

4. BASICS OF WILL DRAFTING

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Estate Planning Basics

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Reasons for Estate Planning

- **During Lifetime:** Management of assets and personal needs, or protection of assets for a spouse or other family in the event of disability or incompetence.
- **After Death:** Management and distribution of estate assets after death, efficiently and while accomplishing the client's goals.
- **What We Will Discuss Today:**
 - Planning Considerations - Family, Spousal and Beneficiary Issues, Assets, Estate Tax and Long-term Planning
 - Wills, Powers of Attorney, Health Care Proxies and Living Wills

Importance of Having a Will

- **No Will:** Laws of intestacy govern the disposition of assets that are not covered by beneficiary designation or joint ownership.
- **Example:** H & W have 3 minor children. H has \$700,000 in assets. W has \$1,000 in assets. House is owned jointly by H & Wife. H dies.
- **Who gets what?**
 - W keeps the house as surviving joint tenant.
 - Wife receives \$375,000 (\$50,000 plus $\frac{1}{2}$ of \$650,000).
 - 3 minor children split the remaining \$325,000. Court-appointed Guardian must get Court approval to make payouts, and children get the balance of funds at age 18.



What You Need to Know

- THE FAMILY TREE, and who is an interested party in the estate under the law.
- THE ASSETS, how they are owned (i.e. jointly, p/o/d, etc.), and the tax consequences (estate and otherwise) of different planning options.
- CONCERNS OF THE CLIENT, i.e. family members with disabilities or other issues, future disability concerns of the client or spouse.
- THE WISHES OF THE CLIENT, even if contrary to some planning recommendations.
- WHAT DOCUMENTS, TRANSFERS AND PLANNING should be used for that client.

The Family Tree

A PERSON WHO DIES WITHOUT A PLAN HAS A PLAN BY STATUTE: DISTRIBUTEES - (EPTL 4-1.1)

- If survived by a spouse and children, spouse receives the 1st \$50,000, and ½ of the balance, and children equally share the other ½ of the balance.
- If survived by only a spouse and no children, the spouse receives everything. (Prior law included parents)
- If survived by only children, the children equally share everything. If there is a predeceased child, his or her children share their parent's inheritance, "by representation."
- If survived by only parents (no spouse, children, grandchildren or younger generations), the surviving parent or parents receive everything. (Siblings do not take if there is a living parent.)



The Family Tree . . . continued

- If survived by only siblings and/or children of deceased siblings, the siblings and issue of deceased siblings take "by representation."
- If survived by only aunts and uncles and/or children of deceased aunts and uncles (1st cousins), the aunts and uncles, and children of deceased aunts and uncles take "by representation" but distribution does not extend any further than 1st cousins (children of deceased 1st cousins get nothing if there is at least one 1st cousin living.)
- If survived by only great-grandchildren of grandparents (1st cousins once removed), the great-grandchildren of grandparents will equally share the estate.
- If survived by no one closer than the above (i.e. only 2nd cousins or 1st cousins twice removed), the estate escheats to the State of New York.

Note: *Half-blood relatives are the same as whole (a half sister is treated the same as a full sister).*

**“TO ISSUE, BY REPRESENTATION” OR
“TO ISSUE, PER STIRPES”**

- **"ISSUE"** means: the descendants in any degree from a common ancestor, i.e. the person's children, grandchildren, great-grandchildren, great-great-grandchildren, and on down in a straight line of kinship.
- Intestacy provisions use "BY REPRESENTATION", not "PER STIRPES" as default of distribution (see EPTL 4-1.1).
- An estate with a Will executed prior to 09/01/1992 which made a disposition to "issue" will be distributed "per stirpes", and an estate with a will executed after 09/01/92 will be distributed "by representation" if either or another method is not specified in the will (see EPTL 2-1.2).

**DISTRIBUTION “BY REPRESENTATION”
VERSUS “PER STIRPES”**

Client had 3 children, A, B & C.

At Client’s death, A is living, and B & C predeceased. All three children had children: A has 1 child, B has 1 child, and C has 4.

- Distribution “by representation” would be:
1/3 to A and
2/3 in 5 equal shares to B & C’s children.



- Distribution “per stirpes” would be:
1/3 to A, 1/3 to B’s child, and 1/3 to C’s 4 children.

Who Cannot Take Under Intestacy?

- Divorced spouse.
- Abandoning spouse (must be unjustified, without consent and continued through death).
- Abandoning parent (failure to provide support).
- Distributee Murderer of Decedent.
- Adopted Out Children.
- Step-Children (Not Adopted).



Protecting Yourself as Drafter

Even if the client does not ask/want, be sure to:

- Discuss estate tax planning.
- Discuss long term care planning.
- Document, document, document.
- Terminate relationship when plan is complete, i.e. send a “we’re done - we did what you wanted” letter to get the statute of limitation started.



Testamentary Capacity

- “Testamentary Capacity” for purposes of Will execution is knowing generally, without prompting:
 - Nature of the act performed (Will execution);
 - Nature and extent of assets to be disposed of;
 - Names and relationship of persons who are the “natural objects of one’s bounty” (distributees)



Drafting the Estate Plan

- An attorney must know how to draft a will or trust, and be able to answer the following questions:
 - What items should be placed in a will?
 - What forms of gifts, outright or in trust, should be considered to accomplish the client’s goals?
 - Should there be provisions for minor or disabled beneficiaries?
 - Who should be the fiduciaries and what authority should they be given?



Wills: Due Execution

- A Will is a declaration of a person's wishes as to the disposition of his or her property, to take effect after death.
- EPTL 3-2.1: Will must be:
 - **in writing**, signed by Testator, age 18 or older, and executed and attested according to:
 - The laws of *New York State* (EPTL 3-2.1); or
 - The laws of the *place where executed*; or
 - The laws of the *place where testator was domiciled*, either when Will executed or at time of death.

Wills: Due Execution (Cont'd)

- **Signed at the end** by testator (or another in testator's presence and by his direction);
- In **presence of** (or acknowledged to) each witness;
- Testator **declares** signed document is his Will to each witness; and
- At least **two witnesses sign** name and address at testator's request (within 30 days).

Will: Witness Requirements

- Attestation clause, witness addresses and date are not necessary for Will to be valid.
- If a witness is a beneficiary under the Will, that witness will not receive more than the intestate share.
- Best Practice: No distributees or beneficiaries act as witnesses.

Proper Execution of Will

- Best practice: Same execution ceremony over and over, every time.
 - No one but testator and witnesses in the room.
 - Review dispositive provisions out loud.
 - Attorney asks, "Is this your Will?" (Declaration)
 - Attorney asks, "Does the Will express your wishes?"
 - Attorney asks, "Are you asking W1 and W2 to be the attesting witnesses to your Will?"
 - Testator signs every page and at the end.
 - Witnesses sign after Testator.
 - Witnesses sign Self-Proving Affidavit.

Affidavit of Attesting Witnesses

- Without “self-proving” witness affidavits, **actual testimony** needed to prove due execution of Will.
- Witness affidavits (executed in compliance with SCPA 1406) are not copies of the attestation clause, but recite required minimum testimony regarding proper execution of the Will.
- Can be signed at execution or any time thereafter, including after death. **Best practice is at execution.**
- Actual testimony in person may still be required (contested estates or question re: execution).

Affidavit of Attesting Witnesses

- Affidavit states that:
 - the testator requested the signature of the witnesses to the Will,
 - Testator signed in their presence and they signed in each other’s presence (or other acceptable alternative per execution statute),
 - the testator was competent, of full age, and not under any undue influence.
- Signed by witnesses before a Notary Public

Who is Executor?

