THINKING OUTSIDE THE BOX: OPTIONS FOR ASSET PRESERVATION

WITH BENEFICIAL TAX CONSEQUENCES

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I. IRREVOCABLE LIFE INSURANCE TRUSTS

a. Structure

i. The typical use for the irrevocable life insurance trust is to remove the value of the death benefit provided by the life insurance policy from the insured's estate. However, the same may also be said for protecting the policy proceeds from the cost of long term care.

ii. We start with the creation of an irrevocable trust. The irrevocable trust is structured so that it will own one or more life insurance policies during the insured's lifetime, and will collect the proceeds from such policies upon the insured's death. Structured properly, the proceeds from the insurance policy or policies should not be includible in the estate of the insured or the estates of the trust beneficiaries.

iii. If the trust is designed to hold life insurance on one life, that is the life of the Grantor, the Grantor should not be a beneficiary of the trust, however the Grantor's spouse and/or other family members may be beneficiaries both during the Grantor's lifetime and upon death. The trust may be structured so that the spouse has access to the proceeds through the actions of a Trustee other than the spouse. If the spouse wishes to have additional access to principal the Grantor may also include provisions allowing the spouse to have a noncumulative power to withdraw the greater of $5,000 or 5% of the value of the trust in each calendar year.

iv. The Trustees may include the Grantor's spouse and/or other family members, however if the Grantor's spouse is serving as the sole Trustee care must be taken in drafting the distribution language that allows the Trustee to make distributions from the trust. A spouse serving alone as Trustee should only be given discretionary distribution permissions if the distribution discretion is subject to an ascertainable standard. (Treasury Regs §20.2014-1(c)(2).

v. If the trust is designed to hold life insurance on the lives of a husband and wife, they may both be the Grantors of the trust but neither should be beneficiaries so as to avoid inclusion of the insurance proceeds in either estate.

vi. Once the trust agreement is in place, the trust may either purchase a new life insurance policy or policies, or may accept the transfer of existing life insurance. If the trust is going to purchase new life insurance, then the Grantor (or someone else, but typically the Grantor), will contribute cash to the trust in order to provide the trust with the funds to pay the premiums on the policy. If an already existing life insurance policy is being transferred to the trust, then a change of beneficiary and change of ownership form must be prepared in order to move the policy from its existing owner to the new trust. It is usually wise to change the beneficiary of the policy first to the trust, prior to changing the owner. If the owner is changed first, then the Trustees of the trust and not the original owner will have to file the change of beneficiary. From an administrative perspective it is easier to do the change of beneficiary first, instructing the insurance company which form to record first. (Many times, we will have the owner also note the time in addition to the date when completing the change of beneficiary and change of ownership forms in order to further demonstrate to the insurance company which occurred first).

b. Taxability

i. Income Tax

1. Grantor Trust Status for the Grantor

a. If trust income is permitted to be and is used to pay premiums on the insurance on the life of the Grantor or the Grantor's spouse, §677(a)(3) provides the trust will be a grantor trust with respect to any portion of the trust whose income is applied to the payment of such premiums and may be applied for such without the consent of an adverse party.

i. Applies regardless of whether existing policy was transferred to the trust or the trust purchased the policy. (*Strockstrom V. Commissioner*, 3 T.C. 664 (1944)

ii. Requiring premiums to be paid out of principal other than capital gains can avoid grantor trust status. (PLR 9227017)

iii. Exceptions won't apply if the Grantor's spouse is a beneficiary. (IRC §677(a)(1) and (2))

b. Grantor Trust status may be an advantage due to the fact that the Grantor will report any income tax on his or her own personal income tax return, therefore paying the income tax. This payment of income tax in essence allows

for additional "gifts" to be made to the trust beneficiaries with the payment of income tax actually being treated as a gift. (Rev. Ruling 2004-64, 2004-27 I.R. B. 7)

c. So what is the downside of the trust including a provision requiring the reimbursement by the trust of income tax paid by the Grantor? (IRC § 2036(a)(1))

2. Grantor Trust Status for Others

a. Crummey withdrawal rights can result in the beneficiaries having such withdrawal rights to be treated as the Grantor over a portion of the trust income. (IRC §678(a)(1))

b. Once the Crummey holder fails to exercise the power to withdraw, the IRS may treat the power holder as if he or she partially released the power to withdraw that portion of the trust corpus. (IRC §678(a)(2))

c. Typically the same powerholder who released the power will be a beneficiary of the trust income and/or principal pursuant to the terms of the trust instrument. The provisions of the trust that permit the distribution of income and/or principal to this beneficiary is similar to the provisions that if applied to the Grantor and/or the Grantor's spouse, would cause the Grantor to be treated as the owner for income tax purposes under IRC §677. As such IRC §678(a)(2) would cause the beneficiary powerholder to therefore be treated as the owner of a portion of the trust for income tax purposes.

d. Crummey Powerholders vs. Grantor – IRC §678(b) will treat the Grantor of the trust as the owner over the Crummey Powerholders.

ii. Gift Tax

1. Transfers of cash or existing life insurance polies to an irrevocable life insurance trust will result in a completed gift if the trust is structured to avoid all provisions that would cause the trust assets to be includible in the Grantor's estate.

2. Treasury Regulations §25.2511-1(h)(8) provides that the gift tax treatment applies not only the transfer of the cash and the policy itself, but also the payment of premiums (whether paid directly or <u>indirectly</u>).

3. Use if Crummey provisions allows for transfers to qualify for the gift tax annual exclusion pursuant to IRC §2503(b). This amount is currently $14,000. With the proper use of the Crummey powers the annual exclusion may be used to cover a substantial portion of

the premium payments made on a life insurance policy as the Crummey powers may be used for each beneficiary of the trust.

4. What about the transfer of an existing life insurance policy? That policy will be considered to have a value, even if the policy is a term policy. When making a transfer of an existing life insurance policy you will want to be sure to order a Form 712 from the life insurance company noting the date of the transfer and the value of the policy. Depending upon the size of the policy you may be required to file a gift tax return as a result of the transfer.

iii. Estate Tax

1. The value of insurance proceeds payable upon the death of the insured will be includible in the insured's estate if the insured is can be treated as having any "incidence of ownership" in the life insurance. (IRC §2042)
2. Use of the ILIT properly will avoid the estate tax on the full amount of the death proceeds payable, provided the ILIT is structured to avoid any incidents of ownership for the insured.
3. IRC §2035 – transfers of policies made within 3 years of death will be pulled back into the Grantor's gross estate (but note the *Silverman* doctrine which provides that if a policy is assigned and after the assignment the assignee pays all premiums, then the proportionate share of the proceeds that is attributable to the premiums paid by the assignee may be excluded from the Grantor's gross estate. (*Silverman Estate v. Commissioner*, 61 T.C. 338 (1973), *aff'd on other grounds*, 521 F.2d 574 (2d Cir. 1975), *acq*., 1978-1 C.B. 2)
4. IRC §2036 – Reimbursement of income taxes will cause inclusion of the proceeds in the Grantor's estate. Be careful of state law, as if the trust has its situs in a state where state law dictates that the Grantor has a right to reimbursement for income tax as this may cause a §2036 issue. Therefore you may wish to include a provision in the trust instrument that states that the Trustee will not pay to the Grantor or the Grantor's estate any portion of the trust, whether income or principal, to satisfy the income tax liability of the Grantor.

c. Use as an Asset Preservation Vehicle for Long Term Care

i. Existing insurance policies may be transferred into the trust but note the 3 year waiting period before the policy is deemed to be removed from the Grantor's estate. For Medicaid purposes, the lookback period will be 5 years.

ii. Best option for estate tax purposes is for the Grantor/insured to purchase life insurance directly from the trust thereby bypassing the 3 year waiting period.

iii. For Medicaid purposes, purchasing a policy directly from the trust will avoid the transfer look back period as far as the cash value is concerned, however to the extent that premiums are paid on an annual basis, the contribution of each premium payment to the trust in order to provide cash to the trust for the premiums will be treated as a new transfer each year.

iv. If Medicaid is the priority over the saving of possible estate tax, then transferring an existing policy may be the better path, particularly if the policy is paid up and no additional premiums need to be made, or if there is sufficient cash value to support any remaining premium payments.

v. If both Medicaid and estate tax savings are priorities, the Grantor may contribute a significant gift of cash or investments to the trust and use the funds to purchase a life insurance policy on the Grantor. By purchasing the policy directly from the trust, the 3 year rule under §2035 will be avoided. By contributing a significant amount of funds to pay the future premiums, the 5 year look back period for Medicaid will begin to run without a recurring 5 year period starting with every premium contribution each year.

II. LIMITED LIABILITY COMPANIES (LLCs)/FAMILY LIMITED PARTNERSHIPS (FLPs)

Many of the structuring rules and tax consequences for Limited Liability Companies ("LLCs") are similar to Family Limited Partnerships ("FLPs"). Generally speaking, the best entity for family planning of passive investments will be the LLC or the FLP, as opposed to a trust or coporation. For family investments, the FLP was typically the entity of choice prior to the existence of LLCs. As states enacted their respective Limited Liability Company Acts, the issue then became and now is a matter of how state law treats the LLC vs. the FLP. For example, in some states an LLC will automatically be dissolved upon the death, retirement, expulsion, bankruptcy, or dissolution of a member whereas the same rule would not apply to an FLP. New York is not one of those states so this difference is no longer a factor in the choice of entity. If the purpose for the entity is to hold an operating business, the LLC will be the primary choice of entity as the LLC provides every member with liability protection whereas the FLP does not (unless the business registers as a limited liability partnership).

a. LLC Structure

i. Formation starts with filing the Article of Organization. You may now go to http://ecorp.dos.ny.gov for online filing. Select "Domestic Business Corporation (for profit) and Domestic Limited Liability Company". This will start you through a screen by screen series of questions which will

produce Articles of Organization for you to file. The current filing fee is $200.00. Filing online allows you to avoid what was the expedited 24 hour service fee of $25.00 or the $75.00 same day expedited service fee) The online filing system will provide you with the same day service without the extra fees unless perhaps if you try to file immediately before the 7:30pm close of the system (the system is operational between 6:30am and 7:30pm on weekdays). We would recommend paying the additional $10.00 for a Certified Copy of the Articles of Organization as banks or other lenders may require this.

ii. After filing the Articles of Organization the formation of the LLC must be published within 120 days of the filing date in two newspapers designated by the county clerk in which the principal office for the LLC is located. The notice must run once a week for six consecutive weeks. Once the publication is completed and the affidavits of publication are obtained from the newspapers, a Certificate of Publication must be filed with the Secretary of State along with a $50.00 filing fee. It may be helpful to use a publication company to handle this step for you as the company will know what newspapers to use and will have a system to accomplish the publication.

iii. The third step in the formation of the LLC is obtaining the EIN for the entity. This may also be done online by going to www.irs.gov. At the top of the home page under the orange "Tools" section there is an option to "Apply for an Employer ID Number". This is available from 7:00am until 10:00pm on weekdays and will take you through a step by step process to obtain the EIN for the entity. Even though you may apply online for the LLC you will want to have your client sign Form SS-4 (Application for Employer Identification Number) for your records appointing you as the Third Party Designee.

iv. Assets are contributed to the Limited Liability Company ("LLC") in exchange for membership interests

v. Assets may be contributed by one individual to form single member LLC, or multiple individuals to form a multi-member LLC

vi. Single member LLCs may be used to initially establish the LLC. The owner of the LLC may then transfer interests in the LLC as a means of transferring value out of his or her name and therefore his or her estate

vii. Multi-member LLCs can be used to allow multiple parties to contribute assets to the LLC in order to centralize the management of those assets, or to initially establish the LLC as a multi-member LLC without the need for transferring the interest from a single member LLC to get the partnership started.

viii. The operating agreement for the LLC is a key ingredient to the success of the LLC. There are several issues that should be addressed within the LLC agreement itself:

1. Business Purpose: the LLC allows for many advantages to its members; however, the IRS in allowing the formation of the LLC recognized the ability to use the LLC contrary to the intentions of Subchapter K of the IRC. The first of these concerns is the business purpose of the LLC. Is the LLC formed for a true business purpose? The operating agreement needs to provide the business purpose for the LLC in order to avoid the IRS arguing that the LLC was formed merely for tax avoidance
2. Economic Arrangement:
    a. Different Classes of Membership Interests:
        i. Voting Rights
        ii. Distribution Rights
        iii. Frozen interests with fixed return
        iv. Management Rights
    b. Loans from Owners
    c. Transfer of Interests
    d. Capital Accounts
3. Management Structure
4. Dissolution/Liquidation

b. FLP Structure

i. The FLP is formed by filing a Certificate of Limited Partnership with the Department of State. FLPs may not be filed online as of yet. A fillable Certificate of Limited Partnership may be obtained at http://www.dos.ny.gov/corps/lpcorp.html#certlp

ii. Filing of the Certificate of Limited Partnership may be done by fax to fax number 518-474-1418. If faxing the Certificate for Filing, remember to include a Credit Card Authorization Form to pay for the filing fee, which is currently $200.00 (plus any expedited fees and the $10.00 for the Certified Copy), if you do not already have an account established with the Department of State. The Credit Card Authorization form and fax numbers may be obtained at http://www.dos.ny.gov/corps/bcfaq.asp#faxes.

iii. After filing the Certificate of Limited Partnership the formation of the limited partnership must be published within 120 days of formation in two newspapers designated by the county clerk in which the principal office for the FLP is located. The notice must run once a week for six consecutive weeks. Once the publication is completed and the affidavits of publication are obtained from the newspapers, a Certificate of

Publication must be filed with the Secretary of State along with a $50.00 filing fee. It may be helpful to use a publication company to handle this step for you as the company will know what newspapers to use and will have a system to accomplish the publication.

iv. Again, as with the LLC, you will then want to obtain and EIN number for the FLP which can be done using the same process mentioned above with the LLCs.

v. The family limited partnership is formed with at least one general partner and at least one limited partner. It can't be formed with one member as the LLC can.

vi. The general and limited partners may be individuals, trusts, LLCs, corporations, or S corporations (the FLP or LLC can't own an S Corporation but an S Corporation can own and LLC interest or FLP interest)

vii. Our favored approach to the formation of an FLP is to have an LLC as the general partner. Using an LLC as the general partner helps to spread the management and control of the entity over one or more family members, helping to alleviate the IRC §2036 and §2038 argument that the senior family member has retained control over the FLP (as mentioned above with LLCs this is important to avoid if estate tax planning is also part of the consideration for establishing the FLP).

viii. If the LLC is used as the General Partner, there will be an LLC operating agreement for the LLC. However, there will also need to be an FLP operating agreement for the FLP as a whole. The considerations that play a part in the formation of the FLP agreement are the same as those set forth above for LLCs.

c. Taxability

i. The initial contribution of assets in exchange for membership units or FLP interests is typically tax free with a few exceptions:

1. Contribution of services results in compensation income to the contributor in the amount of the value of the membership interest received (IRC Reg. §1.721-1(b)(1)

2. Contribution of real property subject to indebtedness triggers income to the extent the debt exceeds the contributors basis in the real property (unless the debt is recourse debt and the contributor retains liability for the debt) (IRC §752(b)

3. Investment company exception: in multi-member LLCs, if the purpose for the contribution of assets is to allow the members to diversify their individual holdings, the contribution of assets will result in in the recognition of taxable income on the unrealized appreciation in the property transferred to the LLC (IRC

§351(e)(1)). Note that an LLC may be treated as an investment company without running afoul of this exception if the members are contributing like assets. See §368 for the following two tests for satisfying the diversification rules:

a. 25% test –the stock of one issuer must be less than or equal to 25% of the total value invested

b. 50% test- no more than 50% of the value may be invested in 5 or fewer issuers

c. E.g. – PLR 200002025

4. This same set of rules applies to partnerships as well.

ii. Income Tax

1. Single Member LLC as a Disregarded Entity

2. C Corporation: LLCs may also be treated as a corporation for income tax purposes. The downside to this is that C Corporations are subject to double taxation. That is, they are subject to income tax at the corporate level on the earning and profits; and they are also taxed at the shareholder level on the dividends distributed. The tax on the earnings can be reduced by compensation, fringe benefits, rent, etc. but these items do not reduce the double taxation upon liquidation of the entity.

3. S Corporation: LLCs are also permitted to elect to be treated as S Corporations. S Corporations, unlike C Corporations only have one level of tax (with a few exceptions). The S Corporation allows for the pass through of income and loss. Each shareholder will be treated as receiving a pro rata share of incidents of taxation for the S Corporation, i.e. income, losses, credits, deductions, etc. However, S Corporations have restrictions on ownership and capital structure that make the S Corporation less desirable for estate and Medicaid planning purposes.

4. Partnership: The better entity classification for LLCs will be to be taxed as a partnership for income tax purposes, similar to the taxability of the FLP. For example, unlike the C Corporation, during the life of the entity there is only one level of tax, i.e. at the membership level. Likewise, if the entity is liquidated, there will only be one level of tax. There are also no restrictions on entity ownership and capital structure as there are with S Corporations, making the partnership status much more desirable for planning purposes.

a. FLPs and LLCs taxed as partnerships are subject to the partnership tax rules for income tax purposes

b. Each partner will report the appropriate pro rata share of the income or loss, credits, deductions or separately stated items of the partnership.

c. For family planning the partnership will typically be a calendar year, although partnerships may elect to have a different tax year.

d. The character of each item of income, loss, credit or deduction is determined by the source from which it was realized. These are separately stated items, after which the remaining income is treated as ordinary income or loss.

e. Each partner may only take advantage of the loss to the extent of the partner's basis in his or her partnership interest. Any unused loss may be carried over.

iii. Gift and Estate Tax

1. Making use of the annual exclusion requires a special provision in the operating agreement or partnership agreement allowing a donee member to assign his or her interest immediately to a third party after first offering it to the other members thereby creating the present interest necessary for us of the annual exclusion

2. Include a provision in the operating agreement (or partnership agreement) that the Transferor Managing Member (General Partner) who has transferred assets to the entity has a fiduciary obligation to the other members in order to avoid inclusion of the value of the assets transferred to the entity in the transferor Manager Member's (or General Partner's) gross estate (avoidance of §§2036(a)(2) and 2038))

a. Watch the voting rights if voting stock is contributed to the LLC (avoidance of §2036(a)(1))

d. Use as an Asset Preservation Vehicle for Long Term Care

i. <u>Example 1: Contribution of Interests in a Family Camp:</u> Mom and Dad wish to preserve the family camp for multiple generations and avoid the risk of losing the camp to long term care costs. Mom and Dad transfer the family camp to an LLC owned by the children.

1. Keeping income for Mom and Dad: If the family camp is rented and Mom and Dad wish to have access to the income for their expenses Mom and Dad may transfer the property to the LLC reserving a life estate. The life estate will allow them to continue to receive the net rental income to apply toward their current living expenses and their future cost of care if care is needed in a skilled nursing facility.

2. What is the effect of the transfer for Medicaid purposes? After the 5 year lookback the value of the family camp will be preserved and the LLC will allow for future management of the family camp as ownership expands through the family generations.
3. What if Mom and Dad don't make the 5 year period? Can valuation help to reduce the exposure of the camp? (FH#5700969R, Oneida County, New York, August 17, 2011)

ii. Example 2: Contribution by Parent and Children of Securities and the Family Farm: Mom transfers securities and real estate to an LLC. Trust A, Trust B and Trust C, all established by Mom (Mom made prior gifts into each Trust as seed money) contributes their seed money consisting of securities to the LLC. The LLC serves as a family holding company, ensuring the centralized management of the family assets going forward. In addition, if Mom gifts at a minimum a portion of her interest to Trusts A, B and C, and the LLC makes distributions in accordance with the members capital accounts, the gifts of LLC interests will reduce the income Mom will receive from the LLC, reducing the exposure of the LLC income to long term care costs.
    1. How will the LLC structure help to reduce estate taxes?
    2. What issues arise with the taxability of the LLC structure in relation to the family farm?
    3. How will the LLC structure be used for asset preservation from long term care costs?

iii. Example 3: Creation of Family Limited Partnership with LLC as the General Partner: Sean and Francesca have real estate and securities they wish to protect. They also acknowledge that as they age they are having difficulty managing their assets. While they love all four of their children, they feel only two are financially responsible and are not influenced by the pressure of spouses on how to handle finances. Sean and Francesca transfer the real estate and securities to an FLP. In order to gain assistance with the management of their finances, the general partner for the FLP is an LLC, of which Sean, Francesca, son, Ben and Son, Max will be members. Sean and Francesca also receive limited partnership interests in exchange for the contribution of property to the FLP. Sean and Francesca will gift limited partnership interests to 4 separate Irrevocable Trusts, one for the benefit of each of their children, Ben, Max, Ryan and Kristen. They will then modify their Wills so that any limited partnership or general partnership interests still owned by them at the time of their death will be divided equally to their 4 children to be held in trust for each child's lifetime. Francesca and Sean would like to include

language within all trusts that will protect the assets from long term care costs for their children as well.

1. What are our estate planning issues?
    a. Valuation discounts on transfer of limited partnership interests. (IRC §2704
    b. Retention of General Partnership interests (IRC §2036)
    c. Trusts for children that will continue for their lives and also for the grandchildren.
2. What are our Medicaid issues?
    a. Retention of General Partnership and Limited Partnership interests – are they are countable resource?
    b. If the interests are a countable resource, what will be the value for Medicaid purposes? (FH#3622131Y, Columbia County, New York, August 27, 2002; *aff'd Campbell v. Commissioner of New York State Dept. of Health*, 14 A.D.3d 766 (2005))
    c. Will an independent valuation assist in the future?
    d. Will the assets held in the Irrevocable Trusts be considered a countable resource? Does the discretion offered to the Trustee increase or decrease the likelihood of the agency looking to the trust principal as a resource?
    e. Is it possible to protect the assets for the children in either the Irrevocable Trusts or the Testamentary Trusts?

SAMPLE

IRREVOCABLE LIFE INSURANCE TRUST

_____ IRREVOCABLE TRUST

THIS IS A TRUST AGREEMENT dated _____, between _____of _____ in the County of _____ and State of New York (the "Grantor") and the Grantor's spouse, _____ and _____ as Trustees (collectively, the "Trustee").

WHEREAS, the Grantor desires to create a trust; and

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

NOW, THEREFORE, the Grantor intends to transfer the property to the Trustee, IN TRUST, and the Trustee agrees to accept the property and to hold, manage and distribute the property under the terms of this Agreement.

ARTICLE I
Trust Name

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

ARTICLE II
Family Information

The Grantor is married to _____ and, subject to the definition of "the Grantor's Wife," below, any reference to the Grantor's Wife shall be to her. The Grantor's children born before the date of this Agreement are _____.

ARTICLE III
Lifetime Trust

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

1. The Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee (excluding, however, any Insured Trustee) may at any time and from time to time determine to such one or more of the Grantor's Wife and the Grantor's descendants in such amounts or proportions as the Trustee (excluding, however, any Insured Trustee) may from time to time select for the recipient's health, education, maintenance or support in his or her accustomed manner of living.

2. The Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee (excluding, however, any Interested Trustee and any Insured Trustee) may at any time and from time to time determine to the Grantor's Wife and the Grantor's descendants in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee and any Insured Trustee) may from time to time select, for any purpose.

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

4. The Lifetime Trust shall also be subject to the withdrawal rights set forth below.

5. The Trustee shall distribute such income and/or principal of the trust to such one or more persons out of a class composed of the Grantor's descendants on such terms as the Grantor's Wife may appoint by a signed writing that is acknowledged before a notary public specifically referring to this power of appointment and delivered to the Trustee provided, however, that this power of appointment may be exercised on Wife's behalf by a guardian or attorney-in-fact appointed to represent Wife and expressly authorized to do so.

B. **End of Lifetime Trust.** Upon the Grantor's death, if the Grantor is survived by the Grantor's Wife, any property of the Lifetime Trust that is included in the Grantor's gross estate shall be distributed to the Grantor's surviving Wife and any property of the Lifetime Trust that is not included in the Grantor's gross estate shall be distributed to the Trustee of the Family Trust hereunder, to be disposed of under the terms of that trust. Upon the Grantor's death, if the Grantor is not survived by the Grantor's Wife, the property of the Lifetime Trust shall be distributed to the Grantor's then living children, _____, in equal shares, per stirpes.

