets be used to supplement, 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 my desire that**, before expending any amount from the 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 endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

The beneficiary shall not have the power to assign, encumber, direct, distribute or authorize distributions from the trust.

b) Income: The Trustee shall hold, invest and reinvest the Trust estate, collect the income therefrom**, [optional] and pay or apply all of the net income therefrom to or for the use of the beneficiary at least quarterly.** The Trustee shall endeavor to distribute income to the beneficiary without reducing or eliminating any government entitlement or payment which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary.** Income shall include any and all payments made to this Trust from any Individual Retirement Account or moneys held in Qualified Plans, whether pursuant to the Minimum Distribution Rules under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") or such greater amount as the Trustee may elect to receive.

Consistent with the intent of this trust fund, the Trustee shall distribute [all] income in kind or in cash in the following manner:

FIRST: For costs of administration of the Trust including payment of all taxes and professional fees.

SECOND: For a housekeeper. The Trustee may pay a housekeeper to care for the beneficiary and perform chores which are not provided by home care workers pursuant to Medicare, Medicaid and Medicare supplemental policy benefits.

THIRD: For needed medical care not paid for by private health insurance or not paid for by government entitlements for which the beneficiary would otherwise be eligible but for the existence of this Trust.

FOURTH: For transportation, entertainment, visitation by family members, and any other need and/or luxury the beneficiary may require.

FIFTH: For professionals and other caregivers. It is anticipated that the class of professionals or caregivers will be social workers, accountants, attorneys, physical or recreational therapists, occupational therapists, speech therapists, feeders, companions, aides, or personal care attendants or private duty nurses not otherwise provided by government entitlements.

SIXTH: For shelter costs of the beneficiary. For purposes of this Trust, this shall mean any taxes, mortgage payment, maintenance charges, rents or any other expenses which will maintain the beneficiary in the housing of the beneficiary's choice. Shelter costs shall also include, but not be limited to, items for the purpose of maintaining the shelter such as repairs, utilities, cable television, and telephone. However, to the extent possible shelter costs shall not include the charges of any medical facility, health related institution, skilled nursing facility, hospital or rehabilitation facility that would otherwise be paid through government entitlements. Private room differentials are properly payable by this Trust.

SEVENTH: For health insurance. The Trustee may purchase whatever health insurance is available .

This above list is intended to be illustrative rather than exhaustive. Any income that cannot be distributed for the above needs, comforts and services shall be distributed outright to the beneficiary at least quarterly.

c) Principal: If the income from the Trust, together with any other income and resources possessed by the beneficiary, including all government benefits, is insufficient to provide for the needs or luxuries of the beneficiary, in the sole opinion of the Trustee, the Trustee is authorized to invade the principal for the beneficiary to the extent necessary to meet such needs or provide such luxuries. The Trustee is strictly prohibited from invading the principal of the Trust if such act will serve to deny, discontinue or reduce a government benefit which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of principal to be beneficial to the beneficiary.** No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by §7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).

So long as all of the income from the trust is distributed to or for the benefit of the beneficiary, none of the income, to the extent possible, 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) Additions to Income and Principal: With the Trustee's consent, any person may, at any time, from time to time, by assignment, gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust.

e) Assignment**: No income or principal payable or to become payable under this Trust shall be subject to anticipation or assignment by the beneficiary or her guardian or to attachment by or to the interference or control of any creditor of the beneficiary or her Guardian or to be taken or reached by any legal or equitable process in satisfaction of any debt or liability of the beneficiary prior to its actual receipt by the beneficiary.**

f) Termination upon Death: This Trust shall terminate upon the death of ___, and after all funeral and other expenses of the beneficiary are paid, the Trust principal and all accumulated income shall be distributed pursuant to paragraph FOURTH of this Last Will and Testament.

KASSOFF, ROBERT & LERNER, LLP
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Fax (516) 766-0738

TESTAMENTARY THIRD PARTY TRUST

Joan Lensky Robert, Esq.