- Letters Testamentary may be granted to natural person or entity authorized by law to be a fiduciary (i.e. bank with trust powers) except those ineligible under SCPA 707:
 - Infants (under age 18)
 - Judicially-declared incompetents
 - Non-domiciliary aliens (unless they serve as co-fiduciary with NY resident fiduciary)
 - Convicted felons
 - Those disqualified due to substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit
 - Persons unable to read/write English, in Court's discretion

What Every Will Should Include

- Specific Bequests (if any)
- Tangible Personal Property
- Cash Gifts (if any)
- Residuary Disposition
- Appointment of Executors and Trustees
- Fiduciary Powers
- Bonding or No Bonding
- Tax Allocation- Residuary or Apportionment?
- Resignation of Fiduciaries



Other Common Provisions

- Marital Deduction Trusts.
- Estate Tax Planning Trusts.
- Trusts for Minor (or Young, not necessarily “Minor”) Beneficiaries.
- Supplemental needs trusts for Disabled Beneficiaries.
- Creditor Protection Provisions.
- Medicaid Protection Provisions.
- Lifetime Trusts (“Dynasty Trusts”).

Common Will Mistakes

- **UNCLEAR:** “I give the sum of \$10,000 to my sister, Sue.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue, if she survives me.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue; or if she does not survive me, equally to her children who survive me.”



Common Will Mistakes

- **UNCLEAR:** “I give \$10,000 to Sue and Bob.”
- **CLEAR:** “I give the sum of \$10,000 to each of Sue and Bob, who shall survive me.”
- **CLEAR:** “I give the sum of \$10,000 equally to Sue and Bob, or all thereof to such of them who survives me.”



Common Will Mistakes

- **INCORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my issue.”
- **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed to my descendants who survive me, per stirpes.” (or ...“by representation.”)
- **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my children who survive me.”

Estate Tax Planning

- Why? To ensure the use of both spouses' estate tax exemption and to defer estate tax until second death.
- Typically includes use of credit shelter and marital deduction trusts:
 - Estate tax exempt amount goes into a credit shelter trust (which can appreciate estate tax free).
 - Excess over estate tax exempt amount passes either outright to the surviving spouse or to a marital deduction trust for the surviving spouse.

Estate Tax Issues



- You must consider both FEDERAL and STATE estate tax considerations:
- FEDERAL ESTATE TAX
 - \$5 Million exemption (indexed for inflation to \$5.34 Million in 2014).
 - 40% Tax Rate
 - Portability- Unused exemption of first spouse to die passes to and can be used by the surviving spouse (\$10.68 Million total per couple). Consider whether wise to rely on portability availability.
- NEW YORK STATE ESTATE TAX
 - \$1 Million exemption
 - Graduated tax rates, top rate of 16%

Estate Tax Planning

- Fractional Share: The residuary estate is divided by fractions (or percentages) by the value as finally determined for federal estate tax purposes.
- Appreciation or depreciation between the date of death (or alternate valuation date) and date of funding are shared proportionally.
- No income tax consequence of funding of the fractional shares.

Estate Tax Planning

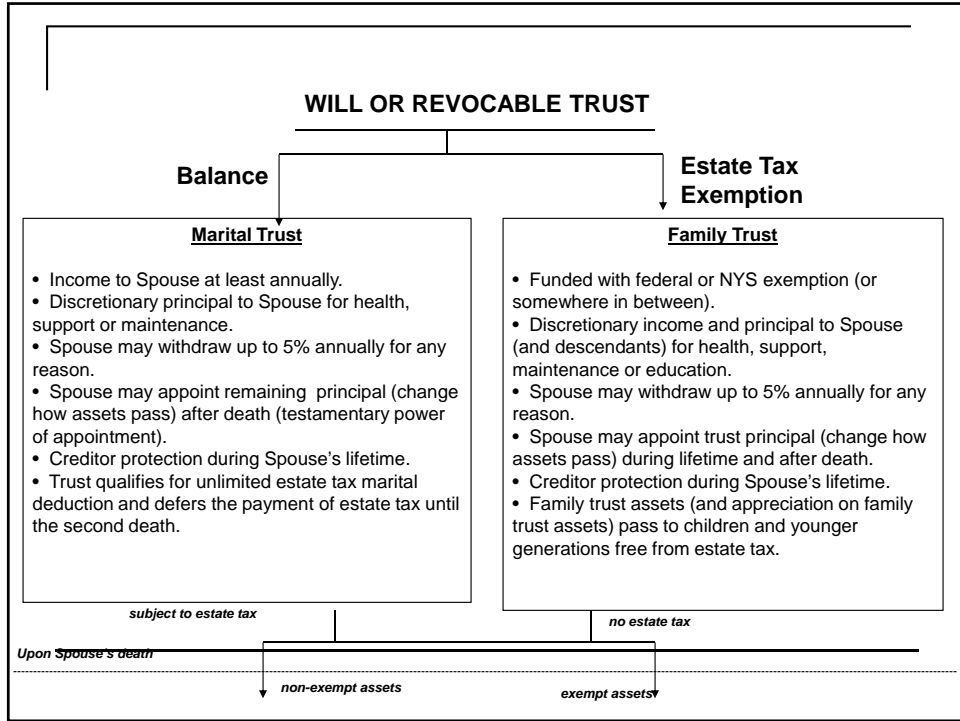
- Pecuniary Share: Either the marital gift (or marital trust) or the allocation of the family/credit shelter trust is defined as a pecuniary amount, leaving the residue for the other.
- Appreciation or depreciation is placed in the non-pecuniary residuary share.
- Income tax consequence based on the difference between the value of the assets at the time of distribution and the estate tax values.

Credit Shelter Trusts

- Also known as Bypass or Family
- Funded with the estate tax exemption (federal or state or somewhere in between).
- May be drafted for the benefit of the surviving spouse or the surviving spouse and the decedent's descendants (or others).
- No estate tax on death of surviving spouse.


Marital Trusts

- Funded with the excess over the estate tax exemption
- Qualifies for the unlimited estate tax marital deduction thereby permitting deferral of estate tax until second death as long as
 - Surviving Spouse is only beneficiary
 - Surviving Spouse takes income annually



THE END.

Questions?



**POWER OF ATTORNEY
NEW YORK STATUTORY GIFTS RIDER
AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS**

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of \$500 for all gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance), or certain other gift transactions during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain gift transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(_____) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries, or other gift transactions. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

(_____) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(_____) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Statutory Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____ , 20__.

PRINCIPAL signs here: == == > _____

STATE OF NEW YORK)

) ss:

COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, 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 her/his capacity, and that by her/his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Statutory Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

Signature of witness 1

Signature of witness 2

Date

Date

Print Name

Print Name

New York State Bar Association

Statutory Gifts Rider, 8/18/10, Eff. 9/12/10

Address

City, State, Zip code

Address

City, State, Zip code

(g) This document prepared by:

**POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM**

(a) **CAUTION TO THE PRINCIPAL:** Your Power of Attorney is an important document. As the “principal,” you give the person whom you choose (your “agent”) authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. “Important Information for the Agent” at the end of this document describes your agent’s responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a “Health Care Proxy” to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____
(name of principal) _____
(address of principal)

hereby appoint:

(name of agent) _____
(address of agent)

(name of second agent) _____
(address of second agent)

as my agent(s).

If you designate more than one agent above, they must act together unless you initial the statement below.

(_____) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

(name of successor agent) _____
(address of successor agent)

(name of second successor agent), _____
(address of second successor agent)

Successor agents designated above must act together unless you initial the statement below.

(_____) My successor agents may act SEPARATELY.

You may provide for specific succession rules in this section. Insert specific succession provisions here:

- (d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under “Modifications”.
- (e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under “Modifications”.