ARTICLE IV

Crummey Rights of Withdrawal

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

ARTICLE V

Family Trust

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

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

1. The Trustee may, but shall not be required to, distribute to one or more of the Grantor's Wife and the Grantor's descendants as much of the net income and principal of the trust as the Trustee may at any time and from time to time determine in such amounts or proportions as the Trustee may from time to time select for the recipient's health, education, maintenance or support, in his or her accustomed manner of living.

2. The Trustee may, but shall not be required to, distribute to one or more of the Grantor's Wife and the Grantor's descendants as much of the net income and principal of the trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine, in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose.

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

4. The Trustee shall distribute such income and/or principal of the trust to such one or more persons out of a class composed of the Grantor's descendants on such terms as the Grantor's Wife may appoint by a signed writing that is acknowledged before a notary public specifically referring to this power of appointment and delivered to the Trustee provided,

however, that this power of appointment may be exercised on the Grantor's Wife's behalf by a guardian or attorney-in-fact appointed to represent the Grantor's Wife and expressly authorized to do so.

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

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

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

2. distributed to the Grantor's then living children, _____, in equal shares, per stirpes.

ARTICLE VI
Insurance Policies

The Trustee may acquire and retain life insurance on the life of any individual (or the joint lives of any individuals) in which any beneficiary has an insurable interest. The Trustee (excluding, however, any Insured Trustee, who shall not participate in any decision involving a life insurance policy on such Trustee's life or its proceeds) shall have all rights of an owner over life insurance policies assigned to or otherwise owned by the Trustee, exercisable in such Trustee's absolute discretion, including without limitation each of the following rights that applies to a policy:

A. **Right to Borrow.** To retain the policy and to pay premiums and interest on policy loans thereon by using income or principal or by borrowing on the policy.

B. **Minimum Deposit.** To adopt a minimum deposit or similar arrangement regarding the policy, even though that may reduce the amount of the death benefit or result in the *de facto* conversion of a cash value life policy into a term policy.

C. **Split Dollar Plans.** To enter into and to terminate split-dollar or similar plans.

D. **Designate Beneficiary.** To designate the beneficiary under the policy and to exercise non-forfeiture provisions, conversion privileges and other options available under the policy.

E. **Miscellaneous.** The Trustee shall have no duty to pay premiums on the insurance policies payable to or owned by the Trustee. The companies issuing insurance policies payable to the Trustee shall have no responsibility for the application of the proceeds or the fulfillment of the trusts hereunder. The direct payment of a premium on an insurance policy shall be treated as an addition to the trust to the extent it is treated as a gift by a living person.

ARTICLE VII
Maximum Duration for Trusts

A. **Maximum Duration for Trusts Defined.** The Maximum Duration for Trusts shall end on the date twenty-one (21) years after the death of the last to die of the measuring lives described in the paragraph below entitled "Measuring Lives."

B. **Measuring Lives.** The measuring lives under the paragraph above entitled "Maximum Duration for Trusts Defined" shall consist of those of the following individuals who are living at the time that the application of such rules limiting the maximum duration of trusts is deemed to begin: the Grantor's Wife, all of the Grantor's descendants and any surviving spouse of a descendant of the Grantor.

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

ARTICLE VIII
Spendthrift Provision

A. **No Assignment.** Each trust shall be a spendthrift trust to the maximum extent permitted by law and no interest in any trust hereunder shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation. Notwithstanding the foregoing, no

provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment.

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

ARTICLE IX
Payments to Minors

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

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

1. to the Minor's descendants surviving the Minor, per stirpes; or if there are no such descendants then living, then

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

3. to the Grantor's descendants then living, per stirpes.

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

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

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

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

E. **Distribution to a Minor's Parent.** The Trustee may distribute the property to a parent of the Minor even if the parent does not assume any formal fiduciary capacity concerning the property.

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

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

ARTICLE X

Exercise of Powers Created Hereunder

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

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

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

ARTICLE XI

Irrevocability

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

beneficiary of a trust hereunder, and the Grantor directs that no distribution shall be made that would have that effect.

ARTICLE XII

Trustees

A. **Appointment of Trustee.** The Grantor appoints the Grantor's Wife, _____, and _____ to serve as Trustees hereunder (collectively referred to in this instrument as the Trustee).

B. **Removal of Trustees.**

1. The Trust Protector shall have the right to remove any Trustee hereunder, whether that Trustee is currently serving or has been named or designated to serve in the future, for any reason or no reason at all. If any Trustee is removed under this paragraph, any successor Trustee appointed by the removed Trustee shall not take office.

2. The power to remove a particular Trustee may be released by the person who holds the power to remove and such release may be limited to such person or also may be made binding upon any and all persons who may have a power to remove.

C. **Compensation of Trustees.** Individual Trustees shall receive reasonable compensation in accordance with the law of the State of New York in effect at the time of payment, unless the Trustee waives compensation; provided, however, that neither the Grantor's Wife nor any descendant of the Grantor who is named herein or otherwise appointed to serve as Trustee hereunder shall receive compensation for serving as Trustee hereunder. A corporate Trustee shall be compensated by agreement with the individual Trustee or, in the absence of such agreement, in accordance with its fee schedule as in effect at the time of payment. The Grantor authorizes a corporate Trustee to charge additional fees for services it provides to a trust hereunder that are not comprised within its duties as Trustee; for example, a fee charged by a mutual fund it administers in which a trust hereunder invests, a fee for providing an appraisal or a fee for providing corporate finance or investment banking services. The Grantor also recognizes that a corporate Trustee may charge separately for some services comprised within its duties as Trustee; for example, a separate fee for investing cash balances or preparing tax returns. Such separate charges shall not be treated as improper or excessive merely because they are

added on to a basic fee in calculating total compensation for service as Trustee. In calculating any compensation based on the value of a trust, a policy of insurance on the life of a living person shall be deemed to have no value.

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

E. **Trust Protector Provisions.**

1. Anyone serving as Trust Protector may resign by acknowledged instrument delivered to the Trustee then acting hereunder.

2. No discretionary distribution shall be made from any trust that would discharge or substitute for a legal obligation of any person serving as Trust Protector even if such a distribution otherwise would be authorized under the terms of the trust.

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

4. The Trustee shall advise each person appointed as a Trust Protector hereunder of such appointment and each person so appointed shall accept such appointment by an acknowledged instrument delivered to the Trustee then serving within sixty (60) days of such

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

F. **Trust Protector Powers.** The Trust Protector shall have the following powers:

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

2. The power to remove Trustees granted and described in the Section titled "Removal of Trustees," above.

3. The power to appoint an individual, corporation or other entity with fiduciary powers to replace any removed Trustee.

4. The Trust Protector and such person's successors shall have the right to appoint additional Co-Trustee(s) (including the Trust Protector), appoint successor Trustee(s) (including the Trust Protector), and remove Trustee(s) by an instrument in writing.

5. The Trust Protector may limit the power of any Independent Co-Trustee, who may be serving from time to time. For example, the Independent Co- Trustee may be limited to exercising only those powers which would, if held by a beneficiary-trustee, cause Trust property to be includable in the estate of the beneficiary- trustee for estate tax purposes.

6. The Trust Protector and any successor Trust Protector is authorized to designate his or her own successor by a written, acknowledged instrument at any time, including under the terms of his or her duly executed Last Will and Testament. Such designation shall be revocable during the time prior to the Trust Protector's death or resignation.

7. Notwithstanding anything herein to the contrary, a person who has contributed property to the trust, any beneficiary of any trust hereunder, any person under a duty to support a beneficiary, and any guardian or spouse of a guardian of a beneficiary, may not serve as a Trust Protector.

8. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

9. Any person serving as Trust Protector may resign at any time by a written instrument duly acknowledged and delivered to the beneficiaries and the then acting Trustees.

10. Grantor hopes that the Trust Protector will always respond to the concerns of the beneficiaries. Notwithstanding the foregoing, the Trust Protector's authority is not conferred in a fiduciary capacity, and the Trust Protector shall not be liable for any action or inaction with respect to any trust hereunder. Furthermore, the Trust Protector shall be under no duty or requirement to monitor any Trustee of any trust hereunder, and shall be under no duty or requirement to exercise these powers.

11. The Trust Protector shall be entitled to his or her customary hourly fees for any time spent in exercising the responsibilities designated under this paragraph, if the Trust Protector is affiliated with a law firm or an accounting firm, but if not, such fees as are negotiated in good faith with the Trustee, and shall be reimbursed for any reasonable expenses of performing his or her duties hereunder. In the event the Trust Protector incurs any expense for legal fees or disbursements in carrying out his or her duties, all such expense shall be reimbursed from the trust from which such expense was incurred.

ARTICLE XIII
Fiduciary Provisions

A. **General Provisions Regarding Changes in Fiduciaries.**

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

2. Separate trusts hereunder may have different Trustees.

3. To the extent not prohibited by applicable law, any Trustee may resign at any time without court approval, whether or not a successor has been appointed, provided the

resigning Trustee complies with any applicable state law governing the resignation of the Trustee that may not be waived by a governing instrument. Such resignation shall be by acknowledged instrument executed by the resigning Trustee and delivered to any other fiduciary (and any Trust Protector) acting hereunder, or if none, to the Grantor's then living eldest adult and competent descendant (who, if a Trustee is resigning, is a beneficiary of the trust of which such Trustee is resigning), or if none, then to the guardian of the Grantor's then living eldest descendant (who, if a Trustee is resigning, is a beneficiary of the trust of which such Trustee is resigning), or, if such descendant is a minor and no guardian for such minor has been appointed and is acting, then to the parent of such descendant or other individual with whom such minor resides.

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

5. If any Trustee is removed, resigns or otherwise ceases to act as Trustee of any trust hereunder, the Trustee shall immediately surrender all records maintained by the Trustee with respect to such trust to the then acting Trustees or, if no other Trustee is then acting with respect to such trust, to the successor Trustee upon receipt of written notice of the designation of the successor Trustee from the person appointing such successor Trustee.

B. **Accountings and Other Proceedings.**

1. The Grantor directs that a trust hereunder be subject to independent administration with as little court supervision as the applicable state law allows. The Trustee shall not be required to render to any court annual or other periodic accounts, or any inventory,

appraisal, or other returns or reports, whether required by statute or otherwise. The Trustee shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as the Trustee shall determine. The Trustee shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians, out of the property of the trust. The Trustee shall not be required to register any trust hereunder except as required by law.

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

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

D. **Required Release of Protected Health Information.** Each individual named herein or appointed pursuant to the provisions hereof as Trustee or Trust Protector who fails within a reasonable time to undergo a medical examination at the written request of any person having an interest hereunder (including, but not limited to, another Trustee or Trust Protector acting hereunder) for the sole purpose of determining if the individual lacks the required capacity to continue to so serve hereunder or fails to cause the results of such examination to be made available within a reasonable time to the person making the written request, shall be treated as resigning as such fiduciary, provided that there is reasonable basis to request the medical examination be undertaken and provided further that no such request may be made more than

once every thirty-six (36) months. The cost of the medical examination shall be borne by the trust with respect to which such individual is acting as Trustee or Trust Protector.

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

F. **Additional General Provisions Regarding Fiduciaries.**

1. "Interested Trustee" means, for any trust, a Trustee who is (i) a transferor of property to the trust, including a person whose qualified disclaimer resulted in property passing to the trust; or (ii) a person who is, or in the future may be, eligible to receive income or principal pursuant to the terms of the trust. A Trustee described in (i) is an Interested Trustee only with respect to the transferred property (including income and gain on, and reinvestment of, such property). A person is described in (ii) even if he or she has a remote contingent remainder interest, but is not described in (ii) if the person's only interest is as a potential appointee under a non-fiduciary power of appointment held by another person which has not yet been exercised or the exercise of which can take effect only in the future, such as a testamentary power held by a living person. A Trustee who is not an Interested Trustee is a "Disinterested Trustee."

2. "Insured Trustee" means for any trust a Trustee who is the insured (or one of the insureds) under a policy of life insurance held in the Trust. No Insured Trustee may participate in the exercise of any incident of ownership over any policy that insures the life of such Trustee.

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

4. Except to the extent, if any, specifically provided otherwise in this Agreement, references to the Trustee shall, in their application to a trust hereunder, refer to all those from time to time acting as Trustee and, if two Trustees are eligible to act on any given matter, they shall act unanimously, and if more than two Trustees are eligible to act on a given matter, they shall act by majority. In the exercise of discretion over distributions, if this Agreement provides that certain Trustees may participate in distributions limited by an ascertainable standard while a different set of Trustees may participate in distributions for any purpose, if the two sets of Trustees (each acting by its own majority) want to distribute the same item of income or principal to different recipients, the distribution desired by the set of Trustees participating in distributions for any purpose shall prevail.

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

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

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

8. The Trustee may employ and rely upon advice given by investment counsel, delegate discretionary investment authority over investments to investment counsel and pay investment counsel reasonable compensation in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation. The Trustee may, but need not, favor retention of assets originally owned by the Grantor. The Trustee shall not be under any duty to diversify investments, regardless of any rule of law requiring diversification, and any such duty is hereby waived.

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

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

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

authorization would cause the trust property to be subject to the claims of the creditors of such Interested Trustee.

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

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

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

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

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

ARTICLE XIV

Governing Law and Trustee Powers

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

A. **Special Trustee Liability Provision.** Some persons may be hesitant to serve as Trustee hereunder because of a concern about potential liability. Therefore, with respect to any trust created hereunder (i) no Trustee shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken in connection with the administration of any trust created hereunder if in good faith reasonably believed by such Trustee to be in accordance with the provisions and intent hereof, except for matters involving such Trustee's willful misconduct or gross negligence proved by clear and convincing evidence, (ii) no Trustee shall have any fiduciary responsibility to observe, monitor or evaluate the actions of any other Trustee and shall not be liable to any party for the failure to seek to remedy a breach of trust, or in a recurring situation to request instructions from a court having jurisdiction over the trust, even if a Trustee may be guilty of a gross violation of fiduciary duties hereunder, and (iii) each Trustee shall be fully indemnified by the trust estate against any claim or demand by any trust beneficiary or trust creditor, except for any claim or demand based on such Trustee's willful misconduct or gross negligence proved by clear and convincing evidence. Expenses incurred by a Trustee in defending any such claim or demand shall be paid by the trust estate in advance of the final disposition of such claim or demand, upon receipt of an undertaking by or on behalf of such Trustee to repay such amount if it shall ultimately be determined that such Trustee is not entitled to be indemnified as authorized by this paragraph. In no event shall any Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

B. **Oil and Gas.** The Trustee may, with respect to rights or interests in oil, natural gas, minerals and other natural resources (together with related equipment), including oil and gas royalties and leases, whether owned in fee, as lessee, lessor, licensee, concessionaire or otherwise, or alone or jointly as partner, joint tenant, joint venturer or in any other noncorporate manner: (i) drill, test, explore, maintain, develop and otherwise exploit, either alone or jointly with others, any such rights or interests; (ii) enter into operation, farm-out, pooling or unitization agreements in connection with any or all of such rights and interests; and (iii) extract, remove, process, convert, retain, store, sell or exchange such rights and interests and the production therefrom, all in any manner, to any extent, on any terms and for any consideration.

C. **Negating Power of Appointment for Interested Trustee as Beneficiary.** Notwithstanding any other provision of this Agreement, no Interested Trustee who is a beneficiary of any trust created hereunder shall ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, uses or accumulations of income or principal by the Trustee to or for any beneficiary other than pursuant to an ascertainable standard, if any, expressly set forth and authorized in this Agreement, or (ii) the exercise of any general power of appointment described in Code Sec. 2041 or 2514 (but this shall not apply to a general power of appointment, if any, granted in a non-fiduciary capacity). If any Trustee is under a duty to support a beneficiary or is acting as a guardian, conservator, or similar fiduciary of any person who is a beneficiary, such Trustee shall not participate in the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Code Sec. 2042(2)) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall have any power of appointment over or power to direct the beneficial enjoyment of the fractional share of any trust hereunder consisting of disclaimed property, including any accumulated income of that share, unless such power to direct the beneficial enjoyment is limited by an ascertainable standard.

D. **Security Interests.** The Trustee may grant security interests and execute all instruments creating such interests upon such terms as the Trustee may deem advisable.

E. **Tax Elections and Allocations.** The Trustee may make all tax elections and allocations the Trustee may consider appropriate; provided, however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. Tax elections and allocations made in good faith shall not require equitable adjustments.

F. **Investment Responsibility.** The Trustee may retain any property originally owned by the Grantor and invest and reinvest in all forms of real and personal property, whether inside or outside the United States, including, without limitation, common trust funds of a corporate Trustee, mutual funds, partnerships (including a partnership in which a Trustee is a partner) and other forms of joint investment (which may but need not be managed by, advised by or affiliated with a Trustee), without regard to any principle of law limiting delegation of investment responsibility by the Trustee.

G. **Compromise Claims or Debts.** The Trustee may compromise claims or debts and abandon or demolish any property which the Trustee shall determine to be of little or no value.

H. **Borrowings.** The Trustee may borrow from anyone, even if the lender is a Trustee under this Agreement, and may pledge property as security for repayment of the funds borrowed, including the establishment of a margin account. No Trustee shall be personally liable for any such loan, and such loan shall be payable only out of assets of the trust.

I. **Sale or Exchange of Property.** The Trustee may sell property at public or private sale, for cash or upon credit, exchange property for other property, lease property for any period of time and give options of any duration for sales, exchanges or leases. The Trustee may give such warranties or indemnifications as the Trustee may deem advisable.

J. **Participation in Mergers and Reorganizations.** The Trustee may join in any merger, reorganization, voting-trust plan or other concerted action of security holders and delegate discretionary powers (including investment powers) in entering into the arrangement.

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

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

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

N. **Distributions in Cash or Kind.** The Trustee may, without the consent of any beneficiary, distribute in cash or in kind, and allocate specific assets in satisfaction of fractional shares or pecuniary sums among the beneficiaries (including any trust) in such proportions, not necessarily pro rata, as the Trustee may determine, even though a Trustee has an interest affected by the distribution and even though different beneficiaries entitled to the same sum or share may thereby receive different mixes of assets, possibly with different income tax bases, as long as the fair market value of property on the date of distribution is used in determining the extent to which any distribution satisfies a sum or share. The decision of the Trustee in dividing any portion of the trust property between or among multiple beneficiaries shall be binding on all persons.

O. **Application of Property.** The Trustee may apply to the use or for the benefit of any individual, any property whether principal or income, that otherwise would or could be distributed directly to such individual.

P. **Acquisition and Maintenance of Real Property.** The Trustee may acquire, hold and maintain any residence (whether held as real property, condominium or cooperative apartment) for the use and benefit of any one or more of the beneficiaries of any trust whenever that action is consistent with the terms of that trust, and, if the Trustee shall determine that it would be in the best interests of the beneficiaries of that trust (and consistent with the terms of that trust) to maintain a residence for their use but that the residence owned by that trust should not be used for such purposes, the Trustee may sell said residence and apply the net proceeds of sale to the purchase of such other residence or make such other arrangements as the Trustee shall deem suitable for the purpose. Any proceeds of sale not needed for reinvestment in a residence as provided above shall be added to the principal of that trust and thereafter held, administered and disposed of as a part thereof. The Trustee may pay all carrying charges of such residence, including, but not limited to, any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including independent contractors) and other expenses incident to the running of a household for the benefit of the beneficiaries of that trust. Without limiting the foregoing, the Trustee may permit any income beneficiary of any trust created hereunder to occupy any real property or use any personal property forming a part of that trust on such terms as the Trustee may determine, whether rent free or in consideration of payment of taxes, insurance, maintenance and ordinary repairs or otherwise.

Q. **Acquisition and Maintenance of Personal Property.** The Trustee may acquire, hold and maintain as a part of each trust hereunder any and all articles of tangible personal property or any other property whether productive, underproductive or unproductive of income, and without any duty to convert such property to productive property, and pay the expenses of the repair and maintenance of such property, and sell such property and apply the net proceeds of sale to the purchase of such other property as the Trustee deems suitable for the purpose.

R. **Hold Trusts as Combined Fund.** The Trustee may hold two or more trusts hereunder as a combined fund (allocating ratably to such trusts all receipts from, and expenses of, the combined fund) for convenience in investment and administration, but no combination of trusts for this purpose may alter their status as separate trusts.

S. **Loans.** The Trustee may make loans to, may buy property from, and generally shall have the power to make contracts with the Grantor's estate or the Grantor's Wife's estate or the trustee of any trust subject to any wealth transfer tax upon either of their deaths, regardless of the fact that one or more or all of the persons serving as Trustee hereunder are also serving as a selling or borrowing or otherwise contracting Executor or Trustee; provided that such loans shall be for adequate interest and shall be adequately secured, and such purchases shall be for the property's then fair market value.

T. **Reliance Upon Advice.** The Trustee may employ and rely upon advice given by accountants, attorneys, investment bankers, and other expert advisors and employ agents, clerks and other employees and pay reasonable compensation to such advisors or employees in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

U. **Trustee as Agent.** Trustees serving in any jurisdiction in which a corporate trustee is unable to serve as Trustee may use such corporate trustee as an agent to perform any task that may lawfully be performed by such an agent in that jurisdiction, and may pay to such corporate trustee such compensation for its services as an agent as shall be agreed upon by all Trustees.

V. **Additions to Trust**. The Trustee may accept or decline to accept additions from any source.

W. **Custodian Employed.** The Trustee may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any bank, trust company, brokerage house or other institution employed as custodian), and pay reasonable compensation to a custodian in addition to any fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

X. **No Portion of Trust Includible in Gross Estate.** It is the Grantor's intent that no portion of any trust hereunder be includible in the Grantor's gross estate or the gross estate of the Grantor's Wife for Federal estate tax purposes. Accordingly, and notwithstanding any provision herein contained to the contrary, this Agreement shall be construed and the trusts hereunder administered in accordance with and to achieve that intention.

ARTICLE XV

S Corporation Stock

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

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

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

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

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

4. The Trustee shall notify the sole beneficiary of each trust held under this paragraph that he or she must timely and properly elect under Code Sec. 1361(d)(2) to cause

such trust held to be treated as a Qualified Subchapter S Trust for Federal income tax purposes, and if the beneficiary fails or refuses to do so, the Trustee shall hold such S Corporation Shares under the paragraph entitled "Electing Small Business Trusts."

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

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

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

1. The Trustee (excluding, however, any Interested Trustee) shall apportion to the trusts under this paragraph a reasonable share of the unallocated expenses of all trusts under this Agreement in a manner consistent with the applicable Internal Revenue Code and Treasury Regulations.

2. The Trustee shall make that election required by Code Sec. 1361(e)(3) to qualify the trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).

3. The Trustee (excluding, however, any Interested Trustee) shall administer each trust under this paragraph as an Electing Small Business Trust under Code Sec. 1361(e).

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

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

1. "Ineligible Trust" means a trust whose ownership of any S Corporation Shares would cause the termination of that corporation's election to be taxed under subchapter S of the Code.

2. "Net Income" means income, as defined in Code Sec. 643(b).

3. "S Corporation Shares" means shares of any stock of a corporation that then operates or that the Trustee shall deem likely to operate in the future under an election to have its earnings taxed directly to its stockholders under subchapter S of the Code.

4. The "QSST Termination Date" means, separately, with respect to each trust held under the paragraph entitled "Qualified Subchapter S Trusts," the earlier of the date on which the beneficiary dies and the date on which the trust terminates.

ARTICLE XVI
The Closely-Held Business

A. **Authority to Operate.** The Trustee may operate "the Business" (as defined below) and retain any equity interests in the Business, even if these interests otherwise would be a speculative or inappropriate investment for a trust. The Trustee may do all things related to the operation of the Business that the Grantor could have done if living, in a fiduciary capacity:

1. The Trustee may carry out the terms of any option or buy-sell agreements into which the Grantor may have entered.

2. The Trustee may sell or liquidate any of the Business interests at such price and on such terms as the Trustee may deem advisable.

3. The Trustee may arrange for and supervise the continued operations of the Business.

4. The Trustee may vote (in person or by proxy) as stockholder or otherwise and in any matter involving the Business on behalf of the trust.

5. The Trustee may grant, exercise, sell, or otherwise deal in any rights to subscribe to additional interests in the Business.

6. The Trustee may take any actions appropriate to cause the capital stock or securities in the Business to be registered for public sale under any state or Federal securities act; may enter into any underwriting agreements or other agreements necessary or advisable for this registration and sale; and may grant indemnities to underwriters and others in connection with such registration.