FIFTH: The Trust so established by paragraph FOURTH shall be known as the _____ TRUST" and shall be administered subject to the following instructions:

A) **Testamentary Purpose**: Because of the nature of the disability of my child, _____, hereinafter referred to as "the beneficiary", at the time of the execution of this Will, it is my intent that the special provisions of this Trust be strictly enforced. It is my intent that the beneficiary shall receive all government entitlements for which the beneficiary would otherwise be entitled but for the bequests hereunder. I recognize that in view of the vast costs involved in caring for a disabled person, a direct bequest to the beneficiary would be rapidly dissipated. It is in awareness of this reality that I create this testamentary trust. I intend this Trust to conform with the requirements set forth in Matter of Escher, 52 N.Y.2d 1006 and EPTL 7-1.12. I intend that this Trust supplement rather than supplant government entitlements.

It is my intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York Estates, Powers and Trusts Law. I intend that the trust assets be used to supplement, 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 my desire that, before expending any amount from the 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 endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

The beneficiary shall not have the power to assign, encumber, direct, distribute or authorize distributions from the trust.

B) **Income**: The Trustee shall hold, invest and reinvest the Trust estate, collect the income therefrom, and pay or apply so much of the net income therefrom **to or for the use of** the beneficiary as the Trustee in his sole discretion shall determine is beneficial to the beneficiary. In using such income, the Trustee, in his sole discretion, may pay or apply the same to or for the use of the beneficiary in such manner as he shall from time to time deem advisable taking into consideration the best interest and welfare of the beneficiary. Any net income not distributed shall be added to the principal.

However, the Trustee is strictly prohibited from distributing income to the beneficiary if such distribution would serve to reduce or eliminate any government entitlement or payment which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements.** The income shall thus be used for those items of need of the beneficiary that will not be paid for by government entitlements. It is my intent that the beneficiary enjoy the maximum advantages of life and at the same time receive government entitlements. It is my intent to supplement rather than supplant government entitlements.

Income shall include any and all payments made to this Trust from any Individual Retirement Account or moneys held in Qualified Plans, whether pursuant to the Minimum Distribution Rules under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") or such greater amount as the Trustee may elect to receive.

C) **Principal:** If the income from the Trust, together with any other income and resources possessed by the beneficiary, including all government benefits, is insufficient to provide for the needs of the beneficiary, in the sole opinion of the Trustee, the Trustee is authorized to invade the principal for the beneficiary to the extent necessary to meet such needs. The Trustee is strictly prohibited from invading the principal of the Trust if such act will serve to deny, discontinue or reduce a government benefit which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements**. **No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by §7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).**

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 **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements**.

D) **Additions to Income and Principal**: With the Trustee's consent, any person may, at any time, from time to time, by assignment, gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust.

E) **Housing**: It should be a priority of the Trustee to ensure proper housing for the beneficiary. The Trustee shall have discretion to invade the principal or distribute income for the purpose of securing appropriate housing, subject to the restrictions set forth herein. My Trustee is encouraged to invest in property in whatsoever form as will maintain _____ in a "homestead" (as the same is currently defined in applicable Social Services Law and Regulations), or in a home-like environment. If an appropriate home-like environment cannot be established for _____, the homestead in which _____ resides at the time of my death shall, if possible, be retained as a home until an appropriate homestead or home-like environment can be established.

F) **Other Needs and Luxuries**: It is my intent that the beneficiary enjoy the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, equipment, and any other need and/or luxury the beneficiary may have to enjoy life to the fullest. The Trustee shall use income and/or principal for these purposes, subject to the restrictions set forth herein.

G) **Visitation to and by Family Members**: The Trustee shall, in his discretion, provide income and/or principal to _____and/or to any member of the family who needs payment for travel arrangements in order to visit _____. It is my wish that family members visit with _____ at least once a year, and the Trustee is instructed to encourage family members by providing travel expenses for_____and by providing reasonable reimbursement, if necessary, for payment of travel arrangements for this purpose.