If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Power of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under “Modifications” that the agents with the same authority are to act together.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either

- (1) Initial the bracket at each authority you grant, or
- (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(_____) (A) real estate transactions;

(_____) (B) chattel and goods transactions;

- (____) (C) bond, share, and commodity transactions;
- (____) (D) banking transactions;
- (____) (E) business operating transactions;
- (____) (F) insurance transactions;
- (____) (G) estate transactions;
- (____) (H) claims and litigation;
- (____) (I) personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;
- (____) (J) benefits from governmental programs or civil or military service;
- (____) (K) health care billing and payment matters; records, reports, and statements;
- (____) (L) retirement benefit transactions;
- (____) (M) tax matters;
- (____) (N) all other matters;
- (____) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
- (____) (P) EACH of the matters identified by the following letters:
_____.

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider.

(h) CERTAIN GIFT TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of \$500 for all gifts described in (l) of the grant of authority section of this document (under personal and family maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

(_____) (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

If you wish to appoint monitor(s), initial and fill in the section below:

(_____) I wish to designate _____, whose address(es) is (are) _____, as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered

on your behalf, initial the statement below. If you wish to define reasonable compensation, you may do so above, under Modifications.

(_____) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION:

This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on the ____ day of _____, 20__

PRINCIPAL signs here: =====> _____

STATE OF NEW YORK)

) ss:

COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, 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

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

- (1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;
- (4) keep a record of all receipts, payments, and transactions conducted for the principal; and
- (5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as agent in either of the following manners:
(Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for
(Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest.

You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

Agent(s) sign(s) here: ==> _____

==> _____

STATE OF NEW YORK)

) ss:

COUNTY OF _____)

On the ____ day of _____, 20__, before me, the undersigned, personally appeared _____, 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

(p) SUCCESSOR AGENT’S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

Successor Agent(s) sign(s) here: ==>

==>

STATE OF NEW YORK)

) ss:

COUNTY OF _____)

On the ____ day of _____, 20____, before me, the undersigned, personally appeared _____, 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

BASICS OF WILL DRAFTING

PATRICIA J. SHEVY, ESQ.
THE SHEVY LAW FIRM LLC
PATRICIASHEVY@SHEVYLAW.COM

The Importance of Having a Will

A Will sets forth a person's directions with respect to the direction of his or her assets after death. Without a properly executed Will, the laws of intestacy will apply to the distribution of a person's assets. Many clients assume that the laws of intestacy will suffice. However, what happens in the following example: Husband and Wife have 3 minor children. Husband has \$700,000 in assets. Wife has \$1,000 in assets. The house is owned jointly by Husband and Wife. Husband dies. Wife keeps the house as surviving joint tenant. The remaining \$700,000 is divided between Wife and children according to the laws of intestacy (Wife receives \$50,000 plus ½ of the remaining \$650,000; the 3 children split the remaining \$325,000). But remember the children are minors, so the court will be involved until the youngest child reaches majority. This is probably not the outcome Husband and Wife had in mind.

Problems with Intestate Succession

When a New York State resident dies leaving no Will, the assets of the decedent will be distributed under New York Estates, Powers and Trusts Law ("EPTL") Article 4, which lists the order and amount that family members will take from the estate of the decedent. In cases where a person dies intestate, EPTL §4-1.1 provides that a decedent's assets will be distributed as follows:

- If survived by a surviving spouse and children, the spouse receives \$50,000 and ½ of the balance. The children equally share the balance.
- If survived by only a surviving spouse, the spouse receives everything.
- If survived by only children, the children equally share everything. If there is a predeceased child, his or her children share their parent's inheritance, by representation.
- If survived by only parents (no spouse, children, grandchildren or younger generations), the surviving parent or parents receive everything.

- If survived by only by brothers and sisters and/or nieces and nephews, the brothers and sisters and/or nieces and nephews, will equally share everything, by representation.
- If survived only aunts and uncles and/or cousins, the aunts and uncles and/or cousins will share equally everything, by representation.
- If survived only by great-grandchildren of grandparents, the great-grandchildren of grandparents will equally share everything.

While EPTL Article 4 clearly describes the distribution of property of a decedent who dies without a Will, it is important to look at some troubling matters that arise outside of the statute. One important reason to have a Will is that New York State does not recognize informal documents that dispose of the decedent's real and personal property if no will exists. All assets pass through the laws of intestacy statute regardless of what the decedent truly wanted.

When a person has died without a Will, the process of administering that person's estate is governed by the laws of intestacy. Rather than an executor being appointed by the Court under a "probate proceeding," an administrator will be appointed by the Court to handle the distribution of that person's assets. New York Surrogate's Court Procedure Act (SCPA) §1001 provides that letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:

- the surviving spouse
- the children
- the grandchildren
- the father or mother
- the brothers or sisters
- any other persons who are distributees and who are eligible and qualify, with preference being given to the person entitled to the largest share in the estate.

Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons. If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county. SCPA §1001.

In order to qualify to apply for the Administrator position, a person must fall under one of the categories of SCPA §1001 and must meet the following requirements as set forth by SCPA §1002. The petition must allege the citizenship of the petitioner and the decedent or person alleged to be deceased, that the decedent or person alleged to be deceased left no will, or that the case is within 1001(9) and must state whether or not the intestate or person alleged to be deceased left any:

- personal property and its estimated value and
- real property, whether it is improved or unimproved, a brief description thereof, the estimated value of the real property and improvements, if any, and the estimated gross rents for the period of 18 months. SCPA § 1002.

In a proceeding for letters of administration, every eligible person who has a right to administration prior or equal to that of the petitioner and who has not renounced must be served with process. SCPA §1003. Before making a decree granting letters of administration, the court may require the petitioner to serve by mail a written notice of the application upon every distribute of the intestate who has not been required to be served with process and who has not appeared in the proceeding or waived process. SCPA §1005. The original Notice must be filed with the court together with an affidavit of service. SCPA §1005 further provides that this notice shall contain:

- Each and every name of the intestate known by the petitioner.
- The fact that letters of administration have been applied for by the petitioner
- That a decree will be made granting letters and to whom.
- The names and addresses of petitioner and each and every distribute listed in the petition.
- That no other distributes are known to exist.
- That letters will issue on or after the dated fixed on the notice.

There are six instances when a spouse will be disqualified from inheriting under the laws of intestacy. A husband or wife will be considered a surviving spouse unless (1) A final decree or judgment of divorce, annulment, nullity, or dissolution of marriage due to absence, was issued and in effect when the deceased spouse died; (2) The marriage was void as incestuous, bigamous, or there was a prohibited remarriage; (3) The spouse had obtained a final decree or

judgment of divorce, annulment, nullity, or dissolution of marriage due to absence outside of New York State that was not recognized as valid under New York State law; (4) A legally recognized final decree or judgment of separation was rendered in New York State against the spouse and was in effect when the deceased spouse died; (5) The spouse abandoned the deceased, and such abandonment continued until the time of death; and (6) a spouse, who had the duty to support the other spouse, failed or refused to do so even though that spouse had the means to do so. EPTL §5-1.2. Under any of these six circumstances, a spouse would not be permitted to collect from the estate of the deceased spouse if the decedent died intestate nor will a jury trial be permitted to determine spousal disqualification. In re Ruggiero's Estate, 51 A.D.2d 969, 970, 368 N.Y.S.2d 722, 726, 82 Misc.2d 211, 215 (1975).