7. The Trustee may participate in any incorporation, dissolution, merger, reorganization or other change in the form of the Business and, where appropriate, deposit securities with any protective committees and participate in voting trusts.

8. The Trustee may delegate to others discretionary power to take any action with respect to the management and affairs of the Business that the Grantor could have taken as the owner of the Business.

9. The Trustee may invest additional capital in, subscribe to additional stock or securities of and loan money or credit to the Business from the trust.

10. The Trustee may accept as correct financial or other statements rendered by the Business as to its conditions and operations except when having actual notice to the contrary.

B. **Compensation.** The Trustee shall be entitled to additional reasonable compensation for the performance of services with respect to the Business, which may be paid to the Trustee from the Business, the trust, or both, as the Trustee may deem advisable.

C. **Conflict of Interest Waived.** The Trustee may exercise the authorities granted under this Article even if the Trustee shall own personally an interest in the Business.

D. **The "Business" Defined.** The "Business" means any interest the Grantor, the Trust, or both, shall own at the Grantor's death, representing, in the aggregate, at least five percent (5%) of the total equity interests in any actively-conducted trade or business, whether incorporated or unincorporated. The "Business" shall also include, but not be limited to, any five percent (5%) or greater equity interests in any corporations, general and/or limited partnerships as well as membership interests in any limited liability company or other business enterprise formed, operated or beneficially owned by the Grantor prior to the Grantor's death or participated in (to the extent of five percent (5%) or more) by the Grantor prior to the Grantor's death. The

"Business" does not include any interests that are regularly traded on an established exchange or over-the-counter.

ARTICLE XVII

Crummey Rights of Withdrawal: Rules, Limitations and Procedures

The withdrawal rights created in the Article entitled "Crummey Rights of Withdrawal" shall be subject to the rules, limitations and procedures contained in this Article.

A. **Withdrawal Rights of Wife.** The Grantor's Wife shall have a right of withdrawal over an amount equal to the value of all contributions to the trust, subject to the limitations set forth below.

1. The maximum amount that the Grantor's Wife may withdraw with respect to all contributions made in any calendar year shall not, in any event, exceed the lesser of: (i) the Federal gift tax annual exclusion in effect at the time of each contribution, less the amount of prior gifts to the Grantor's Wife either outright or in trust, by the same donor during the same calendar year, which gifts were eligible for the Federal gift tax annual exclusion but not eligible for the Federal gift tax marital deduction; and (ii) the greater of that amount referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars ($5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. Absent an express direction to the contrary by a donor at or before the time of a contribution, all gifts to the Grantor's Wife (other than gifts by the Grantor) that enter into the computation under this paragraph shall be treated as having been made equally by the donor and the donor's spouse if the donor was married when the gift was made and the gift was eligible for gift-splitting under Code Sec. 2513(a). The limitation on the amount of a contribution that may be withdrawn under this paragraph, with respect to contributions made by a donor who was married when the gift was made and which gift was eligible for gift-splitting under Code Sec. 2513, shall be separately calculated and applied as to each spouse's deemed half of the gift.

2. The amount withdrawable by the Grantor's Wife shall be noncumulative and shall lapse on the last day of each calendar year, or, if earlier, sixty (60) days after the contribution was made.

3. The Grantor's Wife's withdrawal right continues until it lapses. The Grantor's Wife's withdrawal right shall not terminate merely because of the termination of the Lifetime Trust, but shall continue with respect to all trusts under this Agreement until it lapses as described above. The Grantor's Wife's withdrawal right shall, upon termination of the Lifetime Trust, be exercisable first out of that portion of the Trust Fund that qualifies for the Federal estate tax marital deduction.

4. All other withdrawal rights granted under this Article shall be determined with respect to the difference between the value of the contribution to the trust and any amount that the Grantor's Wife could withdraw under this section as of the time of the contribution, even if the Grantor's Wife does not withdraw such amounts.

B. **Withdrawal Rights of Descendants.** Subject to the limitations set forth below, each of the Grantor's descendants (herein defined as "holders") shall have a right of withdrawal over an amount equal to the value of such holder's proportionate share of the Descendants' Withdrawal Amount. Such holder's "proportionate share" shall be determined by dividing the Descendants' Withdrawal Amount by the number of the then-living holders (not including any individual or individuals who may be excluded by the Disinterested Trustee). The "Descendants' Withdrawal Amount" shall be an amount equal to all contributions made to the trust in any calendar year minus the amount over which the Grantor's Wife has a right of withdrawal.

1. The maximum amount that a descendant may withdraw with respect to all contributions made in any calendar year shall not, in any event, exceed the gift tax annual exclusion in effect at the time of each contribution, less the amount of prior gifts to the same descendant either outright or in trust, by the same donor during the same calendar year, which gifts were eligible for the Federal gift tax annual exclusion.

2. Absent an express direction to the contrary by a donor at or before the time of a contribution, all gifts that enter into the computation under this paragraph shall be treated as having been made equally by the donor and the donor's spouse if the donor was married when the gift was made and the gift was eligible for gift-splitting under Code Sec. 2513(a). The limitation on the amount of a contribution that may be withdrawn under this paragraph, with respect to contributions made by a donor who was married when the gift was

made and which gift was eligible for gift-splitting under Code Sec. 2513, shall be separately calculated and applied as to each spouse's deemed half of the gift.

3. The amount withdrawable by any descendant shall be cumulative, and shall lapse on the last day of each calendar year, or, if earlier, sixty (60) days after the contribution to which it relates in an amount equal to the greater of that sum referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars ($5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. Rights of withdrawal that do not lapse at the end of a calendar year shall continue to be exercisable by the descendant subject to this same limited annual lapse.

4. The withdrawal right of each of the Grantor's descendants shall continue until it lapses as described above and shall not terminate merely because of the termination of the Lifetime Trust but shall continue with respect to all trusts under this Agreement except as to any disposition to the Grantor's Wife of any trust property that is included in the Grantor's gross estate.

C. **Notice.** The Trustee shall promptly notify each competent adult who holds a withdrawal right under this Article of all contributions to which that person's withdrawal right relates. The Trustee shall notify a person who is under a legal disability, including (but not limited to) minority, by notifying:

1. the legal guardian or conservator of the individual's property, who is hereby authorized to exercise the withdrawal rights;

2. any living parent of the individual (excluding, however, with respect to any child of the Grantor, both the Grantor and any parent of the child who is not then married to the Grantor);

3. any other person taking care of the individual or with whom the individual resides; or

4. any other appropriate adult individual selected by the Trustee.

D. **Exercise of Withdrawal Right.** Withdrawal rights under this Article shall be exercisable by a writing delivered to the Trustee. The person to whom notice is properly given

for a minor or disabled individual may decide whether to exercise that minor or disabled individual's withdrawal right, unless that person receiving notice is the donor of the contribution to which the withdrawal right relates, in which case the Trustee shall designate another appropriate adult individual to make such decision.

E. **Satisfaction of Withdrawal Right.** A withdrawal under this Article may be satisfied from the contribution itself or from other trust assets, as the Trustee shall choose. A distribution under this Article may be made to the person who makes the withdrawal or who is, under this Article, entitled to act for the minor or disabled individual.

F. **Power to Exclude.** The Trustee may, by an instrument in writing executed before a contribution, exclude one or more individuals from having withdrawal rights over that contribution or any future contribution or both. The Trustee may not, however, limit or alter any rights resulting from prior contributions. No Interested Trustee or Insured Trustee may participate in any action under this paragraph.

G. **Power to Amend.** The Trustee may, by an instrument in writing, amend this Article to the extent the Trustee shall deem it appropriate to assure that contributions to this trust qualify for the gift tax annual exclusion for Federal gift tax purposes. The Trustee may not amend the trust in any manner that would cause any portion of the trust funds to be included in the Grantor's gross estate, that of the Grantor's Wife, or that of any of the Grantor's descendants, to a greater extent than before such amendment. An amendment made in good faith shall be conclusive on all persons interested in the trust and the Trustee shall not be liable for the consequences of any amendment or for not having amended the trust. No amendment shall limit or alter the rights of a beneficiary in any trust funds held by the Trustee before the amendment. No Interested Trustee or Insured Trustee may participate in any action under this paragraph.

H. **Priority of Withdrawal Rights.** No Trustee may make any discretionary distributions of principal or income that would reduce the available trust principal below the total amount of the then-existing withdrawal rights without advance notice to each trust beneficiary who is entitled to make a withdrawal, or who is, under this Article, entitled to act for a minor or disabled beneficiary.

I. **Special Definitions and Rules.** The following definitions and rules apply for purposes of this Article:

1. "Contribution" means any cash or other assets transferred to the Trustee to be held as part of the trust funds, in a manner that constitutes a gift for Federal gift tax purposes. A contribution also includes any direct or indirect payment of the premiums on a policy of insurance held by the Trustee to the extent it constitutes a gift for Federal gift tax purposes. The amount of a contribution is its Federal gift tax value.

2. The amounts involved in a power to withdraw described as "an amount equal to the greater of that sum referred to in Code Sec. 2514(e)(1) (currently, Five Thousand Dollars ($5,000)) or that percentage referred to in Code Sec. 2514(e)(2) (currently, Five Percent (5%)) of the trust corpus" shall be measured after subtracting all other amounts that the same person could have withdrawn during the same calendar year from this or any other fund, to the extent that such powers must, under applicable Federal gift tax law, be aggregated in determining whether the lapse of the withdrawal power under this Article is a release of a general power of appointment.

3. If the Trustee shall incorrectly determine the amount that should be distributed to a beneficiary under this Article, then within a reasonable period after the correct amount is finally determined, the Trustee shall receive from the beneficiary, or the beneficiary shall receive from the Trustee, as the case may be, an amount equal to the difference between the amount that should properly have been distributed and the amount actually distributed.

4. All withdrawal rights with respect to a contribution to which this Article applies shall arise immediately upon such contribution to the Trust.

5. The Trustee may without liability assume that no prior gifts to any holder of a withdrawal power under this Article were made by a donor or a donor's spouse other than contributions to the trust, unless the Trustee shall have actual notice to the contrary.

ARTICLE XVIII

Definitions and Miscellaneous Provisions

The following definitions and miscellaneous provisions shall apply under this Agreement:

A. **Children and Descendants.** References to "children" and "descendants" shall include children and descendants whenever born.

B. **Spouse**. An individual's "spouse" (other than with respect to the Grantor) is the person (if any) to whom that individual is married at any given time.

C. **Surviving Spouse.** The "surviving spouse" of an individual, other than with respect to the Grantor, is the person (if any) who survives that individual and who is married to and living with that individual as a married couple at the time of his or her death.

D. **The Grantor's Wife.** For purposes of this Agreement, any reference to the Grantor's Wife shall mean _____ only, including if and when she becomes the Grantor's widow. However, _____ shall be treated for all purposes hereunder (other than for purposes of applying the Maximum Duration of Trusts provisions hereof) as though she died when she and the Grantor became legally separated or divorced or their marriage was annulled.

E. **Minor and Adult.** Whether an individual is a minor or an adult shall be determined under the laws of the individual's domicile at the time in question, except in cases when this Agreement has specifically defined "Minor" to mean a person under twenty-one (21) years of age.

F. **Code and Regulations.** References to the "Internal Revenue Code" or "Code" or to provisions thereof are to the Internal Revenue Code of 1986, as amended at the time in question. References to the "Regulations" and "Regs." are to the Regulations under the Code. If, by the time in question, a particular provision of the Code has been renumbered, or the Code has been superseded by a subsequent Federal tax law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to the Grantor's intent as expressed in this Agreement. A similar rule shall apply to references to the Regulations.

G. **Per Stirpes.** Property that is to be divided among an individual's surviving or then-living descendants "per stirpes" or in "per stirpital shares" shall be divided into as many equal shares as there are children of the individual who are then living or who have died leaving surviving or then-living descendants. A share allocated to a deceased child of the individual

shall be divided further among such deceased child's surviving or then-living descendants in the same manner.

H. **Executor.** Whenever herein a reference is made to the Grantor's or another person's Executor, such reference shall be to those serving as the fiduciary of that person's estate, whether or not their title is Executor under applicable state law.

I. **Disabled Trustee.** A Trustee shall be deemed to be "disabled" (and while disabled shall not serve as a Trustee) if another then-serving Trustee or, if there is none, the next successor Trustee receives written certification that the examined individual is physically or mentally incapable of managing the affairs of the trust, whether or not there is an adjudication of incapacity.

1. This certification shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee.

2. This certification need not indicate any cause for the Trustee’s disability.

3. A certification of disability shall be rescinded when a serving Trustee receives a certification that the former Trustee is capable of managing the trust's affairs. This certification, too, shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee.

4. No person is liable to anyone for actions taken in reliance on the certifications under this paragraph or for dealing with a Trustee other than the one removed for disability based on these certifications.

J. **Gross Estate.** "Gross estate" means the Grantor's gross estate as determined for Federal estate tax purposes (or for state death tax purposes where relevant).

K. **Change of Situs.** The situs of the property of any trust created hereunder may be maintained in any jurisdiction, in the discretion of the Trustee (other than an Interested Trustee), and thereafter transferred at any time or times to any jurisdiction selected by the Trustee (other than an Interested Trustee). Upon any such transfer of situs, the trust estate of that trust may thereafter, at the election of the Trustee (other than an Interested Trustee) of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee

(other than an Interested Trustee) of any trust created hereunder elects to change the situs of any such trust, said Trustee is hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

L. **Certain Survivorship Rules.** A person (the "Non-Skip Person") shall not be deemed to have been alive on the date of any distribution from or any termination of any interest in a trust under this Agreement or any other event covered by Reg. §26.2651-1(a)(2)(iii) (or any successor thereto) for which date (the "Transfer Date") the date of the Non-Skip Person's death is relevant if (a) the Non-Skip Person actually was alive on the Transfer Date but is not actually alive on the date ninety (90) days following the Transfer Date, and (b) the existence of a condition of survivorship causes another person who otherwise would be assigned to a generation below that of the Non-Skip Person to be assigned to the generation of the Non-Skip Person for purposes of the Federal tax on generation-skipping transfers.

ARTICLE XIX
Manifestation of Trustee's Actions

When a Trustee takes action that is authorized hereunder and such action does not involve the participation of another person with respect to such action, the Trustee may (but shall not be required to) execute, within a reasonable time of taking such action, an acknowledged, written instrument describing the action taken, which instrument shall be maintained with the trust records and either filed in the court having jurisdiction over the trust or delivered to one or more of the adult and competent beneficiaries then eligible or entitled to distributions of income or principal of such trust or, if there is no such beneficiary, to one or more of the parent(s), guardian(s) of the person, conservator(s) or committee of the minor or incompetent beneficiaries then eligible or entitled to distributions of income or principal of such trust. Failure to execute or to file or deliver the instrument shall not make the action taken by a Trustee void, voidable or ineffective, and the Trustee or Trustees, as the case may be, shall not be subject to any liability or surcharge for failure to document such action.

ARTICLE XX

Savings Clause

Should any of the provisions or directions of this Agreement fail or be held ineffectual or invalid for any reason, it is the Grantor's desire that no other portion or provision of this Agreement be invalidated, impaired or affected thereby, but that this Agreement be construed as if such invalid provision or direction had not been contained therein.

ARTICLE XXI

Captions

The captions used in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement or the intent of any provision therein.

IN WITNESS WHEREOF, the Trustee and the Grantor have signed this Agreement, effective the day and year first above written and executed by each of them on the dates set forth below.

Dated: _____

_____

_____, as Grantor

Dated: _____

_____

_____, as Trustee

Dated: _____

_____

_____, as Trustee

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

On _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____, as Grantor, 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 _____ executed the same in his capacity, and that by his signature on the instrument, the individual, or the person on behalf of whom the individual acted, executed the instrument.

WITNESS my hand and notarial seal.

Dated: _____

(SEAL)

_____

Notary Public

_____

Print Name of Notary

My Commission Expires: _____

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

On _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____, as Trustee, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that _____ executed the same in her capacity, and that by her signature on the instrument, the individual, or the person on behalf of whom the individual acted, executed the instrument.

WITNESS my hand and notarial seal.

Dated: _____

(SEAL)

_____

Notary Public

_____

Print Name of Notary

My Commission Expires: _____

STATE OF NEW YORK)

) :ss

COUNTY OF ONONDAGA)

On _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____, as Trustee, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that _____ executed the same in her capacity, and that by her signature on the instrument, the individual, or the person on behalf of whom the individual acted, executed the instrument.

WITNESS my hand and notarial seal.

Dated: _____

(SEAL)

_____

Notary Public

_____

Print Name of Notary

My Commission Expires: _____

SAMPLE

LLC OPERATING AGREEMENT

OPERATING AGREEMENT

OF

_____

A New York Limited Liability Company

THIS OPERATING AGREEMENT (this "Agreement") is made and entered into effective for all purposes and in all respects as of _____, 20___ by and among _____ (the "Manager") and _____ (whose names are subscribed hereto as "Members"). Capitalized terms used in this Agreement and not otherwise defined herein shall have the meanings set forth in the article entitled "Formation of Company".

WHEREAS, the Articles of Organization of the Company were filed with the New York Secretary of State on _____; and

WHEREAS, the parties hereto desire to enter into an operating agreement for the Company on the terms and conditions herein set forth in accordance with the New York Limited Liability Company Act, N.Y. LLC Law Ch. 34 Sections 101 to 114 of the Act.

NOW, THEREFORE, in consideration of the premises and covenants contained herein, the parties agree as follows.

ARTICLE I

Formation of Company

A. **Formation of the Company.** The Company was formed as a limited liability company under the Act by the filing of the Articles of Organization with New York Secretary of State on _____. The Company shall accomplish all filing, recording, publishing and other acts necessary or appropriate for compliance with all requirements for the operation of the Company as a limited liability company under this Agreement and the Act and under all other laws of the State of New York and such other jurisdictions in which the Manager determines that the Company may conduct business.

B. **Name.** The name of the Company is _____, as such name may be modified from time to time by the Manager in the exercise of sole discretion.

C. **Business of the Company.** The business of the Company shall be the conduct of any business or activity that may be conducted by a limited liability company organized pursuant to the Act.

D. **Powers of the Company.** The Company shall possess and may exercise all the powers and privileges granted by the Act or by any other law, which shall include but not be limited to, the following powers.

1. to sue and be sued, complain and defend, and participate in administrative or other proceedings, in its name;

2. to purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or an interest in it, where situated;

3. to sell, convey, assign, encumber, mortgage, pledge, lease, exchange, transfers, and otherwise dispose of all or any part of its property and assets;

4. to lend money to and otherwise assist its Members and employees;

5. to purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use, and deal in and with, shares or other interests in, or obligations of, other limited liability companies, domestic or foreign corporations, associations, general or limited partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality, or of any instrumentality of any of them;

6. to make contracts and guarantees and incur liabilities, borrow money (at such rates of interest as the Company may determine), issue its notes, bonds and other obligations, and secure any of its obligations, by mortgage or pledge or all or any part of its property, franchises and income;

7. to lend money for its proper purposes, invest and reinvest its funds, and take and hold real property and personal property for the payment of funds so loaned or invested;

8. to conduct its business, carry on its operations and have and exercise the powers granted by the Act in any state, territory, district or possession of the United States, or in any foreign country;

9. to appoint agents of the Company and define their duties and fix their compensation;

10. to make and alter operating agreements, not inconsistent with its Articles of Organization or with the laws of the State of New York, for the administration and regulation of the affairs of the Company;

11. to indemnify a member or former member of the Company as provided in the Act;

12. upon dissolution as provided in this agreement, to cease its activities and surrender its Certificate of Organization;

13. to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the Company is organized; and

14. to become a member of a general partnership, limited partnership, joint venture or similar association, or any other limited liability company.

E. **Location of Principal Place of Business**. The location of the principal place of business of the Company shall be _____. Upon compliance with the applicable legal requirements, the Manager may change the principal place of business to such other location or locations within or without New York as the Manager may determine to be reasonably convenient for the Manager. In addition, the Company may maintain such other offices as the Manager may deem advisable at any other place or places within or without New York.

F. **Registered Agent.** The registered agent for the Company shall be _____ or such other registered agent as the Manager may designate from time to time. The location of the registered office of the Company is _____, or upon compliance with the applicable legal requirements such other registered office as the Manager may designate from time to time.

G. **Term.** The term of the Company shall commence on the date hereof and shall be perpetual, unless the Company is earlier dissolved and terminated in accordance with the provisions of this Agreement.

ARTICLE II

Definitions

“Act” means the New York Limited Liability Company Act, N.Y. LLC Law Ch. 34 Sections 101 to 114, as in effect on the date hereof and as it may be amended hereafter from time to time.

“Additional Member” means any Member admitted to the Company as an additional Member pursuant to the article entitled "Powers, Rights and Duties of Members".

“Agreement” means this Operating Agreement, as amended, modified or supplemented from time to time.

“Articles of Organization” means the Articles of Organization of the Company, as amended, modified or supplemented from time to time.

“Assigning Member” has the meaning set forth in the article entitled "Transfers of Interests by Members".

“Capital Account” means, with respect to each Member, the account established and maintained for the Member on the books of the Company in compliance with Treasury Regulation §§1.704-1(b)(2)(iv) and 1.704-2, as amended. Subject to the preceding sentence, each Member’s Capital Account shall initially equal the amount of cash and the Contribution Value of any other property initially contributed by such Member to the Company. Throughout the term of the Company each Member's Capital Account will be (i) increased by the amount of (A) income and gains allocated to such Member pursuant to the article entitled "Allocation of Income and Losses", and (B) the amount of any cash or the Contribution Value of any property subsequently contributed by such Member to the Company, (net of liabilities secured by the contributed property that the Company is considered to assume or take subject to Code §752) and (ii) decreased by the amount of (A) losses and deductions allocated to such Member pursuant to the article entitled "Allocation of Income and Losses", and (B) the amount of distributions in cash and the value (as determined by the Manager) of property (net of liabilities secured by the property that such Member is considered to assume or take subject to Code §752) distributed to such Member.

“Capital Contribution” means the amount of cash or the Contribution Value of property contributed or deemed to be contributed to the Company by a Member pursuant to the article entitled "Capital Contributions".

"Closing" shall mean the consummation of any purchase and sale contemplated by this Agreement.

"Closing Date" shall mean a business day and hour specified by the LLC in a notice given to all parties to a transfer.

“Code” means the Internal Revenue Code of 1986, as amended from time to time (or any succeeding law).

“Company” means the limited liability company formed by the filing of the Articles of Organization and governed by this Agreement under the name _____.

“Contribution Value” means the fair market value as reasonably determined by the Manager of property (other than cash) contributed by a Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to Code Sec. 752).

"Designated Purchaser" shall mean persons designated by the LLC to be authorized to purchase Units from a Member.

“Fiscal Year” means the calendar year; provided, however, that the first Fiscal Year of the Company shall begin on the date the Articles of Organization are filed with the Secretary of State and end on December 31 of that same year and the last Fiscal Year of the Company shall end on the date on which the Company is terminated.

“Indemnified Party” has the meaning set forth in the article entitled "Powers, Rights and Duties of Manager".

“Interest”, when used in reference to an interest in the Company, means the entire ownership interest of a Member in the Company at any particular time.

"LLC" shall mean “_____”, a LLC incorporated and existing under the laws of the State of New York.

“Manager” has the meaning set forth in the forepart of this Agreement.

“Member” means each Person named as a member on Annex A hereto and each Person admitted as a Substituted Member or an Additional Member pursuant to the terms of this Agreement, and, with respect to those provisions of this Agreement concerning a Member’s rights to receive a share of profits or other distributions or the return of a Member’s contribution, any Transferee of a Member’s Interest in the Company (except that a Transferee who is not

admitted as a Member shall have only those rights specified by the Act and which are consistent with the terms of this Agreement).

“Liquidator” has the meaning set forth in the section entitled Dissolution of Company; Liquidation and Distribution of Assets".

"Members" collectively or "Member" individually shall mean the persons listed in Paragraph A of Background Information, and each of them, and includes any person who may hereafter become the owner of Units of the LLC.

“Net Income” and “Net Loss”, respectively, mean the income or loss of the Company as determined in accordance with the method of accounting followed by the Company for Federal income tax purposes, including, for all purposes, any income exempt from tax and any expenditures of the Company which are described in Code Sec. 705(a)(2)(B); provided, however, that if any property is carried on the books of the Company at a value that differs from that property’s adjusted basis for tax purposes, gain, loss, depreciation and amortization with respect to such property shall be computed with reference to the book basis of such property, consistently with the requirement of Treasury Regulation §1.704-1(b)(2)(iv)(g); and provided, further, that any item allocated under the section entitled "Allocation of Income and Losses" hereof shall be excluded from the computation of Net Income and Net Loss.