H) **Purchase of Insurance:** The Trustee has discretion to use income to purchase whatever insurance is necessary to make _____ financially secure, including purchasing private health insurance, life insurance, liability insurance, homeowner's insurance, renter's insurance and automobile insurance. The private health insurance may be purchased if it will result in providing for payment to those medical professionals or medical providers who would otherwise not accept government entitlements.

Life insurance may be purchased by the Trust on the life of an insured person who chooses to provide financial support for _____ in a manner consistent with the provisions of this Trust. Any insurance purchased with premiums paid from this Trust Fund shall be an asset of the Trust.

I) **Employment of Professionals and Other Caregivers:** The Trustee shall, if necessary, use income from the Trust to hire professionals to assist _____. It is contemplated that the class of professionals that may be needed to assist _____ will be social workers, custodians, medical professionals who would not otherwise accept government entitlements, legal counsel, accounting professionals, investment counsel, physical therapists, occupational therapists, recreational therapists, feeders, housekeepers, attendants, and aides.

J) **Trustee's Fee**: The Trustee shall be entitled to receive for services rendered as Trustee hereof, the commissions to which the sole Trustee is entitled under the

laws of the State of New York in effect at the time such commissions become payable, or, in the case of a corporate fiduciary, its normal and customary fee. At the Trustee's discretion, the fee may be waived. All annual commissions shall be payable without the approval of any Court.

K) **Termination upon Death**: This Trust shall terminate upon the death of _____, and after all funeral and other expenses of the beneficiary are paid, the Trust principal and all accumulated income shall be **distributed to the issue of _____, or if there are no issue, to _____.**

L) **Partial Termination Prior to Death:** The Trust may be partially terminated prior to the death of the beneficiary under the following circumstances:

1) _____ is substantially gainfully employed for a continuous period of two years and,

2) HIS/HER attending physician certifies in writing that the disability no longer limits him/her from being substantially gainfully employed and,

3) The Trustee, in his sole discretion, determines that the facts warrant early termination.

The above factors "1" and "2" shall be considered conditions precedent and the Trustee may not partially terminate the Trust unless both conditions shall have been fulfilled. Nevertheless, the Trustee is not obligated to partially terminate the Trust if the conditions have been met; the Trustee is merely granted sole discretion in such case. The decision of the Trustee as to whether or not to terminate the Trust shall be final and binding upon _____.

If the Trustee chooses to exercise his discretion, said discretion shall be further limited as follows:

At the time the Trustee so elects, 10% of the then existing principal shall be distributed absolutely to the beneficiary. For each consecutive year of substantial gainful employment, an additional 10% of the original amount of principal may, at the Trustee's discretion, be distributed absolutely to the beneficiary. If there is a break in consecutive employment, this distribution test will be reinvoked and the requirements of paragraphs L 1) and 2) must be met anew. If there is no break in consecutive employment, in the last distribution year, the Trust shall terminate with the distribution of all accumulated income and principal to the beneficiary, as the purposes of the Trust will have been fulfilled.

M) COORDINATION OF USE OF TRUST ASSETS WITH ASSETS HELD IN SPECIAL NEEDS TRUST ESTABLISHED PURSUANT TO COURT ORDER: If assets remain in the Special Needs Trust for _____ established pursuant to Order of the Supreme Court, ____ County, the trustee of the testamentary trust created hereunder for the benefit of _____ shall, to the extent possible, use trust assets for the benefit of _____ after the assets in the court-ordered Supplemental Needs Trust have been exhausted or for goods and services that the trustee of the court-ordered Supplemental Needs Trust is not authorized to provide for the beneficiary.