The Court of Appeals gives two elements for proving abandonment by one spouse. The petitioner must show that the abandonment was (1) unjustified and (2) without the consent of the other spouse. The court in In re Maiden's Estate said "to constitute abandonment under this statute something more is necessary than a departure of a spouse from the marital abode or a living apart. The departure must be unjustified and without the consent of the other spouse. The burden to establish abandonment is and remains at all times upon those asserting it." In re Maiden's Estate, 31 N.E.2d 889, 284 N.Y. 429, 430 (1940). In Matter of Baldo, the spouse's choice to sever all contact with decedent at the end of his life and to establish a continuing relationship with another man was evidence sufficient to establish "that hardening of resolve, that irrevocable decision by [respondent]" to terminate her prior conjugal relationship with decedent, and compels a finding of abandonment as a matter of law. Matter of Estate of Baldo, 620 N.Y.S.2d 602, 604, 210 A.D.2d 848, 850 (3rd Dept. 1994).

Similarly, in In re Goethie's Will, the court gives evidence as to who will not take as surviving spouse. The court said, "there can be no clearer or more convincing abandonment of the marital status, or of a spouse, than the solemnizing of a ceremonial marriage to another followed by open and continuous cohabitation and the birth of issue of the subsequent union." In re Goethie's Will, 161 N.Y.S.2d 785, 787, 9 Misc.2d 906, 908 (1957).

EPTL §5-1.4 provides that unless the governing document provides otherwise, a divorce (including a judicial separation) or annulment of a marriage revokes a disposition or appointment by Will, payable/transfer on death designation or beneficiary designation for a life insurance policy or pension/retirement account or by revocable trust. For purposes of these potential transfers to a former spouse, the former spouse will be treated as having immediately predeceased the testator as of the time of the revocation. EPTL §5-1.4(b)(1).

A parent will be disqualified from inheriting under intestacy, any of his or her deceased child's assets if the parent had abandoned the child. Matter of Daniels' Estate, 275 A.D. 890, 90 N.Y.S.2d 26 (4th Dep't 1949.) The court in this case decided that "the compulsory payment of \$7.50 for a period of four weeks under order of the Children's Court did not constitute a resumption of the 'parental relationship and duties' within the purview of the statute [Decedent Estate Law, § 87, subd. (e); § 133, subd. 4, par. (c).]" and therefore, the father would not be allowed to share in the estate of his deceased child. *Id.*

Multiple cases have been decided in New York State that prohibit a beneficiary who murders the decedent to collect any inheritance from the decedent's estate, including instances where the decedent died intestate. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889.) In re Nicpon's Estate makes a distinction, however, in that, though the wrongdoer cannot inherit as a result of his own wrongdoing and the estate of the wrongdoer cannot inherit, an existing interest in the wrongdoer is not diminished simply because of the wrongdoing. In re Nicpon's Estate, 102 Misc.2d 619, 424 N.Y.S.2d 100 (1980.) A caveat to this rule is that a mentally ill person who murders the decedent will not be disqualified from inheriting. In re Wirth's Estate, husband who was found not guilty of murdering his spouse by reason of insanity was not disqualified from taking a share of the wife's estate. In re Wirth's Estate, 59 Misc.2d 300, 298 N.Y.S.2d 565 (1969.)

EPTL §4-1.1(d) states that a child who has been adopted becomes a member of that family, the same as a natural born child of that family. The adopted child will be able to take a distributive share of a deceased adoptive parent's estate and has a right to intestate succession. The court in Bourne v. Dorney said, "in other words, the Legislature has ordained that there shall

be no difference in the right to inherit between a child by adoption and his heirs and next of kin and a child by nature and his heirs and next of kin, and the courts, as in duty bound, have obeyed the command.” Bourne v. Dorney, 171 N.Y.S. 264, 268, 184 A.D. 476, 481 (2d Dep’t 1918). Domestic Relations Law §117(1)(a) states that once a child has been adopted and can take under the intestate succession of the adoptive parents, the child is cut off from inheriting under the intestate succession of the natural parents. The court in DeMund v. LaPoint supported the statute when it ruled in favor of the plaintiffs, stating that a court order of adoption had terminated the right of the defendant to inherit from his natural parent. DeMund v. LaPoint, 647 N.Y.S.2d 662, 665, 169 Misc.2d 1020, 1025 (1996).

It is well settled law that a step-child of the decedent who has not been adopted will not be able to take under the estate of the decedent. The only way for a step-child to take under the estate of the decedent is for the step-child to have been adopted by the decedent. Then the court considers the step-child and parent to be of the same blood. In re Marquet’s Will, 178 N.Y.S.2d 783, 784, 13 Misc.2d 958, 959 (1958.)

A non-marital child can inherit from the natural mother and the mother’s family. EPTL §4-1.2 states that a non-marital child can inherit from the father if proof can be offered for any of the following: (1) An Order of Filiation has been filed; (2) There has been an acknowledgment of paternity by the father which has been filed with the Putative Father’s Registry; (3) The father has consented to and tested positive in a blood genetic marker test, showing paternity, and other clear and convincing evidence has been presented; or (4) There has been open and notorious acknowledgment by the father that he is the father, and there is other convincing evidence or proof of paternity. In re Flemm’s Will, 381 N.Y.S.2d 573, 577, 85 Misc.2d 855, 861 (1975.) This proof can not be offered posthumously, but must be offered during the decedent’s lifetime. Matter of Malavase, 520 N.Y.S.2d 49, 49, 133 A.D.2d 759, 760 (2d Dep’t 1987.)

Lastly, Abandoned Property Law §600 (1) (b) and Surrogate’s Court Procedure Act §2222 state that unclaimed property will be deemed abandoned property if at the time a person is entitled to receive the distribution of monetary proceeds from the decedent’s estate, the whereabouts of that person are unknown. In this situation, the money owed to that person will

escheat to the state, and more specifically, to the comptroller, who will retain the money in case the person appears to claim it. In 2003 there was an addition to the statute, section 1422, that now requires due diligence before remitting funds to the state. This includes advertising the names of property owners in publications and performing mailings at scheduled intervals before turning over the money to the state. Aban. Prop. §1422 (2004).

Though the New York State legislature has written a statute that disposes of a decedent's estate if no Will has been written, the main advantage to having a Will is that the writer's wishes will be honored. Without a Will, the decedent's wishes may not be met. Certain people may be disqualified from receiving assets that the decedent intended if they do not fall within EPTL §4-1.1. The best way to be sure that the decedent's assets go to the people the decedent intended is to specifically name those people in a Will.

Drafting Wills

In New York State, the substantive law of Wills is governed by Article 3 of the New York Estates, Powers and Trusts Law ("EPTL"). Any person 18 years of age or older, of sound mind and memory, may dispose of his or her assets by Will and exercise a power to appoint such property. EPTL §3-1.1. "Sound mind and memory" requires only a "lucid moment" that the testator have a general understanding of the testator's assets and the objects of the testator's bounty (those who would inherit if there is no Will). A good test to determine capacity is to request that the testator draw out a family tree with the attorney draftsman, naming all of the children, grandchildren or other closest living blood relatives. If there are no children, it is also a helpful practice to draw the family tree so that location of the distributees will be made easier after the testator's death.

Every Will should include the following:

- Any Specific Bequests;
- Tangible Personal Property Disposition;
- Any Cash Bequests;
- Residuary Disposition;
- Appointment and Resignation of Executors, Trustees and Alternates;

- Powers of Executors and Trustees;
- Bonding (or No Bonding Requirement);
- Tax Apportionment Provisions (EPTL §2-1.8 governs if Will is silent).

Other common Will provisions include:

- Marital Deduction Trusts (estate tax planning, permitting the deferral of estate tax until the second death);
- Credit Shelter Trusts (estate tax planning, ensuring the use of each spouse's estate tax exemption);
- Trusts for Minor (or Young, not necessarily "Minor") Beneficiaries;
- Creditor Protection Provisions;
- Medicaid Protection Provisions;
- Lifetime Trusts ("Dynasty Trusts").