“Non-Voting Units” shall mean only a Member’s non-voting Interest in the LLC.

"Offering Price" shall mean the price specified by Paragraph B(1) of Article IX.

"Offered Units" shall mean the Units, which a Transferring Member notifies that he intends to transfer.

“Percentage Interests” means with respect to each Member the percentage set forth opposite such Member’s name in Annex A, as adjusted pursuant to the article entitled "Allocation of Income and Losses".

“Person” means any individual, partnership, limited liability company, corporation, trust or other entity.

"Purchase Price" shall mean the price specified by Paragraph B. 8 (a) of Article IX.

“Substituted Member” means any Person admitted to the Company as a substituted Member pursuant to the article entitled "Transfers of Interests by Members".

“Tax Matters Member” has the meaning set forth in the article entitled "Powers, Rights and Duties of Manager".

"Total Disability" means the inability of a Member to perform substantially all of the regular duties of his position with the LLC due to sickness or injury. In addition, a Member shall be conclusively deemed to be totally disabled if he is determined eligible to receive disability benefits from (i) any policy of disability insurance issue by a commercial insurer, (ii) a waiver of premium benefit forming a part of any policy of life insurance, or (iii) Social Security. If there is a dispute concerning the existence or continuation of a total disability, the LLC may require a Member to submit to an examination by a medical doctor at such reasonable times as it may require but not more frequently than once in any 90 day period. The LLC shall pay for such examinations.

“Transfer,” “Transferee” and “Transferor” have the respective meanings set forth in the article entitled "Transfers of Interests by Members".

"Transferring Member" shall mean a Member who intends to voluntarily transfer Units, or any interest in Units, during his lifetime in any manner except as specifically described in Paragraph B.1 of Article IX.

"Units" shall mean all units of the LLC, whether now outstanding or hereafter issued.

“Voting Units” shall mean only a Member’s voting Interest in the LLC.

“Reg.” means regulations promulgated under the Code by the Department of the Treasury of the United States of America.

ARTICLE III
Capital Contributions

A. **Capital Contributions.** On the date hereof, each Person listed on Annex A hereto shall contribute to the capital of the Company the assets set forth opposite such Person’s name in Annex A hereto under the column headed Initial Capital Contribution. Thereupon, such Persons shall be admitted as Members in the Company. The Members admitted to the Company as of the date hereof hereby agree that the amount set forth under the column headed “Initial Capital Account Balance” opposite each Member’s name in Annex A hereto accurately reflects the fair market value of the assets contributed to the Company by such Member.

B. **Additional Capital Contributions.** Any Member may make additional Capital Contributions at any time upon the unanimous consent of all Members. Following any such

additional Capital Contribution, the Percentage Interest of each Member shall be adjusted in the manner provided in the article entitled "Allocation of Income and Losses".

C. **Interest on Capital Contributions.** No Member shall be entitled to interest on or with respect to any Capital Contribution. Notwithstanding the foregoing, a Member may make loans to the Company on such terms (including rate of interest) as shall be determined by the Manager.

D. **Withdrawal and Return of Capital Contributions.** No Member shall be entitled to withdraw any part of that Member's Capital Contribution or to receive any distributions from the Company without the unanimous consent of all Members, except as expressly provided in this Agreement.

ARTICLE IV

Allocation of Income and Losses

A. **Allocation of Net Income and Net Loss.** Subject to the paragraphs entitled "Regulatory Provisions" and "Allocations for Income Tax Purposes", the Company's Net Income and Net Loss for each Fiscal Year shall be allocated to the Members in proportion to their Percentage Interests.

B. **Regulatory Provisions.**

1. The Tax Matters Member shall modify the allocations provided for in the paragraph entitled "Allocation of Net Income and Net Loss" as they deem appropriate to comply with Reg. §§1.704-1(b) and 1.704-2. Without limiting the generality of the foregoing, the Tax Matters Member shall, prior to making any allocations required by the paragraph entitled "Allocation of Net Income and Net Loss", make any allocations required by the "minimum gain chargeback" provision of Reg. §1.704-2(f), the "chargeback of partner nonrecourse debt minimum gain" provision of Reg. §1.704-2(i)(4) and the "qualified income offset" provision of Reg. §1.704-1(b)(2)(ii)(d); in addition, Company losses, deductions or expenditures described in Code Sec. 705(a)(2)(B) attributable to a particular partner nonrecourse liability shall be allocated to the Member that bears the economic risk of loss for the liability in accordance with Reg. §1.704-2(i).

2. The Tax Matters Member shall limit allocations of Net Losses to any Member if such allocation would cause such Members' Capital Account balance, as increased

for any deficit balance in its Capital Account which the Member is required to restore or is deemed required to restore as a result of its share of the Company's minimum gain (within the meaning of Reg. §§1.704(2)(g)(1) and (3)) and its share of partner nonrecourse debt minimum gain (within the meaning of Reg. §1.704(2)(i)(5)) and as decreased by the adjustments referred to in Reg. §§1.704-1(b)(2)(ii)(d)(4), (5) and (6), to be negative while any other Member's Capital Account balance (as so adjusted) is positive. The Tax Matters Member may also make allocations reasonably designed to offset allocations provided for in this section to the extent such allocations shall not be offset by other allocations provided for in this section. The Tax Matters Member may alter the Company's allocations of items entering into the computation of Net Income and Net Losses in the year in which the Company is liquidated to avoid any Member recognizing gain or loss pursuant to Code Sec. 731 on the liquidation of the Company.

3. Solely for purposes of adjusting Capital Accounts (and not for tax purposes), if any property is distributed in kind, the difference between the fair market value of the property and its book value at the time of distribution shall be treated as gain or loss recognized by the Company and allocated pursuant to the paragraph entitled "Allocation of Net Income and Net Loss".

4. Except to the extent otherwise required by the Code and Treasury Regulations, if an Interest or part thereof is transferred in any Fiscal Year, the items of income, gain, loss, deduction and credit allocable to the Interest for such Fiscal Year shall be apportioned between the transferor and the transferee in proportion to the number of days in such Fiscal Year the Interest is held by each of them, except that, if they agree between themselves and so notify the Company within 30 days after the transfer, then at their option and expense, (i) all items or (ii) extraordinary items, including capital gains and losses, may be allocated to the Person who held the Interest on the date such items were realized or incurred by the Company.

C. **Allocations for Income Tax Purposes.** The income, gains, losses, deductions and credits of the Company for Federal, state and local income tax purposes shall be allocated in the same manner as the corresponding items entering into the computation of Net Income and Net Losses were allocated pursuant to the paragraphs entitled "Allocation of Net Income and Net Loss" and "Regulatory Provisions", provided that solely for Federal, state and local income and franchise tax purposes and not for book or Capital Account purposes, income, gain, loss and deduction with respect to property properly carried on the Company's books at a value other than

its tax basis shall be allocated in accordance with the requirements of Code Sec. 704(c) and Reg. §1.704-3.

D. **Withholding.** The Company shall comply with withholding requirements under Federal, state and local law and shall remit amounts withheld to and file required forms with the applicable jurisdictions. To the extent the Company is required to withhold and pay over any amounts to any authority with respect to distributions or allocations to any Member, the amount withheld shall be treated as a distribution in the amount of the withholding to that Member. In the event of any claimed over-withholding, Members shall be limited to an action against the applicable jurisdiction. If the amount withheld was not withheld from actual distributions, the Company may, at its option, (i) require the Member to reimburse the Company for such withholding or (ii) reduce any subsequent distributions by the amount of such withholding. Each Member agrees to furnish the Company with any representations and forms as shall reasonably be requested by the Company to assist it in determining the extent of and in fulfilling its withholding obligations.

E. **Revaluation of Property.**

1. The assets of the Company shall be revalued on the books of the Company to equal their fair market values in accordance with Reg. §1.704-1(b)(2)(iv)(f) at the following times: (A) the day immediately preceding the acquisition of an additional Interest in the Company by any existing or new Member in exchange for more than a de minimis Capital Contribution to the capital of the Company pursuant to the articles entitled "Capital Contributions" Article and "Powers, Rights and Duties of Members"; (B) on the day of any withdrawal of more than a de minimis portion of the Capital Account pursuant to the article entitled "Distributions and Withdrawals" before taking into account such withdrawal; (C) the termination of the Company for Federal income tax purposes, including a dissolution of the Company or a termination pursuant to Code Sec. §708(b)(1)(B); and (D) the occurrence of any other event upon which the Manager believes such revaluation is appropriate. Upon revaluation of the Company's assets pursuant to this section, (i) the fair market value of the assets shall be determined by the unanimous agreement of all Members and (ii) each Member's Capital Account shall be adjusted as if such assets were sold for their fair market values and the Net Income and Net Losses recognized on such sale were allocated to the Members in accordance with the paragraph entitled "Allocation of Net Income and Net Loss".

2. Immediately following the occurrence of any event which has caused the revaluation of the assets of the Company pursuant to the paragraph entitled "Revaluation of Property, each Member's Percentage Interest shall be adjusted to equal the percentage determined by dividing the balance in each Member's Capital Account immediately after such revaluation by the aggregate balance of all Members' Capital Accounts immediately after such revaluation.

3. For purposes of the paragraph entitled "Allocation of Net Income and Net Loss", the Fiscal Year in which the assets of the Company are revalued pursuant to the first paragraph of the section entitled "Revaluation of Property" shall be treated as two separate Fiscal Years, one beginning on the first day of the Fiscal Year and ending on the day of the revaluation and the other beginning on the day immediately following the revaluation and ending on the last day of the Fiscal Year, and Net Income and Net Loss shall be allocated to the Members separately for each portion of the Fiscal Year based on operations for such portion of the year as reflected by a closing of the Company's books. Analogous divisions of the Fiscal Year into multiple Fiscal Years will be made if there be more than one revaluation of assets in any Fiscal Year.

ARTICLE V
Distributions and Withdrawals

A. **Distributions.** Subject to the section entitled "Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets", distributions of cash or property of the Company shall be made at such times and in such manner as shall be approved by the Manager. Any such distribution shall be made to the Members in proportion to their Percentage Interests as of the day on which such distribution is made.

B. **Withdrawals of Capital Account Balance.** Subject to the section entitled "Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets", a Member may withdraw all or any portion of its Capital Account balance at such time or times and in such manner as shall be approved by the Manager, which consent may be granted or withheld in each Member's sole discretion. Any Member withdrawing the entire balance of its Capital Account shall, upon the completion of such withdrawal, be deemed to have withdrawn

from the Company pursuant to the section entitled "Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets".

ARTICLE VI

Books of Account

A. **Books and Records.** Proper and complete records and books of account shall be kept by the Manager in accordance with the Act in which shall be entered fully and accurately all transactions and other matters relative to the Company's business as are usually entered into records and books of account maintained by Persons engaged in businesses of a like character, including a Capital Account for each Member. The Company books and records shall be kept on such method of accounting as the Manager shall determine. The determinations of the Manager with respect to the treatment of any item or its allocation for Federal, state or local tax purposes shall be binding upon all Members so long as that determination is not inconsistent with any express term of this Agreement. The books and records shall at all times be maintained at the principal office of the Company and shall be open to the examination and inspection of the Members or their duly authorized representative for a proper purpose during reasonable business hours at the sole cost and expense of the inspecting or examining Member. The Company shall maintain at its office and make available to each Member or any designated representative of a Member a list of names and addresses of, and Interests owned by, all Members. The Company shall maintain at its registered office those books and records required to be kept pursuant to the applicable sections of the Act.

B. **Tax Returns.** The Company shall file a Federal income tax return and all other tax returns required to be filed by the Company for each Fiscal Year or part thereof, and shall provide, within ninety (90) days following the end of such Fiscal Year, to each Person who at any time during such Fiscal Year was a Member with a copy of the Company's Federal, state and local income tax or information returns.

ARTICLE VII

Powers, Rights and Duties of Members

A. **Limitations.** Other than as set forth in this Agreement, the Members shall not participate in the management or control of the Company's business nor shall they transact any business for the Company, nor shall they have the power to act for or bind the Company, said powers being vested solely and exclusively in the Manager. The Members shall have no interest in the properties or assets of the Company, or any equity therein, or in any proceeds of any sales thereof (which sales shall not be restricted in any respect), by virtue of acquiring or owning an Interest in the Company.

B. **Liability.** Subject to the provisions of the Act, no Member shall be liable for the repayment, satisfaction or discharge of any Company liabilities in excess of the balance of the Capital Account of such Member.

C. **Priority.** Except as set forth in the articles entitled "Allocation of Income and Losses" and "Distributions and Withdrawals", no Member shall have priority over any other Member as to Company allocations or distributions.

D. **Admission of Additional Members.** Any Person may be admitted to the Company as an Additional Member at any time with the unanimous consent of the Members. Such Person shall make such Capital Contribution as all of the Members shall determine. Upon admission of an Additional Member, the Percentage Interest of each Member shall be adjusted in accordance with the section entitled "Allocation of Income and Losses".

ARTICLE VIII

Powers, Rights and Duties of Manager

A. **Authority.** The Manager shall have exclusive and complete authority and discretion to manage the operations and affairs of the Company and to make all decisions regarding the business of the Company. Any such action shall constitute the act of and serve to bind the Company. Persons dealing with the Company are entitled to rely conclusively on the power and authority of the Manager as set forth in this Agreement.

B. **Powers and Duties of Manager.** Except as otherwise specifically provided herein, the Manager shall have all rights and powers in the management of the Company

business to do any and all other acts and things necessary, proper, convenient or advisable to effectuate the purposes of this Agreement. Without limiting the generality of the foregoing, the Manager may appoint one or more investment advisers to manage the Company assets for the Company, any of which may also be affiliated with the Manager. Any such investment adviser may be given discretionary authority in the management of the Company's portfolio.

C. **Expenses of the Company.** The Company shall pay, and the Manager shall not be obligated to pay, all expenses incurred by or on behalf of the Company. The Manager may, in the Manager's discretion, advance funds to the Company for the payment of these expenses and shall be entitled to the reimbursement of any funds so advanced.

D. **Other Activities and Competition; Other Investments by the Manager and its Affiliates.** The Manager shall not be required to manage the Company as the Manager's sole and exclusive function. The Manager, the Manager's affiliates and agents, officers, directors and employees of the Manager and the Manager's affiliates may enter into transactions with the Company and may engage in or possess any interests in business ventures and may engage in other activities of every kind and description independently or with others in addition to those relating to the Company, including the rendering of advice or services of any kind to other investors and the making or management of other investments. Without limiting the generality of the foregoing, the Manager, the Manager's affiliates and any agent, officer, director or employee of the Manager or the Manager's affiliates may act as a director of any corporation, trustee of any trust, partner of any partnership or administrative officer of any business entity, and may receive compensation for service as a director, employee, advisor, consultant or manager with respect to, or participate in profits derived from, investments in or of any such corporation, trust, partnership or other business entity. The Members authorize, consent to and approve such present and future activities by such Persons, whether or not such activities may conflict with any interest of the Company or any of the Members or be competitive with the business of the Company or represent an opportunity that the Company might wish to engage in. Without limiting the generality of the foregoing, the Manager shall not have any obligation or responsibility to disclose or refer any such investments or other activities to the Company or any Member. Neither the Company nor any Member shall have any right by virtue of this Agreement or the partnership relationship created hereby in or to other ventures or activities of the Manager or the Manager's affiliates or to the income or proceeds derived therefrom.

E. **Liability.** Neither the Manager nor any of the Manager's affiliates nor any officer, agent or employee of the Manager or any of the Manager's affiliates shall be personally liable for the return of any portion of the Capital Contributions of the Members; the return of these Capital Contributions shall be made solely from assets of the Company. Neither the Manager nor any of its affiliates nor any officer, agent or employee of the Manager or any of the Manager's affiliates shall be required to pay to the Company or the Members any deficit in a Member's Capital Account upon dissolution or otherwise. The Members shall not have the right to demand or receive property other than cash for their Interest.

F. **Indemnification.**

1. Each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she or a person of whom he or she is the legal representative is or was the Manager, employee or agent of the Company or is or was serving at the request of the Company as a manager, managing member, employee or agent of any other corporation or of a partnership, joint venture, trust or other enterprise (hereinafter an "indemnitee"), whether the basis of such proceeding is alleged action in an official capacity as the Manager, employee or agent of the Company or in any other capacity while serving as the Manager, employee or agent of the Company, shall be indemnified and held harmless by the Company to the fullest extent authorized by the Act, against all expense, liability and loss (including, without limitation, attorneys' fees, judgments, fines and amounts paid or to be paid in settlement) reasonably incurred by such indemnitee in connection therewith; provided, however, that except as provided in the section entitled "Powers, Rights and Duties of Manager" with respect to proceedings seeking to enforce rights to indemnification, the Company shall indemnify any such indemnitee seeking indemnification in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by Members holding more than Fifty Percent (50%) of the Capital Account balances in the Company at the time.

2. The Company shall pay or reimburse the reasonable expenses incurred in defending any such action or proceeding in advance of its final disposition (hereinafter an "advancement of expenses"); provided, however, that, (i) in the case of the Manager, the Manager furnishes the Company with a written affirmation of a good faith belief that the

standard of conduct described in the Act has been met, (ii) the indemnitee furnishes the Company a written general unlimited undertaking (hereinafter an “undertaking”), executed personally or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a “final adjudication”) that such indemnitee is not entitled to be indemnified for such expenses under this section and (iii) a determination is made by Members holding more than Fifty Percent (50%) of the Capital Account balances at the time that the facts then known to such Members would not preclude indemnification under this section

3. If a claim under the article entitled "Powers, Rights and Duties of Manager" is not paid in full by the Company within thirty (30) days after a written claim has been received by the Company, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be twenty (20) days, the indemnitee may at any time thereafter bring suit against the Company to recover the unpaid amount of the claim. If successful in whole or in part in any such suit, or in a suit brought by the Company to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right of an advancement of expenses) it shall be a defense that, and (ii) in any suit brought by the Company to recover an advancement of expenses pursuant to the terms of an undertaking, the Company shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification set forth in the Act. Neither the failure of the Company (including its Manager, independent legal counsel or Members) to have made a determination prior to the commencement of such action that indemnification of the indemnitee is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth in the Act, nor an actual determination by the Company (including its Manager, independent legal counsel or Members) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or brought by the Company to recover an advancement of expenses pursuant to the terms of an undertaking, the burden of

proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this section shall be on the Company.

G. **Resignation of Manager.** Any Manager may resign at any time. The resignation must be made in writing and will take effect at the time specified in the written resignation. If no time is specified, the resignation will be effective at the time the Management receives it. Accepting a resignation is not necessary to make it effective unless the resignation expressly provides that it is necessary.

H. **Removal of Manager.** The Manager may be removed with the consent of the Members holding more than Fifty Percent (50%) of the Capital Account balances in the Company at the time. If the Members remove the Manager, Members holding more than Fifty Percent (50%) of the Capital Account balances in the Company at the time may appoint a successor manager who shall have all of the authority, rights and powers of the Manager under this Agreement. Any such successor manager shall execute documentation satisfactory to all of the Members that such successor manager is subject to all of the duties and obligations of the Manager hereunder.

I. **Tax Matters Member.**

1. For purposes of Code Sec. 6231(a)(7), the "Tax Matters Member" shall be _____ or, if _____ is no longer a Member, another Member appointed by the Manager as "Tax Matters Member", in each case for so long as such Member remains a member in the Company. The Tax Matters Member shall keep the Members fully informed of any inquiry, examination or proceeding with respect to any income tax matter involving the Company.

2. The Tax Matters Member shall promptly notify Members who do not qualify as "notice partners" within the meaning of Code Sec. 6231(a)(i) of the beginning and completion of an administrative proceeding at the Company level promptly upon such notice being received by the Tax Matters Member.

ARTICLE IX

Transfers of Interests by Members

A. **Transfer and Assignment of Members' Non-Voting Interests by Gift; Substituted Members.**

1. A Member may Transfer by gift all or a portion of only that Member's Non-Voting Units in the Company (including any beneficial interest therein), to a "Permitted Transferee" pursuant to this Paragraph A, provided the following conditions are met:

a. the Transferee executes documents reasonably satisfactory to the Manager pursuant to which the Transferee agrees to be bound by this Agreement and any amendments hereto;

b. the Transferee assumes, if so requested by the Company or by its Manager, the obligations, if any, of the Transferor to the Company;

c. all certificates or other instruments shall have been recorded or filed in the proper records of each jurisdiction in which such recordation or filing is necessary to qualify the Company to conduct business or to preserve the limited liability of the Members under the laws of the jurisdiction in which the Company is doing business; and

d. the Transferee represents, and, at the request of the Manager, furnishes to the Company an opinion of counsel satisfactory to the Manager, in form and substance satisfactory to the Manager, as to such matters as the Manager may reasonably request including, without limitation, that such Transfer (A) was made in accordance with and would not violate the Securities Act of 1933, as amended, or any other applicable Federal, state or local law; (B) would not require the Company to register as an investment company under the Investment Company Act of 1940, as amended; (C) would not jeopardize the status of the Company as a partnership or proprietorship for Federal income tax purposes or cause a termination of the Company pursuant to the then applicable provisions of the Act; (D) would not cause a termination of the Company under Code Sec. 708(b)(1)(B); and (E) would not cause the Company to be treated as a "publicly traded partnership" within the meaning of Code Sec. 7704.

2. For purposes of this Agreement, a "Permitted Transferee" is (1) any Member; or (2) any child, grandchild or more remote descendant of a Member.

3. No Member may transfer his or her Voting Units by gift or by any other means other than as set forth below.

4. Any Transfer made pursuant to this Paragraph A by a Member shall be subject to a right of first refusal as provided herein. The Transferor shall give the Manager written notice of the proposed Transfer which shall state the name of the proposed Transferee, the portion of the Transferor's Interest proposed to be transferred, the proposed purchase price

or, if none, the fair market value, as determined by all of the Members (without regard to this right of first refusal), of the Interest to be transferred, and any other material terms of such proposed Transfer. The Company shall, for a period of thirty (30) days after such notice is given, have the right to purchase such Interest at the proposed purchase price (or, if there is no proposed purchase price, at a price equal to the fair market value of the Interest proposed to be transferred (without regard to this right of first refusal)) and on the proposed terms or to assign such right or any portion thereof to such other Person or Persons as the Manager, in the exercise of sole discretion, shall determine.

1. The Transferee of a Member's Interest in the Company may be admitted to the Company as a Substituted Member only upon the receipt of the prior written consent of the Manager and all Members, which consent may be given or withheld in the sole discretion of the Manager and each Member. Unless a Transferee of a Member's Interest in the Company is admitted as a Substituted Member under this section, the Transferee shall have none of the powers of a Member hereunder and shall only have such rights of an assignee under the Act as are consistent with the other terms and provisions of this Agreement. No Transferee of a Member's Interest shall become a Substituted Member unless such Transfer shall be made in compliance with this paragraph and the preceding two paragraphs.

2. Unless a Transferee of a Member's Interest becomes a Substituted Member, such Transferee shall have no right to obtain or require any information or account of Company transactions, or to inspect the Company's books, or to vote on Company matters. Such a Transfer shall merely entitle the Transferee to receive the share of distributions, income and losses to which the transferring Member otherwise would be entitled.

3. All expenses incurred by the Company in connection with any Transfer or substitution of a Member pursuant to this section shall be paid by the Transferor prior to the time of the Transfer or substitution (including, without limitation, any fees and costs of the preparation, filing and publishing of any amendment to this Agreement or to the Articles, if any, and any legal and other fees, expenses and costs of any investigation and preparation, in connection with any action, proceeding or investigation related to any Transfer or attempted Transfer by a Member of a Member's Interest or in connection with the admission into the Company of the Transferee). The Transferor also will indemnify the Company and the Manager against any losses, claims, damages or liabilities to which any of them may become subject in

connection therewith. The reimbursement and indemnity obligations of the Transferor under this paragraph shall be in addition to any liability which the Transferor may otherwise have, shall extend upon the same terms and conditions to the Company and the Manager, shall inure to the benefit of any successors and assigns of the Company and the Manager and shall survive any termination of this Agreement.

4. The Transfer of a Member's Interest and the admission of a Substituted Member shall not be cause for dissolution of the Company.