THIRD PARTY INTERVIVOS TRUST AGREEMENT

This TRUST AGREEMENT made this ___ day of _____, 2013, is established by and between GRANTOR, **(Someone without legal support obligation of beneficiary)** as Grantor and TRUSTEE, as Trustee. The Grantor currently resides at---. The Trustee currently resides at ---***ISSUE: MAY A PARENT OF A MINOR CHILD WHO IS NOT APPLYING FOR MEDICAID BENEFITS SERVE AS GRANTOR? OR THE PARENT OF A MINOR CHILD APPLYING FOR WAIVERED SERVICES???***

TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the BENEFICIARY Special Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is BENEFICIARY. The purpose of the Trust is that the Trust's assets be used to supplement, 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. The Trust is intended to conform with New York State EPTL § 7-1.12, and with any similar statute in any State in which the beneficiary is receiving Medicaid or other federal or State government entitlements.

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

1.3 EPTL § 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Trustee's discretion, the payment or application of the trust principal to or for the benefit of BENEFICIARY, or any beneficiary for any reason whatsoever.

USE OF TRUST INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, or in cash, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in the sole and absolute discretion of the Trustee. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving, unless the Trustee, in the sole and absolute discretion of the Trustee, determines such use of Trust income or principal to be beneficial for the Trustee.

2.3 Power to Execute or Assign Distributions: The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food and Shelter: Notwithstanding the above provisions, the Trustee may make distributions to meet the Beneficiary's need for food, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance if the Trustee determines that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interests, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 Nullification of § 2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions To Income And Principal: With the Trustee's consent, any person may, at anytime, from time to time, by Court order, assignment gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this Trust.

2.7 Other Needs and Comforts: The Trustee has discretion to use income and/or principal to insure that the beneficiary enjoy the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, entertainment, and any other need and/or comforts the beneficiary may require to maximize the Beneficiary's life. This discretion shall include the use of income for needed medical care not paid for by private health insurance or government entitlements. This provision shall include the purchase of any equipment, treatment, computer, services or goods that would enhance the quality of life of the Beneficiary.

2.8 Employment of Professionals and Other Caregivers: The Trustee shall have discretion, if necessary, to use income and/or principal from the Trust to hire professionals to assist BENEFICIARY. It is contemplated that the class of professionals and other caregivers that may be needed to assist BENEFICIARY will be social workers, custodians, legal counsel, aides, housekeepers, accounting professionals, feeders, therapists and any medical professionals or personnel who would not otherwise accept or be paid for fully by government entitlements, vocational and rehabilitation workers, and investment counsel.

DISTRIBUTION UPON DEATH OF BENEFICIARY

3.0 Disposition Of Trust On Death of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY and all remaining accumulated income and principal shall be distributed to **individuals named by grantor (NO PAYBACK)**

TRUSTEE

4.0 Trustee: TRUSTEE shall serve as Trustee of this Trust. ---is appointed Successor Trustee if TRUSTEE is unable or unwilling to serve.

4.1 Bond: The named Trustees shall not be required to execute and file a bond. Any Trustee not named herein shall be required to execute and file a bond for the value of this Trust.

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; (ii) the Guardian of the Beneficiary, if any; (iii) any Successor Trustee; (iv) the Grantor; and (v) the local Social Services agency.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing of a Final Accounting and delivering same to the Beneficiary, the Guardian of the Beneficiary, if any, the Grantor, and any Successor Trustee.

4.4 Annual Accounting: The Trustee shall file during the Grantor, the Beneficiary, the Guardian of the Beneficiary, if any, and if requested, with the local Social Services agency, an annual accounting of all expenditures made and income earned herein..

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee shall have all those discretionary powers mentioned in EPTL §11.1.1 et. seq., or any successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving hereunder may name a Successor Trustee.

4.7 Compensation of Trustee: A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

5.0 MISCELLANEOUS PROVISIONS

5.1 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall related to ro involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.2 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.3 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.4 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.5 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Trustee, and upon any Successor Trustee.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year of the first above written.