Estate tax planning must be considered. While a detailed analysis of the federal and New York State estate tax rules is beyond the scope of these materials, the federal gift and estate tax exemption (the amount which a person may give during lifetime or pass at death without paying federal gift or estate tax) is \$5 Million, indexed for inflation (\$5.34 Million in 2014). There is "portability" of the federal estate tax exemption for married couples, meaning that the unused estate tax exemption of the predeceased spouse can be utilized by the surviving spouse (\$10.68 Million total exemption for a married couple). The New York State estate tax exemption is \$1 Million per person.

Other NYSBA programs sponsored by the Trusts and Estates Section and Elder Law Section are routinely offered providing instruction in Will drafting, estate and long term care planning.

Proper Execution of Wills

Pursuant to EPTL §3-2.1, except for nuncupative and holographic Wills authorized under EPTL §3-2.2, every will must be in writing, and executed and attested in the following manner:

- The Will must be signed at the end thereof by the testator (or in the name of the testator by another person in the testator's presence and by the testator's direction).

- The signature of the testator must be affixed to the Will in the presence of each of the attesting witnesses, or must be acknowledged by the testator to each of the witnesses to have been affixed by the testator or at the testator's direction. The testator may sign either in the presence of, or acknowledge the testator's signature, to each attesting witness separately.
- The testator must declare to each of the attesting witnesses that the instrument to which the testator's signature has been affixed is the testator's Will.
- There must be at least 2 attesting witnesses, who must, within one 30 day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their addresses at the end of the Will.

The competence of an attesting witness is addressed by EPTL §3-2.2. An attesting witness to a Will to whom a beneficial disposition or appointment of property is made is a competent witness as if no disposition or appointment has been made, subject to the following:

- Any disposition or appointment to an attesting witness is void unless there are, at the time of the execution and attestation, at least 2 other attesting witnesses to the Will who receive no disposition or appointment.
- Such an attesting witness is entitled to receive so much of his or her intestate share as does not exceed the value of the disposition made to the witness under the Will.

In practice, it is advisable to follow the same execution ceremony every time your client executes his or her Will. It is also advisable that a draft of the Will be provided to the testator long in advance of the execution ceremony, leaving the testator sufficient time to review the draft, ask questions and make changes. An example of such an execution ceremony is as follows:

- The lawyer, testator and 2 attesting witnesses are in the same room and no one enters or leaves the room during the Will execution ceremony.

- The lawyer provides the final Will to the testator and gives the testator time to review the Will. The lawyer described generally the dispositive terms of the Will and appointments of fiduciaries.
- The lawyers asks the testator the following questions, to which the testator responds yes:
 - Is this your Will?
 - Does it express your wishes?
 - Are you asking Witness 1 and Witness 2 to be the attesting witnesses to your Will?
- The testator then signs the Will at the end thereof. The witnesses sign after the attestation clause. It is also best practice to have the witnesses sign the Affidavit of Subscribing Witnesses at the same time.

If the Will is not stapled prior to execution, it is a good practice to have the testator sign or initial in the margin of every page of the Will. It can be explained to the testator that by signing each page, no one can remove or replace the pages of the Will after the execution ceremony as the testator's signature/initials appear on every page.

If the lawyer cannot be present at the Will execution ceremony, the following instructions should be provided to the testator, in writing:

- Ask at least two people to be witnesses to the execution of the Will. None of the witnesses should be your spouse, children or anyone who is a beneficiary of your estate. Each must be at least 18 years old.
- The Will has been prepared with what is called a Self-Proving Affidavit. That is the very last page of the Will and should be signed at the same time the Will is signed. It must also be notarized and, therefore, a notary public should also be present when the Will is signed. If that is not possible, that affidavit should be left blank. The notary cannot be the same person as one of the witnesses.

- At the time you sign the Will, you, all witnesses, and the notary should be in the room together and everyone must watch everyone else sign.
- When you sign the Will, you must state to the witnesses that the document you are signing is your Will. You must insert the day and month in which you are signing in the spaces provided and then sign on the line indicated.
- You must then specifically ask the witnesses to sign as witnesses and each of them should sign his or her name and address in the spaces provided beneath your signature.
- Please also have each of them print his or her name and address on a separate sheet of paper so that we will be sure that we are able to read the signatures and spell the names and addresses correctly.
- You and each of the witnesses must also sign the Self-Proving Affidavit on one of the lines just below the middle of the page and the notary will then sign at the bottom. The notary must also insert the witnesses names in the appropriate spaces and, if the Will is being signed in Florida, list the form of identification.
- It is very important that each of these steps be followed exactly as I have indicated. They are what are called testamentary formalities and are required to have been observed in order for the Will to be seen as valid. Each of the witnesses should also understand that the self-proving affidavit is a sworn document that will be submitted to the court in which the Will is offered for probate. By signing it, the witness is swearing that you declared the document to be your Will and asked him or her to sign, that he or she saw you and the other witnesses sign, and that you were of sound mind at the time.
- Once the Will has been signed, please send the original, and the separate sheet on which the witnesses have listed their names and addresses, to me by certified mail, return receipt requested. The Will will be placed in our vault for safe-keeping. I will have a photocopy made and sent back to you to keep for your records.

- If you have the original of any earlier Will, that original should now be destroyed by you by tearing it in pieces and throwing the pieces in the trash. If you do not have the original, you should contact the attorney who drew it to ask him or her to send that original to you so it can be destroyed.

Sample Wills

The following Wills are meant as examples. It is important that each Will be prepared with the specific instructions of the testator in mind. Explanatory footnotes are included in these drafts for the ease of the testator in reviewing the drafts before execution. The explanatory notes **MUST** be removed before the Will is executed. Also remember, that under Schneider v. Finmann, the executor of the estate now has the ability (and duty) to bring a malpractice action against the attorney draftsman. Schneider v. Finmann, 15 N.Y.3d 306 (2010). As such, it is important that the attorney draftsman have a full understanding of the testator's goals, and discuss both estate tax planning and long term care planning to ensure the testator has been apprised of all applicable planning tools available. If the testator has potential estate tax and refuses to implement estate tax planning, be sure the file notes and the letter accompanying the draft documents indicate that the planning was recommended and rejected by the testator.

Samples have been included for the following scenarios:

- Single Person, No Trusts for Beneficiaries;
- Single Person, Trusts for Minor/Young Beneficiaries;
- Married Couple, No Trusts for Beneficiaries;
- Married Couple, Trusts for Minor/Young Beneficiaries.

WILL
OF
[CLIENT]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my children who survive me, to be divided among them as they agree, or if they are unable to agree, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.¹

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my descendants who survive me, per stirpes.²

THIRD: ³ Whenever, under this Will, any property vests in a person who has not attained the age of 21, my Executor, without authorization from any court, shall have the power to manage such property, may exercise in respect of such property and the income therefrom all powers conferred by this Will on my Executor (and all powers conferred by law on

¹ This Article provides for the distribution of all personal and household effects. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

² The rest of your assets will be distributed to your descendants (children and younger generations) on a “per stirpes” basis. “Per stirpes” is a legal term that means the children of a predeceased beneficiary equally share their parent’s inheritance. For example, if [Child] predeceases you, [Child]’s children will equally share [Child]’s interest in your estate.

³ In the event a minor inherits under your Will, the Executor can hold the minor’s inheritance in trust until the age of 21 or distribute the minor’s inheritance directly to the minor, to the minor’s parent or to a custodial account for the minor.

executors) and may hold such property until such person attains the age of 21 upon the following terms:

A. There may be used for the person as much of the property, and the income therefrom, as may be determined in the discretion of my Executor. Any income not paid shall be accumulated and added at least annually to principal.

B. In connection with the exercise of the above discretionary power to distribute income or principal, there is no requirement to take into account the other income or capital resources of the person, the interest of the person in any other fund, or the duty of any one to support the person, although these factors may be taken into account.