B. **Transfers Other Than By Gift.**

1. **Transfer of Member's Voting Units by Sale.** A transfer of a Member's Voting Units may only be made by bona fide sale, regardless of whether such transfer is made to a Permitted Transferee, as such term is defined above. Any such transfer shall be made in accordance with the following provisions.

a. **Offer.** If a Member ("Transferring Member") intends voluntarily to transfer Voting Units or any Interest in the LLC by sale ("Offered Units"), during the Transferring Member's lifetime, such Transferring Member shall first give written notice to the LLC of such intent to transfer Units. The written notice shall specify: (a) the number of Units intended to be transferred; (b) the identity of the proposed transferee of the Offered Units; (c) the amount and terms of all consideration to be received by the Transferring Member or others in exchange for the transfer of the Offered Units (collectively referred to as the "Offering Price"); and (d) the date of the proposed transfer which shall not be less than thirty (30) days after the delivery of written notice to the LLC (unless such period is waived in writing by the LLC and all other Members). Such written notice by the Transferring Member shall constitute an offer to sell the Offered Units in whole or in part to the LLC and to the other Members as provided herein. Upon receipt of such notice, the LLC shall forward the notice to all Members other than the Transferring Member

b. **Acceptance by LLC.** For a period of thirty (30) days after the receipt of such notice, the LLC shall have the right to elect to purchase all or any portion of the Offered Units, at whichever of the following the LLC may select: (i) the Offering Price, or (ii) the Purchase Price, each as defined in this Agreement. If the LLC desires to accept in whole or in part the offer either for itself or on behalf of a Designated Purchaser, the LLC shall signify such acceptance, the number of units of Offered Units to be purchased, and the Member's

selection of either the Offering Price or the Purchase Price, by delivery of written notice to the Transferring Member and to the other Members within the thirty (30) day option period of the LLC.

c. **Acceptance by Other Members.** For a period of thirty (30) days after the expiration of such 30-day option period, the Members other than the Transferring Member shall have the right to elect to purchase all or any part of the Offered Units not elected to be purchased by the LLC. A Member who desires to accept in whole or in part the offer to sell, shall signify such acceptance, the number of units of Offered Units elected to be purchased, and his selection of either the Offering Price or the Purchase Price, by delivery of written notice to the Transferring Member and to the LLC with the thirty (30) day option period for the other Members. If more Units are elected to be purchased by the other Members than remain in the offering, such Units shall be allocated among the Member who have elected to accept the offer according to the number of Units each owns compared to the total number owned by all Members electing to accept the offer.

d. **Continuation of Restrictions.** Upon the lapse in whole or in part of the offer, the Transferring Member shall be free to transfer the Offered Units not elected to be purchased by the LLC, or by other Members, but only in strict compliance with the terms of the Offering Price and only for a period of thirty (30) days thereafter. After such 30 day period, the restrictions of this Agreement shall again apply to such proposed transfer. Units transferred in accordance with such proposed transfer shall continue to be subject to all the terms and conditions of this Agreement, and the LLC shall have a right to require, as a condition to such transfer, that the transferee execute a document agreeing to be bound by this Agreement.

2. **Other Voluntary Transfers.** In the event a Member voluntarily ceases to work for the LLC, whether the Member retires or otherwise wishes to terminate service for the LLC ("Withdrawing Member"), such Withdrawing Member shall forfeit his or her Interest effective as of the last day of such Member's employment with the LLC. In such event, the LLC shall purchase all Units comprising such Member's Interest at a Purchase Price which shall be determined in accordance with the following schedule.

a. If the Withdrawing Member has completed less than 8 years of service with the LLC, such Withdrawing Member shall be paid thirty percent (30%) of the "Purchase Value" of such Withdrawing Member's LLC Units.

b. If the Withdrawing Member has completed more than or equal to 8 years of service with the LLC, but less than 10 years of service with the LLC, such Withdrawing Member shall be paid forty percent (40%) of the Purchase Value of such Withdrawing Member's interest.

c. If the Withdrawing Member has completed more than or equal to 10 years of service with the LLC, but less than 15 years of service with the LLC, such Withdrawing Member shall be paid fifty percent (50%) of the Purchase Value of such Withdrawing Member's interest.

d. If the Withdrawing Member has completed more than or equal to 15 years of service with the LLC, but less than 20 years of service with the LLC, such Withdrawing Member shall be paid sixty percent (60%) of the Purchase Value of such Withdrawing Member's interest.

e. If the Withdrawing Member has completed more than or equal to 20 years of service with the LLC, but less than 25 years of service with the LLC, such Withdrawing Member shall be paid seventy percent (70%) of the Purchase Value of such Withdrawing Member's interest.

f. If the Withdrawing Member has completed more than or equal to 25 years of service with the LLC, but less than 30 years of service with the LLC, such Withdrawing Member shall be paid eighty percent (80%) of the Purchase Value of such Withdrawing Member's interest.

g. If the Withdrawing Member has completed more than or equal to 35 years of service with the LLC, but less than 40 years of service with the LLC, such Withdrawing Member shall be paid ninety percent (90%) of the Purchase Value of such Withdrawing Member's interest.

h. If the Withdrawing Member has completed more than or equal to 40 years of service with the LLC, but less than 45 years of service with the LLC, such Withdrawing Member shall be paid One Hundred percent (100%) of the Purchase Value of such Withdrawing Member's interest.

i. The "Purchase Value" of a Member's Interest shall be determined in accordance with the provisions of Paragraph 6 set forth below.

j. Notwithstanding anything to the contrary contained herein this Agreement, only _____, _____ and _____ shall be permitted to count his or her years of service prior to entering into this Agreement toward the vesting schedule set forth under this Paragraph 2. No other Member shall be permitted to count his or her years of service prior to entering into this Agreement toward the vesting schedule set forth under this Paragraph 2. Such years of service shall be set forth on the attached "Annex to Operating Agreement" and shall be added to the years of service provided to the LLC from and after the date of this Agreement for purposes of counting years of service for this Paragraph 2.

k. Further notwithstanding anything to the contrary, the vesting schedule set forth in this Paragraph 2 may be amended from time to time by a majority vote of the Voting Units of the LLC.

3. **Involuntary Transfers.**

a. **Termination of Member from Service.** In the event a Member is terminated from service with the LLC by the Manager, such Member shall immediately forfeit his or her Interest in the LLC. In such event the LLC shall purchase such Member's Interest in accordance with the vesting schedule set forth in Paragraph B.2. of this Article above as if such Member is a Withdrawing Member.

b. **Lien or Charge Against Member's Interest.** Whenever a Member has any notice or knowledge of any attempted, impending, or consummated involuntary transfer of or lien or charge upon any Units, whether by operation of law or otherwise, he shall give immediate written notice thereof to the LLC. Whenever the LLC has any other notice or knowledge of any such attempted, impending, or consummated involuntary transfer, lien, or charge, it shall give written notice thereof to the Members. In either case, all Members agree to disclose to the LLC and to the other Members all pertinent information relating thereto. If any Unit is subjected to any such involuntary transfer, lien, or charge, the LLC and the other Members shall at all times have the immediate and continuing option to purchase such Units at the Purchase Value determined in accordance with the vesting schedule set forth in Paragraph B.2. of this Article above as if such Member is a Withdrawing Member, and Units so purchased shall in every case be free and clear of such transfer, lien, or charge.

4. **Transfers Upon Death.** The LLC agrees to purchase, and each Member agrees on behalf of his estate, heirs, legatees and successors in interest to sell to the LLC or the

other Members at a Purchase Price equal to One Hundred percent (100%) of the Purchase Value all of the Units owned by a Member upon his death.

5. **Other Transfers**

a. **Upon Permanent Disability.** The LLC agrees to purchase, and each Member agrees to sell at a Purchase Price equal to One Hundred percent (100%) of the Purchase Value all of the Units owned upon such Member's Total Disability.

6. **Purchase Value, Purchase Price and Term**

a. **Purchase Value.** Whenever any Units shall be offered at, or is to be bought or sold, the Purchase Value shall be determined by a majority vote of the Voting Units of the LLC.

b. **Purchase Price.** The Purchase Price shall be that amount of the Purchase Value as shall be dictated in accordance with the applicable provisions of this Agreement for the type of transfer of Units to take place.

c. **Payment of Purchase Price.** The Purchase Price shall be paid upon the following terms, unless the parties agree otherwise: twenty percent (20%) in cash at Closing (payable by check which clears in the ordinary course), and the balance payable in five equal annual installments of principal and interest, beginning one year after the date of Closing, with interest at the midterm compounded annually applicable Federal rate for purposes of Section 1274(d) of the Internal Revenue Code of 1986, as amended, on the date of Closing. Notwithstanding anything to the contrary contained herein, in no event shall the LLC be required to pay more than Two Hundred Thousand Dollars ($200,000.00) per year in total for all Members' Interests being purchased by the LLC ("Payment Cap"). In the event that there are sufficient Interests in payment status such that payment on such Interests over a five year period causes the LLC to exceed this Payment Cap, the LLC and Members agreement that the payment term of the payment of the Purchase Price shall be extended in order to bring to total of all payments below the amount of the Payment Cap. The obligation with respect to the balance of the purchase price not paid at Closing shall be evidenced by the negotiable promissory note of the LLC or the purchasing Members, as the case may be, which shall be secured by the Units purchased, and shall provide for prepayment in whole or in part at any time without penalty. Provided, however, that in the event the Units are to be purchased at the Purchase Price due to the death of a Member and in the further even that the Purchaser of the Units owned a life

insurance policy on the life of the deceased Member, then the Purchase Price shall be paid in cash at Closing (payable by check which clears in the ordinary course), to the extent the Purchaser has received or is entitled to receive proceeds of insurance on the life of such deceased Member, and the balance payable in n equal annual installments of principal and interest as provided above.

d. **Offering Price.** Whenever any Units shall be offered at, or is to be bought or sold at the Offering Price, the Offering Price shall be the amount and on the same terms of all consideration to be received by the Transferring Member or others in exchange for the transfer of the Offered Units according to the notice given by the Transferring Member.

e. **Closing.** Whenever the LLC or one or more of its Designated Purchasers shall agree to purchase or sell Units under the terms of this Agreement, the Closing shall take place on the Closing Date at a location convenient to all parties thereto in the New York designated by the LLC. Unless the parties mutually agree to the contrary, the Closing Date shall not be more than thirty (30) days after the occurrence of the last event which fixed the obligation to purchase and sell and the identity of the parties thereto (whether that be a written notice of election to purchase, death of a Member, or whatever). Notice of such details of Closing shall be furnished to all parties no later than ten (10) days prior to the Closing Date. At the Closing, certificates for the number of Units being sold shall be delivered together with instruments sufficient to effect the transfer of such Units duly endorsed by or on behalf of the transferring Member and transferred of record to the purchaser in exchange for payment to the transferring Member of funds required by cash or certified check as specified in the price and terms of the Purchase Price or the Offering Price, as the case may be.

f. **Endorsement on Units Certificates.** Upon the execution of this Agreement, all certificates for Units shall be returned to the LLC for endorsement with the following legend:

> "The Units represented by this certificate may be transferred only in accordance with the terms of an Agreement between the LLC and its Members dated _____, a copy of which is on file with the LLC, and any attempted transfer in violation of the terms of such Agreement is void. Such Agreement may be inspected at the principal office of the LLC during normal business hours."

g. After the Units certificates are so endorsed, they shall be returned to the Members. All certificates of Units issued or reissued after execution of this Agreement shall bear the same endorsement.

7. **Enforcement.** If any transfer of Units is attempted contrary to the provisions of this Agreement, the LLC and the other Members shall have the right to purchase such Units from the transferring Member or the purported transferee, at any time before or after the purported transfer, for the lesser of the Purchase Price at the time of the purported transfer or the Purchase Price at the time the LLC or the other Members elect to purchase such Units. In addition, the LLC may refuse to recognize any purported transferee as a Member for all purposes, including, without limitation, for purposes of dividend and voting rights, until all applicable provisions of this Agreement have been complied with. If the LLC or the other Members exercise an option to purchase under this Agreement, following the Closing Date and tender of the Purchase Price or the Offering Price, as the case may be, the LLC may for all purposes treat any units to be purchased under this Agreement as having been purchased and the certificates for such purchased Units shall be canceled and reflected as having been transferred on the books of the LLC.

8. **Sale Restricted.** The parties hereto acknowledge that the Units cannot be readily purchased or sold on the open market, and for that reason, among others, the parties will be irreparably damaged if this Agreement is not specifically enforced. If any dispute arises concerning the transfer or pledge of Units, an injunction may be issued restraining any transfer or pledge pending the determination of such controversy upon application to a court of competent jurisdiction by a party to this Agreement. If any controversy arises concerning the transfer or pledge of Units, this Agreement shall be enforceable in a court of equity by decree of specific performance. Such remedy shall, however, be cumulative and not exclusive, and shall be in addition to any other remedy the parties may have.

9. **Insurance.** Parties under this agreement may (but are not required to) purchase and maintain policies of disability or life insurance on each of the Members to provide for obligations arising under this Agreement. Each Member agrees to cooperate with any other party's attempt to acquire such insurance on such Member. No Member shall possess any incidents of ownership in any such policy insuring his life. The policies will be the sole property

of the owner. No Member nor any successor, transferee, assignee, or personal representative of any Member shall have any collateral interest in any such policy insuring his own life.

If all the units of any living Member are transferred pursuant to this Agreement, and if all the obligations of the purchasing party or parties for payment of the purchase price have been fully satisfied, then the said living Member may purchase from the owner any policy of insurance owned by the LLC or any other Member insuring his life, for a price equal to the interpolated terminal reserve of such policy plus any prepaid premiums, less any policy indebtedness.

Upon the death of any Member, the LLC shall purchase and the estate of the deceased Member shall sell any policy of life insurance owned by such deceased Member insuring the life of any other living Member, for a price equal to the net cash surrender value of such policy plus any prepaid premiums, less any policy indebtedness.

C. **Right to Treat Successor-in-Interest as Assignee.** Upon the death, disability, winding-up and termination (in the case of a Member that is a partnership or a corporation), termination (in the case of a Member that is a trust), withdrawal in contravention of the section entitled "Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets" or occurrence of an event described in the applicable sections of the Act with regard to a Member (the “Assigning Member”), the Manager shall have the right to treat the successor(s)-in-interest of the Assigning Member as assignees of the Interest in the Company of the Assigning Member, with only such rights of an assignee of a limited liability company interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement. Without limiting the generality of the foregoing, the successor(s)-in-interest of the Assigning Member shall have only the rights to the allocations provided in the article entitled "Allocation of Income and Losses" and the distributions provided in the article entitled "Distributions and Withdrawals". For purposes of this section, if the Assigning Member’s Interest in the Company is held by more than one person (for purposes of this subsection, the “Assignees”), the Assignees by majority vote shall appoint one person with full authority to accept notices and distributions with respect to such Interest in the Company on behalf of the Assignees and to bind them with respect to all matters in connection with the Company or this Agreement.

D. **Transferees Bound by Agreement.** Any successor or Transferee of a Member hereunder shall be subject to and bound by all the provisions of this Agreement as if originally a party to this Agreement.

E. **Effect of Transfer.** Upon the Transfer of the entire Interest in the Company of a Member and effective upon the admission of such Member's Transferee(s) pursuant to the article entitled "Transfers of Interests by Members", the transferring Member shall be deemed to have withdrawn from the Company as a Member.

ARTICLE X

Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets

A. **Withdrawal of Members.** Except pursuant to the article entitled "Transfers of Interests by Members", no Member may withdraw from the Company without the unanimous consent of the Members, which consent may be granted or withheld in their sole discretion. If a Member withdraws from the Company, such action shall be considered a breach of this Agreement, and the Company, in satisfaction of such breach, shall treat the withdrawn Member as an assignee of such Member's Membership Interest. Any Member withdrawing in contravention of this section shall indemnify, defend and hold harmless the Company and all other Members from and against any losses, expenses, judgments, fines, settlements or damages suffered or incurred by the Company or any other Member arising out of or resulting from such withdrawal.

B. **Dissolution of Company.**

1. The Company shall be dissolved, wound up and terminated as provided herein upon the occurrence of the earliest of the following events:

   a. the written consent of all Members to dissolve the Company;

   b. the entry of a judicial decree of dissolution of the Company under the Act.

2. In the event of the dissolution of the Company for any reason, the Manager, or if the Manager has been removed by the Members pursuant to the article entitled "Powers, Rights and Duties of Manager", then a liquidating agent or committee appointed by Members holding Fifty Percent (50%) or more of the Capital Account balances (the Manager or such Person or committee so designated hereinafter referred to as the "Liquidator"), shall begin

to wind up the affairs of the Company and to liquidate the Company's assets. The Members shall continue to share all income, losses and distributions during the period of liquidation in accordance with the articles entitled "Allocation of Income and Losses" and "Distributions and Withdrawals". The Liquidator shall have full right and unlimited discretion to determine the time, manner and terms of any sale or sales of Company property pursuant to such liquidation, giving due regard to the activity and condition of the relevant market and general financial and economic conditions.

3. The Liquidator shall have all of the rights and powers with respect to the assets and liabilities of the Company in connection with the liquidation and termination of the Company that the Manager would have with respect to the assets and liabilities of the Company during the term of the Company, and the Liquidator is hereby expressly authorized and empowered to execute and file any and all documents (including Articles of Dissolution) necessary or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets.

4. Notwithstanding the foregoing, a Liquidator which is not the Manager shall not be deemed a Member in or a successor manager of this Company and shall not have any of the economic interests in the Company of a Member; and such Liquidator shall be compensated for the Liquidator's services to the Company at normal, customary and competitive rates for the Liquidator's services to the Company as reasonably determined by all of the Members.

C. **Distribution in Liquidation.**

1. The Liquidator shall, as soon as practicable, wind up the affairs of the Company and sell and/or distribute the assets of the Company. The assets of the Company shall be applied in the following order of priority:

a. first, to creditors of the Company (including Members who are creditors to the extent permitted by law), in the order of priority provided by law.

b. second, to establish reserves reasonably adequate to meet any and all contingent or unforeseen liabilities or obligations of the Company, provided that at the expiration of such period of time as the Liquidator may deem advisable, the balance of such reserves remaining after the payment of such contingencies or liabilities shall be distributed as hereinafter provided.

c. third, to the Members in accordance with the article entitled "Distributions and Withdrawals".

2. If the Liquidator, in the exercise of sole discretion, determines that assets other than cash are to be distributed, then the Liquidator shall cause the fair market value of the assets not so liquidated to be determined. Such assets shall be retained or distributed by the Liquidator as follows:

a. the Liquidator shall retain assets having an appraised value, net of any liability related thereto, equal to the amount by which the net proceeds of liquidated assets are insufficient to satisfy the requirements of paragraphs 1. a above and 1. b above; and

b. the remaining assets shall be distributed to the Members in the same proportion as cash would be distributed to the Members pursuant to paragraph 1. c above.

3. If the Liquidator, in the exercise of sole discretion, deems it not feasible or desirable to distribute to each Member that Member's allocable share of each asset, the Liquidator may allocate and distribute specific assets to one or more Members, individually or as tenants-in-common, as the Liquidator shall in good faith determine to be fair and equitable, taking into consideration, inter alia, the fair market value of the assets, the liens, if any, to which such property may be subject and the tax consequences of the proposed distribution to each of the Members (including both distributees and others if any). Any distributions in kind shall be subject to such conditions relating to the disposition and management thereof as the Liquidator deems reasonable and equitable.

D. **Rights of the Members.** Each of the Members shall look solely to the assets of the Company for all distributions with respect to the Company and such Member's Capital Contribution (including return thereof), and such Member's share of profits or losses thereof, and shall have no recourse therefore (upon dissolution or otherwise) against any Member. No Member shall have any right to demand or receive property other than cash upon dissolution and termination of the Company.

E. **Deficit Restoration.** Notwithstanding any other provision of this Agreement to the contrary, upon liquidation of a Member's Interest (whether or not in connection with a liquidation of the Company), no Member shall have any liability to restore any deficit in that Member's Capital Account. In addition, no allocation to any Member of any loss, whether attributable to depreciation or otherwise, shall create any asset of or obligation to the Company,

even if such allocation reduces a Member's Capital Account or creates or increases a deficit in such Member's Capital Account; it is also the intent of the Members that no Member shall be obligated to pay any such amount to or for the account of the Company or any creditor of the Company (however, if any court of competent jurisdiction holds that, notwithstanding the provisions of this Agreement, the Member is obligated to make any such payment, such obligation shall be the obligation of such Member and not of the Manager or of the Company). The obligations of the Members to make contributions pursuant to the article entitled "Capital Contributions" are for the exclusive benefit of the Company and not of any creditor of the Company; no such creditor is intended as a third-party beneficiary of this Agreement nor shall any such creditor have any rights hereunder, including without limitation the right to enforce any Capital Contribution obligation of the Members.

F. **Termination.** The Company shall terminate when all property owned by the Company shall have been disposed of and the assets shall have been distributed as provided in the article entitled "Withdrawal of Members; Dissolution of Company; Liquidation and Distribution of Assets". The Liquidator shall then execute and cause to be filed Articles of Dissolution of the Company.

ARTICLE XI

Amendment of Agreement and Power of Attorney

A. **Approval of Amendments.** Amendments to this Agreement which do not adversely affect the right of the Members in any material respect may be made by the Manager without the consent of the Members if those amendments are (i) of an inconsequential nature (as determined in good faith by the Manager), (ii) necessary to maintain the Company's status as a partnership or proprietorship according to Code Sec. 7701(a)(2), (iii) necessary to preserve the validity of any and all allocations of Company income, gain, loss or deduction pursuant to Code Sec. 704(b), or (iv) contemplated by this Agreement (including without limitation amendments in connection with the admission of new Members, making of additional Capital Contributions or withdrawal of a Member). Amendments to this Agreement other than those described in the foregoing sentence may be made only if embodied in an instrument signed by the Manager and all Members. Any such supplemental agreement or amendment shall be adhered to and have the same effect from and after its effective date as if the same had originally been embodied in, and

formed a part of, this Agreement. The Manager shall give written notice to all Members promptly after any amendment has become effective. Any amendment to this Agreement must be in writing.

B. **Amendment of Articles.** In the event this Agreement shall be amended pursuant to the article entitled "Amendment of Agreement and Power of Attorney", the Manager shall amend the Articles to reflect that change if they deem the amendment of the Articles to be necessary or appropriate.

C. **Power of Attorney.** Each Member hereby irrevocably constitutes and appoints the Manager (and the Liquidator) as the Member's true and lawful attorney-in-fact, with full power of substitution, in the Member's name, place and stead to make, execute, sign, acknowledge (including swearing to), record and file, on behalf of the Member and on behalf of the Company, the following:

1. The Articles and any other certificates or instruments which may be required to be filed by the Company or any of the Members under the laws of the State of New York and any other jurisdiction whose laws may be applicable;

2. Articles of Dissolution of the Company and such other instruments as may be deemed necessary or desirable by the holder of such power upon the termination of the Company; and

3. Any and all amendments of the instruments described in the article entitled "Amendment of Agreement and Power of Attorney", provided such amendments are either required by law to be filed or have been authorized by the Members.

4. The foregoing grant of authority:

a. shall survive the delivery of an assignment by a Member of the whole or any portion of its Interest and any assignee of such Member does hereby constitute and appoint the aforesaid holders his attorney in the same manner and force and for the same purposes as does the assignor;

b. is a special power of attorney coupled with an interest, is irrevocable and shall survive the death or incapacity of the Member granting the power; and

c. may be exercised by the holder on behalf of a Member by a facsimile signature or by listing all of the Members executing any instrument with a single signature as attorney-in-fact for all of them.

ARTICLE XII

Miscellaneous

A. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given when delivered in person or by registered or certified mail to the addresses of the Members as shown from time to time on the records of the Company. Any Member may specify a different address by notifying the Manager in writing of that different address.

B. **Liability for Estate Tax.** The parties acknowledge that although they believe the Purchase Price payable by reason of the death of a Member for the deceased Member's units may not necessarily establish the estate tax or other death tax value of such units. Notwithstanding any estate or other death tax apportionment law or provision in any other document to the contrary, no purchaser of such units shall be liable for any estate or other death tax due on the excess, if any, of the value of the units so purchased as determined for estate tax or other death tax purposes and the purchase price paid for such units. Each Member agrees that the purchase price for the units many be withheld until it is established to the reasonable satisfaction of the purchaser or purchasers that no estate or other death tax due on any such excess shall be chargeable to or payable by the purchasers.

