

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.

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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

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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

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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 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

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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.

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.

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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.

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.

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(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.

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(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:

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(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

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 {H2149375.1}

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

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.

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(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

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.

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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

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[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

PHONE #: **315-456-9643**

OF BIRTH: **March 18, 1933**

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.

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The purpose for such disclosure is:

- | | |
|--|--|
| <input type="checkbox"/> At my request (only patient may check) | <input type="checkbox"/> Payment/insurance |
| <input type="checkbox"/> Healthcare | <input type="checkbox"/> Employment |
| <input checked="" type="checkbox"/> Other <u>To obtain supporting information, reports and testimony to establish ability of Trustee/Patient to continue acting as Trustee</u> | |

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.

John H. Client

November, _____, 2013

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

Witness

November, _____, 2013