C. Any part or all of such property, or the income therefrom, may be applied for the benefit of the person, and in the case of a minor may be paid or delivered to the minor, to a parent or guardian of the minor, to an individual with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute, as may be determined in the discretion of my Executor.

D. The remaining property shall be distributed to the person when he or she attains the age of 21, or to the estate of the person upon his or her death prior to attaining such age.

FOURTH: In addition to the powers conferred by law, my Executor has complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:⁴

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor may determine, without regard to any requirement for diversification;

⁴ This Article grants specific powers to the Executor. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor may determine, and to improve or take any other action with respect to real property;

D. To borrow money for any purpose, from others or from any Executor, with or without security, and to mortgage or pledge any property, real or personal;⁵

E. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor), and to treat their compensation as an administration expense;

F. To sell any property, real or personal, to any Executor or beneficiary at fair market value; and

G. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.⁶

FIFTH: Where a party to any proceeding with respect to my estate has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.⁷

⁵ While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

⁶ A distribution “in kind” means that the Executor can distribute an investment directly to a beneficiary. For example, if the estate owns 10 shares of stock in a corporation, the Executor can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

⁷ This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will as the minor or disabled beneficiary.

SIXTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will shall be paid from my residuary estate.⁸

SEVENTH: A. I appoint my [Ex Relation], [EXECUTOR], to be the Executor of this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], and [Ex3 Relation], [EXECUTOR3], or the survivor of them, to be substitute Executors.⁹

B. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Executor in any jurisdiction.

C. Any Executor may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor that he or she is no longer able to make decisions with respect to financial matters.

D. As used in this Will, the term “Executor” means the Executor or Executors acting from time to time and any Administrator with the Will annexed.

⁸ This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is \$5.34 Million with a 40% tax rate. The New York State estate tax exemption is \$1 Million and it is not currently scheduled to increase.

⁹ This Article concerns the Executor, provides for the appointment of successor Executors and the resignation of Executors.

IN WITNESS WHEREOF, I have duly executed this Will this ____ day of _____, 20____.

[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____ residing at _____

_____ residing at _____

WILL
OF
[CLIENT]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my children who survive me, to be divided among them as they agree, or if they are unable to agree or if any of them is a minor at the time of division, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.¹⁰

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my descendants who survive me, per stirpes, subject to Article THIRD.¹¹

THIRD: Any property (other than tangible personal property) that would otherwise pass outright under this Will (other than pursuant to the exercise of a discretionary fiduciary power) to a descendant of mine who has not attained the age of [Age], shall instead be

¹⁰ This Article provides for the distribution of all personal and household effects. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

¹¹ The rest of your assets will be distributed to your descendants (children and younger generations) on a “per stirpes” basis. “Per stirpes” is a legal term that means the children of a predeceased beneficiary equally share their parent’s inheritance. For example, if [Child] predeceases you, [Child]’s children will equally share [Child]’s interest in your estate.

held by the Trustee as a separate trust for that descendant (the “Beneficiary”) upon the following terms:¹²

A. The Trustee may distribute to the Beneficiary any part or all of the income and principal of the trust as the Trustee may determine for health, support, maintenance or education. Any income not paid shall be accumulated and added at least annually to principal.

B. The Trustee shall distribute the remaining principal of the trust to the Beneficiary upon his or her attaining the age of [Age].¹³

C. If the Beneficiary dies prior to attaining the age of [Age], then upon his or her death the remaining principal of the trust shall be distributed, subject to this Article, in equal shares to his or her then surviving children; or if there is none, to the then surviving descendants, per stirpes, of the person who, among a class consisting of me and my descendants, is the Beneficiary’s closest ancestor with any then surviving descendant.¹⁴

D. Notwithstanding anything herein, any trust created under this Will for any person not in being at the date of my death shall (unless terminated earlier) terminate 21 years after the death of the last to survive of all descendants of my parents in being at such date, and upon such termination the assets of such trust shall be distributed to that person.¹⁵

¹² This Article establishes a trust for any beneficiary under the age of [Age]. During that time, the Trustee may distribute the trust assets for the beneficiary’s health, support and educational needs.

¹³ The balance of the trust will be distributed to the beneficiary when he or she attains the age of [Age].

¹⁴ If the beneficiary dies before the age of [Age], the beneficiary’s children will inherit the balance of the trust. If the beneficiary does not have children, the beneficiary’s siblings will share the balance equally.

¹⁵ This prevents any trust from violating the Rule Against Perpetuities-- a rule that does not permit trusts to last forever.

FOURTH: ¹⁶A. Any property, whether principal or income, distributable to any person under this Will, may be applied for the benefit of that person, including without limitation a distribution to a trust for the benefit of that person. In the case of a minor, the property may be paid or delivered directly to the minor, to a parent or guardian of the minor, to a person with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute until age 21 or whatever earlier age is the maximum permitted under applicable law.¹⁷

B. Except as otherwise specifically provided herein, in connection with the exercise of a discretionary power to distribute income or principal to any person, there is no requirement to take into account a person's other income or capital resources, the interest of the person in any other fund, or the duty of anyone to support the person, although these factors may be taken into account.¹⁸

C. Notwithstanding anything herein, no person may participate in a decision to make any proposed discretionary distribution of income or principal to himself or herself or to satisfy any legal obligation of that person.¹⁹

D. No beneficiary of any trust has any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the trust in any way; nor is any interest in any manner liable for or subject to the debts, liabilities or obligations of the beneficiary or claims of any sort against the beneficiary.²⁰

¹⁶ This Article provides standard terms for administering your Will.

¹⁷ If a minor's inheritance is too small to justify a trust, this permits the Executor to distribute the inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

¹⁸ The Trustee may take a beneficiary's income and other resources into consideration, but is not required to do so.

¹⁹ A Trustee cannot distribute trust assets to himself or herself or to satisfy the Trustee's legal obligations, such as child support. This is necessary to provide for creditor protection.

²⁰ This Section protects trust assets from the beneficiary's creditors.

FIFTH: Except as otherwise specifically provided herein, in addition to the powers conferred by law, my Executor and the Trustee have complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:²¹

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor or the Trustee may determine, without regard to any requirement for diversification;

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor or the Trustee may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor or the Trustee may determine, and to improve or take any other action with respect to real property;

D. To permit any income beneficiary (and the guardian of any minor income beneficiary and the family of such guardian) to use any real property or tangible personal property held hereunder for the benefit of the beneficiary, rent free or otherwise, upon such terms as my Executor or the Trustee (other than the beneficiary or guardian) may determine;

E. To borrow money for any purpose, from others or from any Executor or Trustee, with or without security, and to mortgage or pledge any property, real or personal;²²

²¹ This Article grants specific powers to the Executor and Trustee. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

²² While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

F. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor or Trustee), and to treat their compensation as an administration expense;

G. To sell any property, real or personal, from my estate to any trust or from any trust to my estate or from one trust to another;

H. To sell any property, real or personal, to any Executor, Trustee or beneficiary at fair market value;

I. To make loans to any income beneficiary hereunder, interest free or otherwise, upon such terms as my Executor or the Trustee (other than such beneficiary) may determine;

J. To sever any trust into two or more separate trusts having the same terms as the original trust, and to combine two or more trusts having identical terms and beneficiaries (whether or not these trusts resulted from division of a prior trust), at any time and from time to time (whether before or after funding), without approval of any court, for administrative, tax or any other purpose determined by the Trustee to be in the best interests of any beneficiary (including any remainder beneficiary);²³

K. To hold the property of any separate trusts as an undivided whole; provided that these separate trusts must have undivided interests; and provided further that no holding may defer the vesting of any estate in possession or otherwise;

L. To allocate administration expenses to income or principal in the proportions that my Executor or the Trustee may determine, to the extent this discretion is permitted under applicable law, without liability to any person for any consequences of this allocation;

²³ Paragraphs J through M permit the Trustee to make different tax elections for the various trusts created under your Will.