C. **Other Documents.** The parties agree to execute and deliver all proxies, Units transfer agent agreements, authorizations, documents and instruments which are necessary to carry out the terms and conditions of this Agreement.

D. **Entire Agreement.** It is agreed that as a material consideration for the execution of this Agreement there are and were no verbal or written representations, agreements, or promises pertaining to the subject matter of this Agreement not incorporated in writing in this Agreement. This Agreement supersedes all other agreements, if any, among the parties relating to the Units and sets forth all agreements among them relating to the Units. Neither this Agreement nor any of its terms, conditions, representations, or warranties can be terminated, amended, waived, or extended except by an appropriate written instrument duly executed by the parties.

E. **Governing Law.** This Agreement and the rights of the parties hereunder shall be governed by and interpreted in accordance with the law of the State of New York.

F. **Effect.** Except as herein otherwise specifically provided, this Agreement shall be binding upon and inure to the benefit of the parties and their legal representatives, successors and assigns.

G. **No Waiver.** No assent, express or implied, by the LLC or any Member to any breach in or default of any agreement or condition contained in this Agreement on the part of any other Member shall constitute a waiver of or assent to any succeeding breach in or default of the same or any other agreement or condition of this Agreement.

H. **Pronouns and Number.** Wherever it appears appropriate from the context, each term stated in either the singular or the plural shall include the singular and the neuter shall include the masculine, feminine and neuter.

I. **Captions.** Captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit or extend the scope or intent of this Agreement or any provision hereof.

J. **Partial Enforceability.** If any provision of this Agreement, or the application of that provision to any Person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of that provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

K. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument. In addition, this Agreement may contain more than one counterpart of the signature page and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages. All of those counterpart signatures pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

L. **Amendment or Termination.** This Agreement shall terminate upon the first to occur of the following events:

1. The execution of an agreement to revoke this Agreement, signed by all the living parties and the personal representative of any deceased party who has not yet been fully paid for the sale of all the units of such decedent; or

2. The adoption of a plan of sale or liquidation by the LLC, or the bankruptcy, receivership, or dissolution of the LLC (but such termination shall not extinguish the rights or obligations of the parties arising out of any event occurring before such termination); or

3. The complete termination of all ownership of units in the LLC by all the Members, and the satisfaction of all obligations respective such termination as provided in this Agreement; or

4. The death of all the Members within one hundred eighty (180) days of each other.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

Dated: _____, 20___

_____
_____, Manager

Dated: _____, 20___

_____
_____, Member

Dated: _____, 20___

_____
_____, Member

Dated: _____, 20___

_____
_____, Member

Dated: _____, 20___

_____
_____, Member

Dated: _____, 20___

_____
_____, Member

Dated: _____, 20___

_____
_____, Member

ANNEX

TO OPERATING

AGREEMENT

NAMES, ADDRESSES, AND
CAPITAL ACCOUNTS OF MEMBERS

Name and Address of Member	***Initial Capital Contribution***	***Initial Percentage Voting Interest***	***Initial Percentage Non-Voting Interest***	***Years Of Service***
TOTAL:	$0	0%	0%	

SAMPLE

FLP

AGREEMENT OF LIMITED PARTNERSHIP

FAMILY LIMITED PARTNERSHIP AGREEMENT

FOR

_____

_____

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AGREEMENT OF LIMITED PARTNERSHIP
FOR
_____

THIS LIMITED PARTNERSHIP AGREEMENT ("Agreement") is made and entered into effective for all purposes and in all respects as of the _____ by and among the General Partner and the Limited Partners, all as listed on Exhibit "A" (the General Partner and the Limited Partners collectively referred to as the "Partners").

ARTICLE I
Formation

A. **Formation of the Partnership.** The Partners acknowledge that the partnership was formed by the filing of the Certificate of Limited Partnership (the "Certificate") with the Secretary of State of the State of Florida on _____ (the "Effective Date"). The General Partners, for themselves and their Agents and for the Limited Partners, shall accomplish all filing, recording, publishing and other acts necessary or appropriate for compliance with all the requirements for the formation and operation of the Partnership as a limited partnership under the Act and under all other laws of the State of Florida and such other jurisdictions in which the General Partners determine that the Partnership may conduct business. Each Limited Partner shall promptly execute all relevant certificates and other documents as the General Partners shall request. The rights and duties of the Partners shall be as provided in the Act except as modified by this Agreement.

B. **Name.** The name of the Partnership shall be the _____, as such name may be modified from time to time by the General Partners following written notice to the Limited Partners.

C. **Principal Office.** The principal place of business of the Partnership shall be _____, or at such other place as may from time to time be approved by the General Partners.

D. **Name and Address of the Partners.** The name, address and percentage of interest in the Partnership ("Interest") of each Partner is set forth in Exhibit "A" attached hereto and made a part hereof.

E. **Registered Agent.** The registered agent of the Partnership is _____, who is a registered business in the state of formation. The address of the registered agent is _____.

F. **Term of the Partnership.** The Partnership shall terminate only as provided in this Agreement.

G. **Purpose.** The purpose and business of the Partnership shall be to conduct any business or activity that may be conducted by a limited partnership organized pursuant to the Act; to invest in securities of every kind (including without limitation stocks, options, warrants, promissory notes secured by deeds of trust, bonds, limited partnership interests), physical commodities and commodity futures, and ownership interests and indebtedness of every kind; to engage in other investment activities including, without limitation, investing in mutual funds, real estate and other investments that offer the opportunity for an appropriate return; to make direct investments or form partnerships, corporation or other entities for the purpose of making investments; and to engage in any and all activities related or incidental to the foregoing and to do all things necessary or convenient for the accomplishment thereof. The Partnership may execute, deliver and perform all contracts and undertakings and engage in any and all activities and transactions as may, in the determination of the General Partners, be necessary or advisable to carry out the foregoing objects and purposes.

ARTICLE II
Definitions

"Act" means the Florida Revised Limited Partnership Act, Fla. Stat. Section 620.101 et seq., as in effect on the date hereof and as it may be amended hereafter from time to time.

"Additional General Partner" means any General Partner admitted to the Partnership as an additional General Partner the "Admission of Additional General Partners" Section of the "Powers, Rights and Duties of General Partners" Article.

"Additional Limited Partner" means any Limited Partner admitted to the Partnership as an additional Limited Partner pursuant to the "Addition of Additional Limited Partners" Section of the "Powers, Rights and Duties of the Limited Partners" Article.

"Agreement" means this Agreement of Limited Partnership, as amended, modified or supplemented from time to time.

"Assigning Partner" has the meaning set forth in the "Transfers of Interest by Partners" Article.

"Capital Account" means, with respect to each Partner, the account established and maintained for the Partner on the books of the Partnership in compliance with Reg. §§1.704-1(b)(2)(iv) and 1.704-2, as amended. Subject to the preceding sentence, each Partner's Capital Account shall initially equal the amount of cash and the Contribution Value of any other property initially contributed by such Partner to the Partnership. Throughout the term of the Partnership a Partner's Capital Account will be (i) increased by the amount of (a) income and gains allocated to such Partner pursuant to the "Capital Contributions" Article, and (b) the amount of any cash or the or the Contribution Value of any property subsequently contributed by such Partner to the Partnership, and (ii) decreased by the amount of (a) losses and deductions allocated to such Partner pursuant to the "Capital Contributions" Article, and (b) the amount of distributions in cash and the value (as determined by the Partners) of property (net of liabilities secured by the property that such Partner is treated as assuming or taking subject to pursuant to the provisions of Code Sect. 752) distributed to such Partner.

"Capital Contribution" means the amount of cash or the Contribution Value of property contributed or deemed to be contributed to the Partnership by a Partner, pursuant to the "Capital Contributions" and "Additional Capital Contributions" Sections of the "Capital Contributions" Article.

"Certificate" means the Certificate of Limited Partnership of the Partnership, as amended, modified or supplemented from time to time.

"Code" means the Internal Revenue Code of 1986, as amended from time to time (or any succeeding law).

"Contribution Value" means the fair market value as reasonably determined by the General Partners of property (other than cash) contributed by a Partner to the Partnership (net of liabilities secured by such contributed property that the Partnership is treated as assuming or taking subject to pursuant to the provisions of Code Sec. 752.

"Fiscal Year" means the calendar year; provided, however, that the last Fiscal Year of the Partnership shall end on the date on which the Partnership is terminated.

"General Partners" shall mean, collectively, that General Partner set forth in the forepart of this Agreement and any Additional General Partner named pursuant to the provisions of the

"Admission of Additional General Partners" Section of the "Powers, Rights and Duties of General Partners" Article.

"Indemnified Party" has the meaning set forth in the provisions of the "Admission of Additional General Partners" Section of the "Powers, Rights and Duties of General Partners" Article.

"Interest," when used in reference to an interest in the Partnership, means the entire ownership interest of a Partner in the Partnership at any particular time.

"Limited Partner" means each Person named as a limited partner on Exhibit A hereto and each Person admitted as a Substituted Limited Partner or an Additional Limited Partner pursuant to the terms of this Agreement, and, with respect to those provisions of this Agreement concerning a Limited Partner's rights to receive a share of profits or other distributions or the return of a Limited Partner's contribution, any Transferee of a Limited Partner's Interest in the Partnership (except that a Transferee who is not admitted as a Limited Partner shall have only those rights specified by the Act and which are consistent with the terms of this Agreement.)

"Liquidator" has the meaning set forth in the "Withdrawal of Partners; Dissolution of Partnership" Article.

"Net Income" and "Net Loss," respectively, mean the income or loss of the Partnership as determined in accordance with the method of accounting followed by the Partnership for Federal income tax purposes, including, for all purposes, any income exempt from tax and any expenditures of the Partnership which are described in Code Sec. 705(a)(2)(b); provided, however, that if any property is carried on the books of the Partnership at a value that differs from that property's adjusted basis for tax purposes, gain, loss, depreciation and amortization with respect to such property shall be computed with reference to the book basis of such property, consistently with the requirement of Sections 1.704-1(b)(2)(iv)(g); and provided, further, that any item allocated under the "Allocation of Income and Losses" Article shall be excluded from the computation of Net Income and Net Loss.

"Partners" means all General Partners and all Limited Partners, collectively, where no distinction is required by the context in which the term is used.

"Partnership" means the limited partnership formed pursuant to this Agreement under the name _____ Agreement of Limited Partnership.

"Percentage Interests" means with respect to each Partner the percentage determined by dividing the balance of such Partner's Capital Account by the aggregate balances of all Partners'

Capital Accounts. The initial Percentage Interest of each Partner is set forth opposite such Partner's name in Exhibit A.

"Person" means any individual, partnership, limited liability company, corporation, trust or other entity.

"Reg." means regulations promulgated under the Code by the Department of the Treasury of the United States of America.

"Substituted General Partner" means any Person admitted to the Partnership as a substituted General Partner pursuant to the "Transfer of Interests by Partners" Article.

"Substituted Limited Partner" means any Person admitted to the Partnership as a substituted Limited Partner pursuant to the "Transfer of Interests by Partners" Article.

"Tax Matters Partner" has the meaning set forth in the "Accounting and Management" Article.

"Transfer," "Transferee" and "Transferor" have the respective meanings set forth in the "Transfer of Interests by Partners" Article.

ARTICLE III

Capital Contributions

A. **Capital Contributions.** The General Partners shall contribute to the capital of the Partnership the assets set forth opposite such Partner's name in Exhibit A hereto under the column headed Initial Capital Contribution. Thereupon, each Limited Partner shall contribute to the capital of the Partnership the assets set forth opposite such Partner's name in Exhibit A hereto under the column headed Initial Capital Contribution. The Partners admitted to the Partnership as of the date hereof hereby agree that the amount set forth under the column headed "Initial Capital Account Balance" opposite each Partner's name in Exhibit A hereto accurately reflects the fair market value of the assets contributed to the Partnership by such Partner.

B. **Additional Capital Contributions.** Any partner may make additional Capital Contributions at any time upon the unanimous consent of all Partners. Following any such additional Capital Contribution, the Percentage Interest of each Partner shall be adjusted in the manner provided in the "Allocation of Income and Losses" Article.

C. **Interest on Capital Contributions.** No Partner shall be entitled to interest on or with respect to any Capital Contribution. Notwithstanding the foregoing, a Partner may make

loans to the Partnership on such terms (including rate of interest) as shall be determined by the General Partners.

ARTICLE IV

Allocation of Income and Losses

A. **Allocation of Net Income and Net Loss.** Subject to the "Regulatory Provisions" and "Allocations for Income Tax Purposes" Sections, below, the Partnership's Net Income and Net Loss for each Fiscal Year shall be allocated to the Partners in proportion to their Percentage Interests.

B. Regulatory Provisions.

1. The General Partners shall modify the allocations provided for above in this Article as they deem appropriate to comply with Reg. §§1.704-1(b) and 1.704-2. Without limiting the generality of the foregoing, the General Partners shall, prior to making any allocations required by this Article, make any allocations required by the "minimum gain chargeback" provisions of Reg. §1.704-2(i)(4) and the "qualified income offset" provision of Reg. Sec.1.704-1(b)(2)(ii)(d); in addition, Partnership losses, deductions or expenditures described in Code Sec. 705(a)(2)(B) attributable to a particular partner nonrecourse liability shall be allocated to the Partner that bears the economic risk of loss for the liability in accordance with Reg. §1.704-2(i).

2. The General Partners shall limit allocations of Net Losses to any Partner if such allocation would cause such Partner's Capital Account balance, as increased for any deficit balance in the Capital Account which the Partner is required to restore or is deemed required to restore as a result of its share of the Partnership's minimum gain (within the meaning of Reg. §§1.704(2)(g)(1) and (3)) and its share of partner nonrecourse debt minimum gain (within the meaning of Reg. §1.704(2)(i)(d)(5)) and as decreased by the adjustments referred in Reg. §§1.704-1(b)(2)(ii)(d)(4), (5) and (6), to be negative while any other Partner's Capital Account balance (as so adjusted) is positive. The General Partners may also make allocations reasonably designed to offset allocations provided for in this paragraph to the extent such allocations shall not be offset by other allocations provided for in this paragraph. The General Partners may alter the Partnership's allocations of items entering into the computation of Net Income and Net Losses in the year in which the Partnership is liquidated to avoid any Partner recognizing gain or loss pursuant to Code Sec. 731 on the liquidation of the Partnership.

3. Solely for purposes of adjusting Capital Accounts (and not for tax purposes), if any property is distributed in kind, the difference between the fair market value of the property and its book value at the time of distribution shall be treated as a gain or loss recognized by the Partnership and allocated pursuant to the "Allocation of Net Income and Net Loss" Section, above.

4. Except to the extent otherwise required by the Code and Treasury Regulations, if an Interest or part thereof is transferred in any Fiscal Year, the items of income, gain, loss, deduction and credit allocable to the Interest for such Fiscal Year shall be apportioned between the transferor and the transferee in proportion to the number of days in such Fiscal Year the Interest is held by each of them, except that, if they agree between themselves and so notify the Partnership within thirty (30) days after the transfer, then at their option and expense, (i) all items or (ii) extraordinary items, including capital gains and losses, may be allocated to the Person who held the Interest on the date such items were realized or incurred by the Partnership.

C. **Allocations for Income Tax Purposes.** The income, gains, losses, deductions and credits of the Partnership for Federal, state and local income tax purposes shall be allocated in the same manner as the corresponding items entering into the computation of Net Income and Net Losses were allocated pursuant to this Article, provided that solely for Federal, state and local income and franchise tax purposes and not for book or Capital Account purposes, income, gain, loss and deduction with respect to property properly carried on the Partnership's books at a value at a value other than its tax basis shall be allocated in accordance with the requirements of Code Sec. 704(c) and Reg. §1.704-3.

D. **Withholding.** The Partnership shall comply with withholding requirements under Federal, state and local law and shall remit amounts withheld to and file required forms with the applicable jurisdictions. To the extent the Partnership is required to withhold and pay over any amounts to any authority with respect to distributions or allocations to any Partner, the amount withheld shall be treated as a distribution in the amount of the withholding to that Partner. In the event of any claimed over-withholding, Partners shall be limited to an action against the applicable jurisdiction. If the amount withheld was not withheld from actual distributions, the Partnership may, at its option, (i) require the Partner to reimburse the Partnership for such withholding or (ii) reduce any subsequent distributions by the amount of such withholding. Each Partner agrees to furnish the Partnership with any representations and forms as shall reasonably

be requested by the Partnership to assist it in determining the extent of, and in fulfilling its withholding obligations.

E. Revaluation of Property.

1. The assets of the Partnership shall be revalued on the books of the Partnership to equal their fair market values in accordance with Reg. §1.704-1(b)(2)(iv)(f) at the following times: (a) the day immediately preceding the acquisition of an additional Interest in the Partnership by any existing or new Partner in exchange for more than a de minimis Capital Contribution to the capital of the Partnership pursuant to the "Interest on Capital Contributions" Section of the "Capital Contributions" Article, the "Admission of Additional Limited Partners" Section of the "Powers, Rights and Duties of Limited Partners" Article, and the "Other Activities and Competition" Section of the "Powers, Rights and Duties of General Partner" Article; (b) on the day of any withdrawal of more than a de minimis portion of the Capital Account pursuant to the "Distributions and Withdrawals" Article before taking into account such withdrawal; (c) the termination of the Partnership for Federal income tax purposes, other than a termination pursuant to Code Sec. 708(b)(I)(B); and (d) the occurrence of any other event upon which the General Partners believe such revaluation is appropriate. Upon revaluation of the Partnership's assets pursuant to this paragraph, (i) the fair market value of the assets shall be determined by the unanimous agreement of all General Partners and (ii) each Partner's Capital Account shall be adjusted as if such assets were sold for their fair market values and the Net Income and Net Losses recognized on such sales were allocated to the Partners in accordance with the "Allocation of Net Income and Net Loss" Section, above.

2. Immediately following the occurrence of any event which has caused the revaluation of the assets of the Partnership pursuant to the paragraph above, each Partner's Percentage Interest shall be adjusted to equal the percentage determined by dividing the balance in each Partner's Capital Account immediately after such revaluation by the aggregate balance of all Partner's Capital Accounts immediately after such revaluation.

3. For purposes of the "Allocation of Net Income and Net Loss" Section above, the Fiscal Year in which the assets of the Partnership are revaluated pursuant to paragraph 1 of this Section, shall be treated as two separate Fiscal Years, one beginning on the first day of the Fiscal Year and ending on the day of the revaluation and the other beginning on the day immediately following the revaluation and ending on the last day of the Fiscal Year, and Net Income and Net Loss shall be allocated to the Partners separately for each portion of the Fiscal

Year based on operations for such portion of the year as reflected by a closing the Partnership's books. Analogous divisions of the Fiscal Year into multiple Fiscal Years will be made if there be more than one revaluation of assets in any Fiscal Year.

ARTICLE V
Distributions and Withdrawals

A. **Distributions.** Subject to the "Distribution in Liquidation" Section of the "Withdrawal of Partners; Dissolution of Partnership" Article, distributions of cash or property of the Partnership shall be made at such times and in such manner as shall be approved by unanimous consent of the General Partners. Any such distribution shall be made to the Partners in proportion to their Percentage Interests as of the day on which such distribution is made.

B. **Withdrawal of Capital Account Balance.** Subject to the "Distribution in Liquidation" Section of the "Withdrawal of Partners; Dissolution of Partnership" Article, a Partner may withdraw all or any portion of its Capital Account balance only at such time or times and in such manner as shall be approved by unanimous consent of the General Partners, which consent may be granted or withheld in each General Partner's sole discretion. Any Partner withdrawing the entire balance of its Capital Account shall, upon the completion of such withdrawal, be deemed to have withdrawn from the Partnership pursuant to the "Withdrawal of Partners" Section of the "Withdrawal of Partners; Dissolution of Partnership" Article.

ARTICLE VI
Accounting and Management

A. **Books and Records.** Proper and complete records and books of account shall be kept by the General Partners in accordance with the Act in which shall be entered fully and accurately all transactions and other matters relative to the Partnership's business as are usually entered into records and books of account maintained by Persons engaged in businesses of a like character, including a Capital Account for each Partner. The Partnership books and records shall be kept on such method of accounting as the General Partners shall determine. The determinations of the General Partners with respect to the treatment of any item or its allocation for Federal, state or local tax purposes shall be binding upon all Partners so long as that determination is not inconsistent with any express term of this Agreement. The books and records shall at all times be maintained at the principal office of the Partnership and shall be

open to the examination and inspection of the Partners or their duly authorized representative for a proper purpose during reasonable business hours at the sole cost and expense of the inspecting or examining Partner. The Partnership shall maintain at its office and make available to each Partner or any designated representative of a Partner a list of names and addresses of, and Interests owned by, all Partners.

B. **Partnership Tax Returns.** The Partnership shall file a Federal income tax return and all other tax returns required to be filed by the Partnership for each Fiscal Year or part thereof, and shall provide, within ninety (90) days following the end of such Fiscal Year, to each Person who at any time during such Fiscal Year was a Partner with a copy of the Partnership's Federal, state and local income tax or information returns.

C. **Tax Matters Partner.**

1. For purposes of Section 6231(a)(7) of the Code, the "Tax Matters Partner" shall be _____ as a Manager of the General Partner or if _____ shall cease to serve as the Tax Matters Partner, the General Partner or, if there is more than one General Partner, whichever General Partner is designated by the General Partners as "Tax Matters Partner," in each case for so long as such General Partner remains a general partner of the Partnership. The Tax Matters Partner shall keep the Limited Partners fully informed of any inquiry, examination or proceeding.

2. The Tax Matters Partner shall promptly notify Partners who do not qualify as "notice partners" within the meaning of Code Sec. 6231(a)(i) of the Code of the beginning and completion of an administrative proceeding at the Partnership level promptly upon such notice being received by the Tax Matters Partner.

ARTICLE VII

Powers, Rights and Duties of the Limited Partners

A. **Limitations.** The Limited Partners shall not participate in the management or control of the Partnership's business nor shall they transact any business for the Partnership, nor shall they have the power to act for or bind the Partnership, said powers being vested solely and exclusively in General Partners. The Limited Partners shall have no interest in the properties or assets of the General Partners, or any equity therein, or in any proceeds of any sales thereof (which sales shall not be restricted in any respect), by virtue of acquiring or owning an Interest in the Partnership.

B. **Liability.** Subject to the provisions of the Act, no Limited Partner shall be liable for the repayment, satisfaction or discharge of any Partnership liabilities in excess of the balance of the Capital Account of such Limited Partner.

C. **Priority.** Except as set forth in Article IV and Article V, no Limited Partner shall have priority over any other Limited Partner as to Partnership allocations or distributions.

D. **Admission of Additional Limited Partners.** Any Person may be admitted to the Partnership as an Additional Limited Partner at any time with the unanimous consent of the Partners. Such Person shall make such Capital Contribution as all of the Partners shall determine. Upon admission of an Additional Limited Partner, the Percentage Interest of each Partner shall be adjusted in accordance with the "Revaluation of Property" Section of the "Allocation of Income and Losses" Article.

ARTICLE VIII

Powers, Rights and Duties of General Partners

A. **Authority.** The General Partners shall have exclusive and complete authority and discretion to manage the operations and affairs of the Partnership and to make all decisions regarding the business of the Partnership. Except as otherwise specifically provided herein, any action permitted or required to be taken by the General Partners pursuant to this Agreement shall be taken by the General Partners holding more than 50% of the aggregate Capital Account balances held by all General Partners. Any such action shall constitute the act of and serve to bind the Partnership, the Partners and their respective successors, assigns and personal representatives. Persons dealing with the Partnership are entitled to rely conclusively on the power and authority of the General Partners as set forth in the Agreement.

B. **Powers and Duties of General Partners.** Except as otherwise specifically provided herein, the General Partners shall have all rights and powers of general partners under the Act, and shall have all authority, rights and powers in the management of the Partnership business to do any and all other acts and things necessary, proper, convenient or advisable to effectuate the purposes of this Agreement. Without limiting the generality of the foregoing, the General Partners may appoint one or more investment advisors to manage the Partnership assets for the Partnership, any of which may also be affiliated with a General Partner. Any such investment adviser may be given discretionary authority in the management of the Partnership's portfolio.

C. **Compensation of the General Partner.** In consideration for its services in the management of the Partnership, the Partnership shall pay to the General Partner, a management fee in the amount of Five percent (5%) of the fair market value of the Partnership assets, as determined in accordance with the provisions of Paragraph E of Article IV of this Agreement, payable in equal quarterly installments. This fee will be payable in all events and shall not be terminated or amended without unanimous consent of the partners.

D. Expenses of the Partnership.

1. The Partnership shall pay, and the General Partners shall not be obligated to pay, all expenses incurred by or on behalf of the Partnership other than those expenses payable by the General Partners pursuant to the next paragraph (below). The General Partners may, in their discretion, advance funds to the Partnership for the payment of these expenses and shall be entitled to the reimbursement of any funds so advanced.

2. The General Partners shall pay and the Partnership shall not be obligated to pay salaries and fringe benefits of the officers and employees of the General Partners; and rent, office equipment, fire and theft insurance, heat, light, cleaning, power, water and utilities of any office space maintained by the General Partners on their behalf.

E. **Other Activities and Competition.** Additional Investments by the General Partners and Affiliates. The General Partners shall not be required to manage the Partnership as their sole and exclusive function. The General Partners, their affiliates and agents, officers, directors and employees of the General Partners and their affiliates may enter into transactions with the Partnership and may engage in or possess any interests in business ventures and may engage in other activities of every kind and description independently or with others in addition to those relating to the Partnership, including the rendering of advice or services of any kind to other investors and the making or management of other investments. Without limiting the generality of the foregoing, the General Partners and their affiliates may act as a director of any corporation, trustee of any trust, partner of any partnership or administrative officer of any business entity, and may receive compensation for service as a director, employee, adviser, consultant or manager with respect to, or participate in profits derived from investments in or of any such corporation, trust, partnership or other business entity. The Limited Partners authorize, consent to and approve such present and future activities by such Persons, whether or not such activities may conflict with any interest of the Partnership or any of the Partners or be competitive with the business of the Partnership or represent an opportunity that the Partnership

might wish to engage in. Without limiting the generality of the foregoing, the General Partners shall not have any obligation or responsibility to disclose or refer any such investments or other activities to the Partnership or any Partner. Neither the Partnership nor any Partner shall have any right by virtue of this Agreement or the partnership relationship created hereby in or to the other ventures or activities of the General Partners or their affiliates or to the income or proceeds derived therefrom.

F. **Liability.** Neither the General Partners nor any of their affiliates nor any officer, agent or employee of the General Partners or any of their affiliates shall be personally liable for the return of any portion of the Capital Contributions of the Limited Partners; the return of these Capital Contributions shall be made solely from assets of the Partnership. Neither the General Partners nor any of their affiliates nor any officer, agent or employee of the General Partners or any of their affiliates shall be required to pay to the Partnership or the Limited Partners any deficit in a Limited Partner's Capital Account upon dissolution or otherwise. The Limited Partners shall not have the right to demand or receive property other than cash for their Interest. Neither the General Partners nor any of their affiliates nor any officer, agent or employee of the General Partners or any of their affiliates shall be liable, responsible or accountable to the Partnership or the Limited Partners for (a) any act or omission performed or omitted by them, including without limitation, those acts performed or omitted on advice of legal counsel, accountants, brokers or consultants of the Partnership, or for any costs, damages or liabilities arising therefrom, or by law, unless that act or omission was performed or omitted fraudulently or in bad faith or constituted gross negligence or willful misconduct, (b) any tax liability imposed on the Partnership or the Limited Partners or (c) any loss due to the negligence, dishonesty or bad faith of any employee, officer, broker, consultant or other agent of the Partnership selected, engaged or retained in good faith by the General Partners or any stockholder (if any General Partner is a corporation), member (if any General Partner is a limited liability company), partner (if any General Partner is a partnership), or owner (if any General Partner is another type of entity) in the General Partners.

G. Indemnification.

1. The Partnership shall indemnify and hold harmless the General Partners, their stockholders (if any General Partner is a corporation), members (if any General Partner is a limited liability company), partners (if any General Partner is a partnership), owners (if any General Partner is another type of entity), and the officers, agents and employees of the General

Partners (including investment advisers appointed pursuant to the "Powers and Duties of General Partners" Section, above), and their stockholders (if any General Partner is a corporation), member (if any General Partner is a limited liability company), partners (if any General Partner is a partnership), owner (if any General Partner is another type of entity), and the affiliates of the General Partners and the officers, agents and employees of such affiliates (each an "Indemnified Party"), from and against any loss, expense, damage or injury suffered or sustained by them, by reason of any acts, omissions or alleged acts or omissions arising out of their activities on behalf of the Partnership or in furtherance of the interests of the Partnership, including but not limited to any judgment, award, settlement, reasonable attorneys' fees and other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding or claim and including any payments made by the General Partners to any affiliate, or any of their respective officers, agents or employees pursuant to an indemnification agreement no broader than this section, provided, that none of the General Partners, any of their affiliates, any officer, agent or employee of the General Partners or any of their affiliates shall be entitled to indemnification under this paragraph if the acts, omissions or alleged acts or omissions upon which such actual or threatened action, proceeding or claims are based were performed or omitted fraudulently or in bad faith or constituted gross negligence or willful misconduct.

2. The Partnership shall indemnify and hold harmless the Limited Partners, including, but not limited to, their trustees and beneficiaries, (each an "Indemnified Party"), from and against any loss, expense, damage or injury suffered or sustained by them, by reason of any acts, omissions or alleged acts or omissions arising out of their activities on behalf of the Partnership or in furtherance of the interests of the Partnership, including but not limited to any judgment, award, settlement, reasonable attorneys' fees and other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding or claim and including any payments made by the Limited Partners to any trustee or beneficiary pursuant to an indemnification agreement no broader than this section, provided, that none of the Limited Partners, any of their affiliates, any officer, agent or employee of the Limited Partners or any of their affiliates shall be entitled to indemnification under this paragraph if the acts, omissions or alleged acts or omissions upon which such actual or threatened action, proceeding or claims are based were performed or omitted fraudulently or in bad faith or constituted gross negligence or willful misconduct.

3. Any indemnification pursuant to this section shall be only from the assets of the Partnership.

H. **Admission of Additional General Partners.** Any Person may be admitted to the Partnership as an Additional General Partner at any time upon the written consent of each General Partner, if any is remaining at such time, and the affirmative vote of all of the Limited Partners at such time. Such Person shall make such Capital Contribution as all of the General Partners shall determine and shall have such of the rights of a General Partner as provided herein as all of the Partners may determine to grant such Person. Upon admission of an Additional General Partner, the Percentage Interest of each Partner shall be adjusted in accordance with the "Revaluation of Property" Section" of the "Allocation of Income and Losses" Article, above.

ARTICLE IX

Transfers of Interest by Partners

A. Transfer of Interest by General Partners.

1. Except as otherwise provided in the "Right to Treat Successor-in-Interest as Assignee" Section, below, no General Partner may sell, assign, pledge or in any manner dispose of, or create, or suffer the creation of, a security interest in or any encumbrance on all or a portion of its Interest in the Partnership (the commission of any such act being referred to as a "Transfer," any Person who effects a Transfer being referred to as a "Transferor" and any person to whom a Transfer is effected being referred to as a "Transferee"), without the prior unanimous consent of all Partners which consent may be granted or withheld in each Partner's sole discretion. No Transfer of an Interest shall be effective until such date as all requirements of the "Transfers of Interest by Partners" Article in respect thereof have been satisfied and, if consents, approvals or waivers are required by the Partners, all of same shall have been confirmed in writing by the Partners. Any Transfer or purported Transfer of an Interest in the Partnership not made in accordance with this Agreement shall be null and void and of no force or effect whatsoever.

2. The Transferee of a General Partner's Interest in the Partnership may be admitted to the Partnership as a Substituted General Partner only upon the receipt of the prior written consent of each General Partner and all of the Limited Partners, which consent may be given or withheld in each Partner's sole discretion.

B. Transfer and Assignment of Limited Partners' Interests; Substituted Limited Partners.

1. A Limited Partner may Transfer all or a portion of that Limited Partner's Interest in the Partnership (including any beneficial interest therein), provided the following conditions are met:

a. the Transferee executes documents reasonably satisfactory to the General Partners pursuant to which the Transferee agrees to be bound by this Agreement and any amendments hereto;

b. the Transferee assumes, if so requested, the obligations, if any, of the Transferor to the Partnership;

c. all certificates or other instruments shall have been recorded or filed in the proper records of each jurisdiction in which such recordation or filing is necessary to qualify the Partnership to conduct business or to preserve the limited liability of the Limited Partners under the laws of the jurisdiction in which the Partnership is doing business; and

d. the Transferee represents, and, at the request of the General Partners, furnishes to the Partnership an opinion of counsel satisfactory to the General Partners, in form and substance satisfactory to the General Partners, as to such matters as the General Partners may reasonably request including, without limitation, that such Transfer (a) was made in accordance with and would not violate the Securities Act of 1933, as amended, or any other applicable Federal, state or local law; (b) would not require the Partnership to register as an investment company under the Investment Company Act of 1940, as amended; (c) would not jeopardize the status of the Partnership as a partnership for Federal income tax purposes or cause a termination of the Partnership pursuant to the then applicable provisions of the Act; and (d) would not cause the Partnership to be treated as a "publicly traded partnership" within the meaning of Section 7704 of the Code.

2. Any Transfer by a Limited Partner shall be subject to a right of first refusal as provided herein. The Transferor shall give the General Partners written notice of the proposed Transfer which shall state the name of the proposed Transferee, the portion of the Transferor's Interest proposed to be transferred, the proposed purchase price or, if none, the fair market value, as determined by all of the Partners (without regard to this right of first refusal), of the Interest to be transferred, and any other material terms of such proposed Transfer. The Partnership shall, for a period of thirty (30) days after such notice is given, have the right to

purchase such Interest at the proposed purchase price (or, if there is no proposed purchase price, at a price equal to the fair market value of the Interest proposed to be transferred (without regard to this right of first refusal)) and on the proposed terms or to assign such right or any portion thereof to such other Person or Persons as the General Partners, in their sole discretion, shall determine.

3. The Transferee of a Limited Partner's Interest in the Partnership may be admitted to the Partnership as a Substituted Limited Partner only upon the receipt of the prior written consent of all Partners, which consent may be given or withheld in each Partner's sole discretion. Unless a Transferee of a Limited Partner's Interest in the Partnership is admitted as a Substituted Limited Partner under this paragraph, it shall have none of the powers of a Limited Partner hereunder and shall only have such rights of an assignee under the Act as are consistent with the other terms and provisions of this Agreement. No Transferee of a Limited Partner's Interest shall become a Substituted Limited Partner unless such Transfer shall be made in compliance with this section.

4. Unless a Transferee of a Limited Partner's Interest becomes a Substituted Limited Partner, such Transferee shall have no right to obtain or require any information or account of Partnership transactions, or to inspect the Partnership's books, or to vote on Partnership matters. Such a Transfer shall merely entitle the Transferee to receive the share of distributions, income and losses to which the transferring Limited Partner otherwise would be entitled.

5. All expenses incurred by the Partnership in connection with any Transfer or substitution of a Limited Partner pursuant to this the "Transfer and Assignment of Limited partners' Interest" Section, above, shall be paid by the Transferor prior to the time of the Transfer or substitution (including, without limitation, any fees and costs of the preparation, filing and publishing of any amendment to this Agreement or to the Certificate, if any, and any legal and other fees, expenses and costs of any investigation and preparation, in connection with any action, proceeding or investigation related to any Transfer or attempted Transfer by a Limited Partner of a Limited Partner's Interest or in connection with the admission into the Partnership of the Transferee). The Transferor also will indemnify the Partnership and the General Partners against any losses, claims, damages or liabilities to which any of them may become subject in connection therewith. The reimbursement and indemnity obligations of the Transferor under this paragraph shall be in addition to any liability which the Transferor may otherwise have, shall

extend upon the same terms and conditions to the Partnership and the General Partners, shall inure to the benefit of any successors and assigns of the Partnership and the General Partners and shall survive any termination of this Agreement.

6. The Transfer of a Limited Partner's Interest and the admission of a Substituted Limited Partner shall not be cause for dissolution of the Partnership.

C. **Right to Treat Successor-in-Interest as Assignee.** Upon the death, disability, winding-up and termination (in the case of a Partner that is a partnership), dissolution and termination (in the case of a Partner that is a corporation), termination (in the case of a Partner that is a trust), withdrawal in contravention of the "Withdrawal of Partners" Section of the "Withdrawal of Powers; Dissolution of Partnership" Article or occurrence of an event described in the Act with regard to a Partner, whether a Limited Partner or a General Partner (the "Assigning Partner"), the General Partners shall have the right to treat the successor(s)-in-interest of the Assigning Partner as assignees of the Interest in the Partnership of the Assigning Partner, with only such rights of an assignee of a partnership interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement. Without limiting the generality of the foregoing, the successor(s)-in-interest of the Assigning Partner shall have only the rights to the allocations provided in the "Allocation of Income and Losses" Article, above, and the distributions provided in the "Distributions and Withdrawals" Article, above. For purposes of this section, if the Assigning Partner's Interest in the Partnership is held by more than one person (for purposes of this subsection, the "Assignees"), the Assignees by majority vote shall appoint one person with full authority to accept notices and distributions with respect to such Interest in the Partnership on behalf of the Assignees and to bind them with respect to all matters in connection with the Partnership or this Agreement.

D. **Transferees Bound by Agreement.** Any successor or Transferee of a Limited Partner hereunder or any successor or Transferee of a General Partner shall be subject to and bound by all the provisions of this Agreement as if originally a party to this Agreement.

E. **Effect of Transfer.** Upon the Transfer of the entire Interest in the Partnership of a Partner and effective upon the admission of such Partner's Transferee(s) pursuant to either the first or second sections of this Article, the transferring Partner shall be deemed to have withdrawn from the Partnership as a Partner.

ARTICLE X

Withdrawal of Partners; Dissolution of Partnership

A. **Withdrawal of Partners.** No Partner may withdraw from the Partnership without the unanimous consent of the General Partners, which consent may be granted or withheld in their sole discretion. Any Partner withdrawing in contravention of this section shall indemnify, defend and hold harmless the Partnership and all other Partners from and against any losses, expenses, judgments, fines, settlements or damages suffered or incurred by the Partnership or any other Partner arising out of or resulting from such retirement or withdrawal. No transfer of all or a portion of a Partner's interest in accordance with the "Transfers of Interests by Partners" Article shall constitute a withdrawal within the meaning of this Section.

B. Dissolution of Partnership.

1. The Partnership shall be dissolved, wound up and terminated as provided herein upon the occurrence of the earliest of the following events:

a. the Partners, by unanimous agreement, shall elect, in writing, to dissolve the Partnership;

b. the occurrence of an event of withdrawal of a General Partner under the applicable sections of the Act, unless (i) at the time there is at least one other General Partner and the remaining General Partner or General Partners carry on the business of the Partnership (which they are hereby permitted to do) or (ii) within ninety (90) days after the withdrawal, all of the Partners agree in writing to continue the business of the Partnership and, if there is no remaining General Partner, to the appointment, effective as of the date of withdrawal, of one or more additional General Partner(s); or

c. the entry of a decree of judicial dissolution under the applicable sections of the Act.

2. In the event of the dissolution of the Partnership for any reason, the General Partners remaining in the Partnership, or, if there are no General Partners remaining, then a liquidating agent or committee appointed by all of the Limited Partners (the General Partners or such Person or committee so designated hereinafter referred to as the "Liquidator"), shall begin to wind up the affairs of the Partnership and to liquidate the Partnership's assets. The Partners shall continue to share all income, losses and distributions during the period of liquidation in accordance with the "Allocation of Income and Losses" Article, above, and the "Distributions and Withdrawals" Article, above. The Liquidator shall have full right and

unlimited discretion to determine the time, manner and terms of any sale or sales of Partnership property pursuant to such liquidation, giving due regard to the activity and condition of the relevant market and general financial and economic conditions.

3. The Liquidator shall have all of the rights and powers with respect to the assets and liabilities of the Partnership in connection with the liquidation and termination of the Partnership that the General Partners would have with respect to the assets and liabilities of the Partnership during the term of the Partnership, and the Liquidator is hereby expressly authorized and empowered to execute and file any and all documents (including a certificate of cancellation) necessary or desirable to effectuate the liquidation and termination of the Partnership and the transfer of any assets.

4. Notwithstanding the foregoing, a Liquidator which is not a General Partner shall not be deemed a Partner in this Partnership and shall not have any of the economic interests in the Partnership of a Partner; and such Liquidator shall be compensated for its services to the Partnership at normal, customary and competitive rates for its services to the Partnership as reasonably determined by all of the Limited Partners.

C. **Distribution in Liquidation.**

1. The Liquidator shall, as soon as practicable, wind up the affairs of the Partnership and sell and/or distribute the assets of the Partnership. The assets of the Partnership shall be applied in the following order of priority:

a. first, to creditors of the Partnership (including Partners who are creditors to the extent permitted by law), in the order of priority provided by law;

b. second, to establish reserves reasonably adequate to meet any and all contingent or unforeseen liabilities or obligations of the Partnership, provided that at the expiration of such period of time as the Liquidator may deem advisable, the balance of such reserves remaining after the payment of such contingencies or liabilities shall be distributed as hereinafter provided;

c. third, to the Partners in accordance with the "Distributions" Section of the "Distributions and Withdrawals" Article, above.

2. If the Liquidator, in its sole discretion, determines that assets other than cash are to be distributed, then the Liquidator shall cause the fair market value of the assets not so liquidated to be determined. Such assets shall be retained or distributed by the Liquidator as follows:

3. The Liquidator shall retain assets having an appraised value, net of any liability related thereto, equal to the amount by which the net proceeds of liquidated assets are insufficient to satisfy the requirements of the first and second paragraphs of this section; and

4. The remaining assets shall be distributed to the Partners in the same proportion as cash would be distributed to the Partners pursuant to third paragraph of this section.

5. If the Liquidator, in its sole discretion, deems it not feasible or desirable to distribute to each Partner its allocable share of each asset, the Liquidator may allocate and distribute specific assets to one or more Partners, individually or as tenants-in-common, as the Liquidator shall in good faith determine to be fair and equitable, taking into consideration, inter alia, the fair market value of the assets, the liens, if any, to which such property may be subject and the tax consequences of the proposed distribution to each of the Partners (including both distributees and others if any). Any distributions in kind shall be subject to such conditions relating to the disposition and management thereof as the Liquidator deems reasonable and equitable.

D. **Rights of the Limited Partners.** Each of the Limited Partners shall look solely to the assets of the Partnership for all distributions with respect to the Partnership and such Partner's Capital Contribution (including return thereof), and such Partner's share of profits or losses thereof, and shall have no recourse therefor (upon dissolution or otherwise) against the General Partners or any other Limited Partner. No Partner shall have any right to demand or receive property other than cash upon dissolution and termination of the Partnership.

E. **Deficit Restoration.** Notwithstanding any other provision of this Agreement to the contrary, upon liquidation of a Partner's Interest (whether or not in connection with a liquidation of the Partnership), no Partner shall have any liability to restore any deficit in its Capital Account. In addition, no allocation to any Partner of any loss, whether attributable to depreciation or otherwise, shall create any asset of or obligation to the Partnership, even if such allocation reduces a Partner's Capital Account or creates or increases a deficit in such Partner's Capital Account; it is also the intent of the Partners that no Partner shall be obligated to pay any such amount to or for the account of the Partnership or any creditor of the Partnership (however, if any court of competent jurisdiction holds that, notwithstanding the provisions of this Agreement, the Limited Partner is obligated to make any such payment, such obligation shall be the obligation of such Limited Partner and not of the General Partners or of the Partnership).

The obligations of the Partners to make contributions pursuant to the "Capital Contributions" Article, above, are for the exclusive benefit of the Partnership and not of any creditor of the Partnership; no such creditor is intended as a third-party beneficiary of this Agreement nor shall any such creditor have any rights hereunder, including without limitation the right to enforce any Capital Contribution obligation of the Partners.

F. **Termination.** The Partnership shall terminate when all property owned by the Partnership shall have been disposed of and the assets shall have been distributed as provided in the "Distribution in Liquidation" Section of this Article, above. The Liquidator shall then execute and cause to be filed a certificate of cancellation of the Partnership.

ARTICLE XI

Amendment of Partnership Agreement and Power of Attorney

A. **Approval of Amendments.** Amendments to this Agreement may be made by the General Partners without the consent of the Limited Partners if those amendments are (i) of an inconsequential nature (as determined in good faith by the General Partners), (ii) necessary to maintain the Partnership's status as a partnership according to Code Sec. 7701(a)(2), (iii) necessary to preserve the validity of any and all allocations of Partnership income, gain, loss or deduction pursuant to Code Sec. 704(b) contemplated by this Agreement (including without limitation amendments in connection with the admission of new Partners, making of additional Capital Contributions or withdrawal of a Partner) or (iv) relate to timing distribution to partners withdrawals by partners or the liquidation of the Partnership. Amendments to this Agreement other than those described in the foregoing sentence may be made only if embodied in an instrument signed by all General Partners and all Limited Partners. Any such supplemental agreement or amendment shall be adhered to and have the same effect from and after its effective date as if the same had originally been embodied in, and formed a part of, this Agreement. The General Partners shall give written notice to all Partners promptly after any amendment has become effective. Any amendment to this Agreement must be in writing.

B. **Amendment of Certificate.** In the event this Agreement shall be amended pursuant to the "Approval of Amendments" Section of this Article, above, the General Partners shall amend the Certificate to reflect that change if they deem the amendment of the Certificate to be necessary or appropriate.

C. **Power of Attorney.** Each Limited Partner hereby irrevocably constitutes and appoints each General Partner (and the Liquidator) as its true and lawful attorney-in-fact, with full power of substitution, in its name, place and stead to make, execute, sign, acknowledge (including swearing to), record and file, on behalf of it and on behalf of the Partnership, the following:

1. The Certificate and any other certificates or instruments which may be required to be filed by the Partnership or any of the Partners under the laws of the State of Florida and any other jurisdiction whose laws may be applicable;

2. A certificate of cancellation of the Partnership and such other instruments as may be deemed necessary or desirable by the holder of such power upon the termination of the Partnership; and

3. Any and all amendments of the instruments described in paragraphs (a) and (b) hereof, provided such amendments are either required by law to be filed or have been authorized by the Limited Partners.

4. The foregoing grant of authority:

a. shall survive the delivery of an assignment by a Limited Partner of the whole or any portion of its Interest and any assignee of such Limited Partner does hereby constitute and appoint the aforesaid holders his attorney in the same manner and force and for the same purposes as does the assignor;

b. is a special power of attorney coupled with an interest, is irrevocable and shall survive the death or incapacity of the Limited Partner granting the power; and

c. may be exercised by the holder on behalf of a Limited Partner by a facsimile signature or by listing all of the Limited Partners executing any instrument with a single signature as attorney-in-fact for all of them.

ARTICLE XII

Assignment of Partner's Interest

A. **Assignment of a Partner's Interest.** A Partner may sell, assign, transfer, encumber, hypothecate or otherwise dispose of all or any part of such Partner's Partnership Interest or such Partner's equitable right to the profits or capital of the Partnership either with the prior written consent of a Majority-in-Interest of all Partners, or pursuant to a *bona fide* offer (as

defined below), as to which no such consent shall be required (but which shall be subject to the right of first refusal set forth in the succeeding paragraph). "Majority-in-Interest" of the Partners at any time means those Partners (including the Partner seeking to sell, assign, transfer, encumber, hypothecate or dispose of the interest or right) whose aggregate Partnership Interests, at such time, exceed Fifty Percent (50%) of the aggregated Partnership Interests of all Partners. A person who acquires a Partner's interest in a transfer that does not comply with this Section shall be an assignee, and shall neither become a Partner, nor vote or participate in any decision of the Partners.

1. A Partner may sell, assign or otherwise transfer any of his or her Partnership Interest in exchange for valuable consideration (in whole or in part), only pursuant to a *bona fide* offer (as defined below), and a Partner who receives and wishes to accept a *bona fide* offer to buy any or all of his or her Partnership Interest shall promptly send a notice to each other Partner and be deemed to have offered to sell that portion of his or her Partnership Interests to which the *bona fide* offer relates, to the other Partners at the same price and on the same terms as those in the *bona fide* offer. This notice shall include a statement of the name, address (both home and office) and business or occupation of the person to whom such Partnership Interest would be sold, the price at which and the terms on which the Partner proposes to sell his or her Partnership Interest pursuant to the *bona fide* offer and any other facts that would reasonably be deemed material.