M. To treat capital gains on the books, records and tax returns of any trust as part of a distribution to a beneficiary of the trust to the extent of principal distributed to the beneficiary;

N. To change the situs of any trust at any time and from time to time for the convenience of the beneficiaries or the Trustee or for any other reason; and²⁴

O. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.²⁵

SIXTH: Where a party to any proceeding with respect to my estate or any trust has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.²⁶

SEVENTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will, shall be paid from my residuary estate.²⁷

²⁴ A change in situs means a change in jurisdiction or location. For example, if a beneficiary moves to a state that does not have a state income tax, the trust can also be moved to that state.

²⁵ A distribution “in kind” means that the Trustee can distribute an investment directly to a beneficiary. For example, if the trust owns 10 shares of stock in a corporation, the Trustee can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

²⁶ This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will.

²⁷ This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is \$5.34 Million with a 40% tax rate. The New York State estate tax exemption is \$1 Million and it is not currently scheduled to increase.

EIGHTH: ²⁸A. I appoint my [Gu Relation], [GUARDIAN], to be the Guardian of the person and property of each child of mine who is a minor at the time of my death. If [s/he] fails to qualify or to continue to act, I appoint my [Gu2 Relation], [GUARDIAN], to be such Guardian.

B. I appoint my [Ex Relation], [EXECUTOR], to be the Executor of this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], to be substitute Executor.

C. I appoint my [Tee Relation], [TRUSTEE], to be the Trustee under this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Tee2 Relation], [TRUSTEE2], to be substitute Trustee.

D. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Guardian, Executor or Trustee in any jurisdiction.

E. Any Executor or Trustee may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor or Trustee is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor or Trustee that he or she is no longer able to make decisions with respect to financial matters.

F. To the extent that the exercise of this right does not conflict with the foregoing, each individual acting or designated to act as a Trustee has the right to designate a person to act as a substitute Trustee in the event he or she fails to qualify or to continue to act, provided that no conflicting prior designation is in effect. Any designation of a substitute Trustee shall be made by a duly acknowledged instrument filed with the court having

²⁸ This Article concerns the Executor and Trustee, provides for the appointment of successor Executors and Trustees and the resignation of Executors and Trustees.

jurisdiction of the administration of my estate. Different Trustees may be designated for separate trusts.²⁹

G. As used in this Will, the term “Executor” means the Executor acting from time to time and any Administrator with the Will annexed.

H. As used in this Will, the term “Trustee” means the Trustee acting from time to time.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of ___, 20__.

[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator’s Will in the presence of us and of each of us, who, at the testator’s request, in the testator’s presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____ residing at _____

_____ residing at _____

²⁹ This permits a Trustee to appoint his or her successor in the event no other Trustee is appointed under your Will.

WILL
OF
[CLIENT]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my spouse, [SPOUSE]; or if my spouse does not survive me, to my children who survive me, to be divided among them as they agree, or if they are unable to agree, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.³⁰

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my spouse, [SPOUSE]; or if my spouse does not survive me, to my descendants who survive me, per stirpes.³¹

THIRD: ³² Whenever, under this Will, any property vests in a person who has not attained the age of 21, my Executor, without authorization from any court, shall have the power to manage such property, may exercise in respect of such property and the income

³⁰ This Article provides for the distribution of all personal and household effects after the second death. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

³¹ After you are both gone, the rest of your assets will be distributed to your descendants (children and younger generations) on a “per stirpes” basis. “Per stirpes” is a legal term that means the children of a predeceased beneficiary equally share their parent’s inheritance. For example, if [Child] predeceases you, [Child]’s children will equally share [Child]’s interest in your estate.

³² In the event a minor inherits under your Will, the Executor can hold the minor’s inheritance in trust until the age of 21 or distribute the minor’s inheritance directly to the minor, to the minor’s parent or to a custodial account for the minor.

therefrom all powers conferred by this Will on my Executor (and all powers conferred by law on executors) and may hold such property until such person attains the age of 21 upon the following terms:

A. There may be used for the person as much of the property, and the income therefrom, as may be determined in the discretion of my Executor. Any income not paid shall be accumulated and added at least annually to principal.

B. In connection with the exercise of the above discretionary power to distribute income or principal, there is no requirement to take into account the other income or capital resources of the person, the interest of the person in any other fund, or the duty of any one to support the person, although these factors may be taken into account.

C. Any part or all of such property, or the income therefrom, may be applied for the benefit of the person, and in the case of a minor may be paid or delivered to the minor, to a parent or guardian of the minor, to an individual with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute, as may be determined in the discretion of my Executor.

D. The remaining property shall be distributed to the person when he or she attains the age of 21, or to the estate of the person upon his or her death prior to attaining such age.

FOURTH: In addition to the powers conferred by law, my Executor has complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:³³

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor may determine, without regard to any requirement for diversification;

³³ This Article grants specific powers to the Executor. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor may determine, and to improve or take any other action with respect to real property;

D. To borrow money for any purpose, from others or from any Executor, with or without security, and to mortgage or pledge any property, real or personal;³⁴

E. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor), and to treat their compensation as an administration expense;

F. To sell any property, real or personal, to any Executor or beneficiary at fair market value; and

G. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.³⁵

FIFTH: Where a party to any proceeding with respect to my estate has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.³⁶

³⁴ While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

³⁵ A distribution “in kind” means that the Executor can distribute an investment directly to a beneficiary. For example, if the estate owns 10 shares of stock in a corporation, the Executor can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

³⁶ This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will as the minor or disabled beneficiary.

SIXTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will shall be paid from my residuary estate.³⁷

SEVENTH: A. I appoint my spouse, [SPOUSE], to be the Executor of this Will. If my spouse fails to qualify or to continue to act, I appoint my [Ex 2 Relation], [EXECUTOR2], to be substitute Executor.³⁸

B. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Executor in any jurisdiction.

C. Any Executor may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor that he or she is no longer able to make decisions with respect to financial matters.

D. As used in this Will, the term "Executor" means the Executor acting from time to time and any Administrator with the Will annexed.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of ____, 20__.

[Client]

³⁷ This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is \$5.34 Million with a 40% tax rate. The New York State estate tax exemption is \$1 Million and it is not currently scheduled to increase.

³⁸ This Article concerns the Executor. Additionally, this Article provides for the appointment of successor Executors and the resignation of Executors.

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____residing at _____

_____residing at _____

WILL
OF
[CLIENT]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my spouse, [SPOUSE]; or if my spouse does not survive me, to my children who survive me, to be divided among them as they agree, or if they are unable to agree or if any of them is a minor at the time of division, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.³⁹

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my spouse, [SPOUSE]; or if my spouse does not survive me, to my descendants who survive me, per stirpes, subject to Article THIRD.⁴⁰

THIRD: Any property (other than tangible personal property) that would otherwise pass outright under this Will (other than pursuant to the exercise of a discretionary fiduciary power) to a descendant of mine who has not attained the age of [Age], shall instead be

³⁹ This Article provides for the distribution of all personal and household effects after the second death. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

⁴⁰ After you are both gone, the rest of your assets will be distributed to your descendants (children and younger generations) on a “per stirpes” basis. “Per stirpes” is a legal term that means the children of a predeceased beneficiary equally share their parent’s inheritance. For example, if [Child] predeceases you, [Child]’s children will equally share [Child]’s interest in your estate.

held by the Trustee as a separate trust for that descendant (the “Beneficiary”) upon the following terms:⁴¹

A. The Trustee may distribute to the Beneficiary any part or all of the income and principal of the trust as the Trustee may determine for health, support, maintenance or education. Any income not paid shall be accumulated and added at least annually to principal.

B. The Trustee shall distribute the remaining principal of the trust to the Beneficiary upon his or her attaining the age of [Age].⁴²

C. If the Beneficiary dies prior to attaining the age of [Age], then upon his or her death the remaining principal of the trust shall be distributed, subject to this Article, in equal shares to his or her then surviving children; or if there is none, to the then surviving descendants, per stirpes, of the person who, among a class consisting of me and my descendants, is the Beneficiary’s closest ancestor with any then surviving descendant.⁴³

D. Notwithstanding anything herein, any trust created under this Will for any person not in being at the date of my death shall (unless terminated earlier) terminate 21 years after the death of the last to survive of all descendants of my parents and my spouse’s parents in being at such date, and upon such termination the assets of such trust shall be distributed to that person.⁴⁴

⁴¹ This Article establishes a trust for any beneficiary under the age of [Age]. During that time, the Trustee may distribute the trust assets for the beneficiary’s health, support and educational needs.

⁴² The balance of the trust will be distributed to the beneficiary when he or she attains the age of [Age].

⁴³ If the beneficiary dies before the age of [Age], the beneficiary’s children will inherit the balance of the trust. If the beneficiary does not have children, the beneficiary’s siblings will share the balance equally.

⁴⁴ This prevents any trust from violating the Rule Against Perpetuities-- a rule that does not permit trusts to last forever.

FOURTH: ⁴⁵A. Any property, whether principal or income, distributable to any person under this Will, may be applied for the benefit of that person, including without limitation a distribution to a trust for the benefit of that person. In the case of a minor, the property may be paid or delivered directly to the minor, to a parent or guardian of the minor, to a person with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute until age 21 or whatever earlier age is the maximum permitted under applicable law.⁴⁶

B. Except as otherwise specifically provided herein, in connection with the exercise of a discretionary power to distribute income or principal to any person, there is no requirement to take into account a person's other income or capital resources, the interest of the person in any other fund, or the duty of anyone to support the person, although these factors may be taken into account.⁴⁷

C. Notwithstanding anything herein, no person may participate in a decision to make any proposed discretionary distribution of income or principal to himself or herself or to satisfy any legal obligation of that person.⁴⁸

D. No beneficiary of any trust has any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the trust in any way; nor is any interest in any manner liable for or subject to the debts, liabilities or obligations of the beneficiary or claims of any sort against the beneficiary.⁴⁹

⁴⁵ This Article provides standard terms for administering your Will.

⁴⁶ If a minor's inheritance is too small to justify a trust, this permits the Executor to distribute the inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

⁴⁷ The Trustee may take a beneficiary's income and other resources into consideration, but is not required to do so.

⁴⁸ A Trustee cannot distribute trust assets to himself or herself or to satisfy the Trustee's legal obligations, such as child support. This is necessary to provide for creditor protection.

⁴⁹ This Section protects trust assets from the beneficiary's creditors.

FIFTH: Except as otherwise specifically provided herein, in addition to the powers conferred by law, my Executor and the Trustee have complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:⁵⁰

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor or the Trustee may determine, without regard to any requirement for diversification;

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor or the Trustee may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor or the Trustee may determine, and to improve or take any other action with respect to real property;

D. To permit any income beneficiary (and the guardian of any minor income beneficiary and the family of such guardian) to use any real property or tangible personal property held hereunder for the benefit of the beneficiary, rent free or otherwise, upon such terms as my Executor or the Trustee (other than the beneficiary or guardian) may determine;

E. To borrow money for any purpose, from others or from any Executor or Trustee, with or without security, and to mortgage or pledge any property, real or personal;⁵¹

⁵⁰ This Article grants specific powers to the Executor and Trustee. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

⁵¹ While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

F. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor or Trustee), and to treat their compensation as an administration expense;

G. To sell any property, real or personal, from my estate to any trust or from any trust to my estate or from one trust to another;

H. To sell any property, real or personal, to any Executor, Trustee or beneficiary at fair market value;

I. To make loans to any income beneficiary hereunder, interest free or otherwise, upon such terms as my Executor or the Trustee (other than such beneficiary) may determine;

J. To sever any trust into two or more separate trusts having the same terms as the original trust, and to combine two or more trusts having identical terms and beneficiaries (whether or not these trusts resulted from division of a prior trust), at any time and from time to time (whether before or after funding), without approval of any court, for administrative, tax or any other purpose determined by the Trustee to be in the best interests of any beneficiary (including any remainder beneficiary);⁵²

K. To hold the property of any separate trusts as an undivided whole; provided that these separate trusts must have undivided interests; and provided further that no holding may defer the vesting of any estate in possession or otherwise;

L. To allocate administration expenses to income or principal in the proportions that my Executor or the Trustee may determine, to the extent this discretion is permitted under applicable law, without liability to any person for any consequences of this allocation;

⁵² Paragraphs J through M permit the Trustee to make different tax elections for the various trusts created under your Will.

M. To treat capital gains on the books, records and tax returns of any trust as part of a distribution to a beneficiary of the trust to the extent of principal distributed to the beneficiary;

N. To change the situs of any trust at any time and from time to time for the convenience of the beneficiaries or the Trustee or for any other reason; and⁵³

O. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.⁵⁴

SIXTH: Where a party to any proceeding with respect to my estate or any trust has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.⁵⁵

SEVENTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will shall be paid from my residuary estate.⁵⁶

⁵³ A change in situs means a change in jurisdiction or location. For example, if a beneficiary moves to a state that does not have a state income tax, the trust can also be moved to that state.

⁵⁴ A distribution “in kind” means that the Trustee can distribute an investment directly to a beneficiary. For example, if the trust owns 10 shares of stock in a corporation, the Trustee can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

⁵⁵ This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will.

⁵⁶ This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is \$5.34 Million with a 40% tax rate. The New York State estate tax exemption is \$1 Million and it is not currently scheduled to increase.

EIGHTH: ⁵⁷A. If my spouse fails to continue to act as Guardian of the person and property of any minor child of mine, I appoint my [Gu Relation], [GUARDIAN1]; or if [s/he] fails to qualify or to continue to act, I appoint my [Gu2 Relation], [GUARDIAN2], to be such Guardian.

B. I appoint my spouse, [SPOUSE], to be the Executor of this Will. If my spouse fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], to be substitute Executor.

C. I appoint my [Tee Relation], [TRUSTEE], to be the Trustee under this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Tee2 Relation], [TRUSTEE2], to be substitute Trustee.

D. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Guardian, Executor or Trustee in any jurisdiction.

E. Any Executor or Trustee may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor or Trustee is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor or Trustee that he or she is no longer able to make decisions with respect to financial matters.

F. To the extent that the exercise of this right does not conflict with the foregoing, each individual acting or designated to act as a Trustee has the right to designate a person to act as a substitute Trustee in the event he or she fails to qualify or to continue to act, provided that no conflicting prior designation is in effect. Any designation of a substitute Trustee shall be made by a duly acknowledged instrument filed with the court having

⁵⁷ This Article concerns the Executor and Trustee, provides for the appointment of successor Executors and Trustees and the resignation of Executors and Trustees.

jurisdiction of the administration of my estate. Different Trustees may be designated for separate trusts.⁵⁸

G. As used in this Will, the term “Executor” means the Executor acting from time to time and any Administrator with the Will annexed.

H. As used in this Will, the term “Trustee” means the Trustee acting from time to time.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of _____, 20__.

[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator’s Will in the presence of us and of each of us, who, at the testator’s request, in the testator’s presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____ residing at _____

_____ residing at _____

⁵⁸ This permits a Trustee to appoint his or her successor in the event no other Trustee is appointed under your Will.