2. Each other Partner shall have sixty (60) days from the date on which the notice referred to in this Article is mailed by U.S. mail or, if earlier, the date on which it is personally delivered to each other Partner, in which to elect to buy all or any of the offered interests (as defined below). Each other Partner may accept this offer and elect to buy the offered interests in proportion to their respective percentages of the total Partnership Interests (excluding the offered interests) or in such other proportion as they shall agree upon.

3. If the other Partners do not agree to buy in the aggregate all of the offered interests within this option period, the offered interests may be sold pursuant to the *bona fide* offer. If the offered interests are not sold pursuant to the *bona fide* offer within thirty (30) days after the expiration of the option period, the restrictions on transfer under this Agreement shall again apply as if no *bona fide* offer had been received and no notice had been given. A sale of the offered interest is consummated when notice is received by the General Partners that ownership of the offered interests has been transferred.

4. For purposes of this Article, a *bona fide* offer shall mean a written offer received from a prospective buyer who reasonably appears to be financially able to complete the purchase, setting forth in detail the purchase price and terms under which the offered interests will be bought, together with a good check equal to at least Ten Percent (10%) of the proposed purchase price. For purposes of this Article, the "offered interests" shall mean all of the Partnership Interests to which a *bona fide* offer refers.

ARTICLE XIII
Miscellaneous

A. **Notices.** All notices and demands required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given when delivered in person or by registered or certified mail to the addresses of the Partners as shown from time to time on the records of the Partnership. Any Partner may specify a different address by notifying the General Partners, in writing, of that different address among them, and may be modified or amended only in writing as set forth herein.

B. **Amendments.** This Agreement may be amended or modified only by a written instrument approved in writing by all of the Partners.

C. **Binding Nature of Agreement.** The provisions of this Agreement shall be binding upon the executors, administrators, legal representatives, heirs, successors and assigns of the parties hereto.

D. **Entire Agreement.** This Agreement constitutes the entire agreement among the parties. It supersedes any prior agreement or understandings among them, and may be modified or amended only in writing as set forth herein.

E. **Governing Law.** This Agreement and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Florida.

F. **Counterparts.** This Agreement may be executed in counterparts, each one of which shall be deemed an original and all the counterparts together shall constitute one and the same Agreement.

G. **Pronouns and Number.** Wherever it appears appropriate from the context, each term stated in either the singular or the plural shall include the singular and the neuter shall include the masculine, feminine and neuter.

H. **Headings.** The headings and captions herein are inserted solely for the purpose of convenience of reference and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

I. **Partial Enforceability.** If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder hereof and the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

GENERAL PARTNER:

_____

Dated: _____, 2015

By:_____
_____, Manager

By:_____
_____, Manager

LIMITED PARTNERS:

Dated: _____, 2015

_____
_____, Limited Partner

_____ **Family Trust**

Dated: _____, 2015

By:_____
_____, Trustee

Dated: _____, 2015

By:_____
_____, Trustee

_____ Family Trust

Dated: _____, 2015 By:_____
_____, Trustee

Dated: _____, 2015 By:_____
_____, Trustee

_____ Family Trust

Dated: _____, 2015 By:_____
_____, Trustee

Dated: _____, 2015 By:_____
_____, Trustee

EXHIBIT "A"
PARTNERS

PARTNERS (Names and Addresses)	**PARTNERSHIP CONTRIBUTION**	**INTEREST**
GENERAL PARTNER:		
LIMITED PARTNERS:		
TOTAL:	**$**	**100%**

CASES, RULINGS AND FAIR HEARINGS

United States Tax Court.

STOCKSTROM V. COMMISSIONER OF INTERNAL REVENUE

3 T.C. 664 (T.C. 1944)

ARTHUR STOCKSTROM, PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 1238.

United States Tax Court.

Promulgated April 26, 1944.

On December 23, 1936, petitioner created a trust for the benefit of his children and authorized the trustee to invest principal and accumulated income in insurance policies on the settlor's life. On December 29 the trustee applied for such a policy and it was issued to the trustee on December 31. The premiums due upon such policy during the taxable years were paid by the trustee from the accumulated income of the trust. *Held,* the income of the trust so used was taxable to petitioner under section 167 (a) (3), Internal Revenue Code.

W. R. Gilbert, Esq., for the petitioner.

Richard A. Jennings, Esq., for the respondent.

This case involves deficiencies in income tax as follows:

1939	.....	$665.83	1940
.....		1,206.40	1941
.....	3,535.35		

Only one question is raised, whether that part of the income of the trust used to pay premiums on insurance policies on the life of petitioner is taxable to him under section 167 (a) (3), Internal Revenue Code, the other issues originally raised having been settled before trial. The facts, which were stipulated, are as follows.

FINDINGS OF FACT.

Petitioner is an individual, residing in the county of St. Louis, Missouri. He filed his individual income tax returns for the calendar years 1939, 1940, and 1941, all on a cash basis, with the collector of internal revenue at St. Louis. On December 23, 1936, petitioner, as grantor, and the Security National Bank Savings Trust Co. of St. Louis, as trustee, entered into a trust indenture. The pertinent parts are set out below:

ITEM ONE: The Trustee is authorized * * * to invest and reinvest principal funds of the trust estate in such bonds, common or preferred stocks, notes *665 secured by first mortgage or first deed of trust on improved real estate, debentures, and may purchase policy or policies of insurance of such kind and character and with such benefits as the Trustee may determine on the life of the Grantor or on the life of any child of the Grantor, and other class or classes of property * * *. The Trustee shall have full power to hold, possess, manage and control any policy or policies of insurance which the Trustee may have purchased for this trust as above provided. The Trustee shall as to any due and unpaid premium on any policy of insurance which the Trustee may have purchased for the trust, apply in or toward the payment of such premium any principal funds that may be then in the

trust estate or the Trustee may if it deems the same to the best interest of the trust estate exercise the power to borrow money hereinafter set forth and apply such borrowed funds or any part thereof in or toward payment of such premium. As to any policy of insurance which the Trustee may elect to purchase hereunder the Trustee is authorized to assign or transfer the same or to abandon or surrender the same or to surrender the same and receive the surrender value thereof; to cause any lapse or forfeited policy or policies to be reinstated or revived; to collect the proceeds of said policies as and when they shall become due and payable by reason of the death of the insured or otherwise and for said purpose the Trustee may institute any suit or suits at law or in equity in order to enforce any such policy, and, in case of controversy or litigation over the collection of same, may adjust, compromise or otherwise settle any controversy or contest concerning said policy or the collection thereof it being understood, however, that the Trustee shall not, except at its option, enter upon or maintain any litigation to enforce any such policy until it shall have been indemnified to its satisfaction against all expenses to which it may be subjected by any such action on its part, but that if it does enter into or maintain any such litigation it shall have the right to reimburse itself from the proceeds of any policy subject to this trust, for such expenses as it may thereby incur; to exercise any right or privilege in respect to any policy subject hereto that may be exercised by the absolute owner thereof, and generally, to do any act or thing in respect to any such policy or policies that could be done by the absolute owner thereof. The Trustee is further authorized to determine, except when otherwise directed in this Indenture, whether any money or other assets received hereunder shall be considered part of the principal of the trust estate or part of the income thereof or shall be apportioned between principal and income of the trust estate and the manner and extent of such apportionment; * * *.

ITEM TWO: The entire trust estate shall be divided into four separate equal shares and one such share shall be set apart for Grantor's daughter, Margaret Joan Stockstrom, and another such share shall be set apart for Grantor's daughter, Mary E. Stockstrom, and another such share shall be set apart for Grantor's son, Louis Stockstrom II and the remaining share shall be set apart for Grantor's son, Arthur Stockstrom, Jr. Should the Trustee elect to purchase any policy or policies of insurance as authorized in ITEM ONE hereof then division of each such policy of insurance shall be made among the respective shares or portions of the trust estate by apportioning undivided interests in and to such policy of insurance to the respective shares or portions in the relative amounts to which such shares or portions respectively may be entitled. Each share set apart as aforesaid although subject to the relevant provisions of this Indenture shall be administered and considered as a separate trust estate.

SEC. A. Each hereinabove named child of Grantor for whom an estate is set apart as hereinabove in this ITEM TWO directed shall enjoy such estate in the following manner, that is to say that until such child attains twenty-one years of age the Trustee shall accumulate the net income of his or her said estate *666 and the Trustee may in its discretion from time to time as the Trustee may determine add accumulated income of such child's estate or portion or portions of such accumulated income as the Trustee may determine, to the principal of such child's estate in which event such addition or additions of accumulated income shall become and be administered as a part of the principal of such child's estate. The Trustee may, however, in its discretion invest and reinvest accumulated income with like power as is set forth in ITEM ONE hereof in regard to principal funds, and in such event such funds shall not lose their identity as accumulated income of such child's estate. On the twenty-first birthday of such child the income of his or her estate then accumulated and which shall not have been added to the principal of his or her estate, and the net income of such child's estate thereafter received (including income accrued at the twenty-first birthday of such child and thereafter collected) shall until the death of such

child be paid to him or her or be accumulated as the Trustee may determine, that is to say, the Trustee shall decide as to the advisability and amount of any disbursement to such child of any current or accumulated income of his or her estate and the decision of the Trustee in such matter shall be conclusive and binding on all parties in interest. Accumulated income of such child's estate after such child attains twenty-one years of age may in the discretion of the Trustee be invested and reinvested with like power as is set forth in ITEM ONE in regard to principal funds.

The beneficiaries under the trust agreement are petitioner's four children, whose names and dates of birth are as follows:

> Arthur Stockstrom, Jr..... Jan. 9, 1925 Louis Stockstrom, II..... Jan. 9, 1925 Mary E. Stockstrom..... July 27, 1922 Margaret Jones Stockstrom..... Feb. 12, 1920

Pursuant to the terms of the trust agreement, Gladys T. Stockstrom, petitioner's wife, became a cotrustee of the trust on or about May 15, 1937.

For the calendar year 1939, 1940, and 1941 the cotrustees filed for each of the above named beneficiaries a fiduciary income tax return with the collector of internal revenue at St. Louis, Missouri, reporting for each of the beneficiaries taxable income in the amounts of $1,135.34, $1,052.33, and $756.09 for the respective years. Taxes in the amounts of $40.06, $41.30, and $65.16 were paid for each of the beneficiaries for the respective years.

On December 29, 1936, the Security National Bank Savings Trust Co. of St. Louis, Missouri, acting as trustee under the trust indenture referred to above, applied for Policy No. B-473852 in the Northwestern National Life Insurance Co. of Minneapolis, Minnesota, on the life of petitioner. The amount of the policy is $100,000, which, under the terms of the trust indenture, was divided equally among the four beneficiaries. A photostatic copy of the insurance policy was put in evidence and is incorporated by reference. The application for the policy designated the Security National Bank Savings Trust Co. of St. Louis as "The Beneficiary (The Owner)," and on the policy was endorsed the following typewritten statement: *667

Pursuant to the provisions contained in the application for this policy No. B-473852, it is agreed that this policy shall belong to the Security National Bank of St. Louis, Trustee, (the Owner) and be subject to its exclusive control and disposition, and that the rights reserved to the Insured by the terms of the policy shall accrue to and may be exercised by said Owner without the consent of the Insured.

> Dated December 31, 1936 WM. JOHNSON
> *Ass't. Secretary*

Original Beneficiary Designation

Security National Bank of St. Louis, Trustee under written trust agreement dated December 23, 1936, or its successor or successors in trust, on payment of the proceeds of this policy to said trustee or successor or successors, shall fully and finally discharge the Company from all liability, irrevocable.

> Dated December 31, 1936 WM. JOHNSON
> *Ass't. Secretary*

The initial premium on this policy was $3,580. The annual premiums thereafter amounted to $3,059. The policy was issued on December 31, 1936, and by its terms it will become a paid-up endowment policy when petitioner reaches the age of 85. Petitioner was born on October 23, 1892. During the taxable years under consideration the trustees paid out of the accumulated income of the trust the amount of the annual premium on the insurance policy. The term "accumulated income," by stipulation of the parties, has the same meaning here as in the trust instrument.

Petitioner was never a director, officer, or employee of the Security National Bank Savings Trust Co. of St.

Louis, but in 1929 he owned 3 out of 3,500 shares outstanding of a par value of $100 each and continued to own same; and in 1940, the par value of the stock having been changed to $25, he received 12 out of 14,000 shares outstanding in exchange for his 3 shares.

In his income tax returns for the taxable years under consideration petitioner did not include any of the income of the trust, but respondent in his deficiency notice determined that the annual premiums on the insurance policy paid by the trustees should be included in the petitioner's income and increased petitioner's taxable income by these amounts.

By stipulation, the claim of deduction of certain trustees' fees and investment and management expenses is waived; and the deduction of $3,275 as bad debts in the calendar year 1941 is agreed to be allowed only in the sum of $1,237.50.

OPINION.

KERN, Judge:

If petitioner had owned life insurance policies written upon his life and then assigned them to a trust which he created for the purpose of using the trust income for the payment of the premiums thereon, the trust income so used would clearly have been *668 taxable to petitioner under section 167 (a) (3) of the Internal Revenue Code.[1] *Burnet* v. *Wells,* 289 U.S. 670.

> 1. SEC. 167. INCOME FOR BENEFIT OF GRANTOR.
> (a) Where any part of the income of a trust —
> * * * * * * *
>
> (3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);
>
> then such part of the income of the trust shall be included in computing the net income of the grantor.

Here the petitioner created a trust of which his children, the natural objects of his parental solicitude, were the beneficiaries, and specifically provided that the trustee should have the right to purchase life insurance upon petitioner's life and use the principal or accumulated income of the trust for the payment of premiums upon such policies. This trust was created on December 23, 1936. On December 29, 1936, the trustee applied for a life insurance policy upon the life of petitioner, and such a policy insuring the life of petitioner for $100,000 was issued to the trustee on December 31, 1936. The annual premiums due upon this policy during the taxable years were paid from the accumulated income of the trust.

Does the fact that the insurance upon petitioner's life was taken out directly by the trustee after the creation of the trust instead of by the petitioner himself before the creation of the trust, being later assigned to it by him, prevent the taxation to petitioner of the trust income used for the payment of premiums under section 167 (a) (3)? We are of the opinion that it does not. See *Alfred F. Pillsbury,* 19 B. T. A. 1229; affd., 67 F.2d 151; *Frank C. Rand,* 40 B. T. A. 233; affd.,116 F.2d 929; and concurring opinion in *Frederick K. Barbour,* 39 B. T. A. 910, 915; reversed on other grounds,122 F.2d 165.

In order to hold otherwise, it would be necessary to read into the unequivocal provisions of the statute a

nonexistent limitation; and such a limitation would open such a loophole in the application of the statute as to completely defeat the legislative purpose. That purpose is to prevent the avoidance of tax by the allocation of income through a trust device to the payment of life insurance premiums, which are universally recognized as a normal expense of protecting dependents but which are personal, as distinguished from business, expenses, and are therefore not deductible from gross income. Whether the trust antedated the policies, or the policies antedated the trust, seems as irrelevant in construing the legislative purpose as any question concerning the chronological priority of the egg and the chicken. The relevant fact is that the income of a trust created *669 by the petitioner for the benefit of his children is authorized by him to be used and is used for the payment of premiums upon policies of insurance on his life, ultimately payable, through the trust, to the children. Under the plain language of the statute the trust income so used is taxable to petitioner.

Our holding upon this issue does not, we think, contravene the due process clause of the Fifth Amendment.

Any controversy on the boundaries of legislative power, Cardozo, J., pointed out, "must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases" (*Burnet* v. *Wells, supra,* pp. 677, 678). In the present case, the policies were not the contracts of the settlor as in *Burnet* v. *Wells,* but those of the trustee. In the *Wells* case undoubtedly the Court emphasizes the fact that the trust income is used for the satisfaction of the settlor's contractual obligations; but it also emphasizes the peace of mind of the settlor which flows from his adopted method of providing for his children and dependents. It upholds the statutory provision, since in general it would apply only to trusts for the care of dependents. Cases beyond the line are left for future determination: "The exceptional, if it arises, may have its special rule." (*Ibid,* p. 681.)

The petitioner-settlor here allowed the insurance to be laid on his own life, to increase the investment range of a trust which he had created. The proceeds of the policies so purchased would ultimately benefit his own children. The peace of mind which such a settlement would bring to the settlor would not be any different in kind from the repose he would find in having the trust pay premiums on policies which he still nominally owned, or had owned and later assigned. The trust was specifically authorized to invest its income in such policies on petitioner's life. Within eight days after its creation, the trust acquired such a policy. The guardian hand of the father and settlor reaches out here with every premium payment to protect his children, the beneficiaries, by safeguarding the trust income meant ultimately for them. The trustee opposes no adversary force to the settlor's will, but becomes the willing utensil of his power. It is unnecessary in these circumstances to analyze or define under local law the settlor's legal or equitable interest in a contract which he has authorized to be brought into being for the benefit of persons whose care and protection are the natural objects of his paternal desire and which is paid for by the income from property which he has given to the trust. We can not say in these circumstances that this case is so exceptional as to put it beyond the reach of legislative power and is not covered by the principle set out in the *Wells* case, *670 *supra.* That that case did not in its facts go so far in no way vitiates its principle, which still germinates and lives in a different soil and somewhat different circumstances. See *Frank C. Rand, supra,* p. 238.

Reviewed by the Court.

Decision will be entered under Rule 50.

Ltr. Rul. 9227017

TRUSTEE/GRANTOR'S POWER TO PAY INSURANCE PREMIUMS DOES NOT TRIGGER GRANTOR TRUST

Reference:

Section 677 -- Income for Grantor's Benefit

Full Text:

Date: March 31, 1992

Refer Reply to: CC:PSI:3 TR-31-512-91

Dear * * *

This letter is in response to a letter dated March 5, 1991, and subsequent correspondence submitted on your behalf by your authorized representative, concerning the effect of certain trust provisions on the qualification of the Trust as a charitable remainder unitrust under section 664 of the Internal Revenue Code. Specifically, rulings were requested on whether the existence or exercise of the trustee's power to pay annual premiums on an insurance policy on the Grantor's life cause the Grantor to be treated as the owner of all or any portion of the Trust under section 677(a)(3) and whether the existence or exercise of such power would disqualify the Trust as a charitable remainder unitrust under section 664.

The following representations have been made. The Grantor proposes to create the Trust, which is intended to qualify as a charitable remainder unitrust under section 664 of the Code. The Grantor will serve as trustee. The trust will be governed by the laws of state X.

The governing instrument provides that the trustee will pay the unitrust amount in quarterly installments to the Grantor and his wife during their joint lives and then to the survivor for his or her lifetime. The governing instrument also provides that the unitrust amount will be the lesser of the Trust's income, as defined in section 643(b) of the Code, or 5 percent of the net fair market value of the Trust's assets valued annually. The unitrust amount for any year will include any amount of the Trust's income in excess of the amount required to be distributed under the general rule above to the extent that the aggregate of the amounts paid in prior years was less than the aggregate of the amounts computed as 5 percent of the net fair market value of the Trust's assets on the valuation dates. Upon the death of the survivor, the trustee will distribute all of the then principal and income of the Trust to charities which qualify as organizations described in sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a).

Upon creating the Trust, the Grantor will transfer to the Trust a policy of insurance on his life, together with other assets. The Grantor will assign ownership of the policy to the trustee as owner, and the trustee will designate the Trust as the beneficiary of the policy.

Article Nine, Section (2) of the governing instrument will provide that the trustee shall have:

power to acquire and hold insurance on the life of the Grantor and to pay the premiums on the insurance and to exercise all rights of an owner of such insurance including the right to surrender the insurance or allow it to lapse, provided that the premiums on the insurance shall be charged to the Trust's principal account and any proceeds paid on the insurance upon the death of the insured, any dividends paid on the insurance during the life of the insured, any withdrawals made from the insurance during the life of the insured and any amount paid on the surrender of the insurance during the life of the insured shall be credited to the Trust's principal account, and no part of any such receipt shall be credited to the Trust's income account notwithstanding any statute, rule or convention to the contrary.

One of the statutory provisions of State X provides that a trust is administered with due regard to the respective interests of income beneficiaries and remaindermen if receipts are credited and expenditures are charged to income or principal in accordance with the terms of the trust instrument, notwithstanding contrary statutory provisions. State X has no statutory provision concerning whether the trust's payment of premiums on life insurance policies should be charged to principal or income or concerning whether any amounts received by a trust on account of life insurance policies should be allocated to principal or income. In addition, State X has no statutory provision concerning "underproductive property" that would allocate to income a portion of the proceeds received from the sale or other disposition of underproductive assets.

Under section 664(d)(2) of the Code, a charitable remainder unitrust is a trust that provides for the distribution of the unitrust amount, at least annually for life or a term of years, to one or more persons (at least one of which is not a charitable organization) with an irrevocable remainder interest to be held for the benefit of, or paid over to, a qualified charitable organization.

Under section 664(d)(2)(A) of the Code, the unitrust amount is generally a fixed percentage (which is not less than 5 percent) of the net fair market value of the trust's assets valued annually. However, under section 664(d)(3), the governing instrument may instead provide that the trustee is to pay the unitrust recipient: (A) the amount of the trust income, if such amount is less than the amount determined by the fixed percentage of the value of the trust's assets; and (B) any amount of trust income which is in excess of the amount required to be distributed based on the fixed percentage, to the extent that the aggregate of the amounts paid in prior years was less than the aggregate of the required amounts based on the fixed percentage of the value of the trust's assets.

Section 1.664-3(a)(1)(i)(b) of the Income Tax Regulations refers to the payout provisions of section 644(d)(3) of the Code as the "income exception." This section of the regulations states that the amount of trust income for purposes of the income exception is the amount of trust income as defined in section 643(b) and the applicable regulations thereunder.

Section 643(b) of the Code provides that the term "income" when standing alone means the amount of income of the trust for the taxable year determined under the terms of the governing instrument and applicable local law.

Section 1.664-1(a)(4) of the regulations provides that for a trust to be a charitable remainder trust, it must meet the definition of, and function exclusively as, a charitable remainder trust from the creation of the trust. Solely for purposes of section 664 of the Code and the regulations thereunder, the trust will be deemed to be created at the earliest time that neither the grantor nor any other person is treated as the owner of the entire trust under subpart E, part I, subchapter J, chapter 1, subtitle A of the Code (subpart E), but in no event prior to the time property is first transferred to the trust. For purposes of the preceding sentence, neither the grantor nor the grantor's spouse is treated as the owner of the trust merely because the grantor or the grantor's spouse is named as a recipient of the annuity or unitrust amount.

Section 677(a)(3) of the Code provides that the grantor is treated as the owner of any portion of a trust whose income without the approval or consent of any adverse party is, or in the discretion of the grantor or a nonadverse party, or both, may be, applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

In the present situation, the Grantor will transfer an insurance policy on his life to the Trust, and the trustee will thereafter pay the premiums on the policy. The terms of the governing instrument provide that any amount received by the Trust with respect to insurance policies on the Grantor's life, whether received during the Grantor's life or upon his death, will be allocated to the Trust's principal, and not income. Because the Trust is an "income exception" unitrust within the meaning of section 664(d)(3) of the Code and section 1.664-3(a)(1)(i)(b) of the regulations, the unitrust amount payable to the noncharitable beneficiaries is limited to the Trust's income defined in section 643(b) if such income is less than the fixed percentage of net value of the Trust's assets. Because amounts received on account of insurance policies on the Grantor's life will not be allocated to income under the terms of the governing instrument, these amounts will not be used in computing the amount of the Trust's income and thereby will not be used in determining the income limitation on the unitrust amount payable to the noncharitable beneficiaries. Rather, amounts received on account of insurance policies on the life of the Grantor will be allocated to the principal and will become part of the remainder that is payable to qualified charitable organizations.

Therefore, based on all the facts presented and the representations made, we conclude that under these circumstances the insurance policy on the Grantor's life is irrevocably payable for a charitable purpose within the meaning of the parenthetical of section 677(a)(3) of the Code. Because the policy is so payable, we conclude that the existence or exercise of the trustee's power to pay annual premiums on the insurance policy on the Grantor's life does not cause the Grantor to be treated as the owner of all or any portion of the Trust under section 677(a)(3) of the Code.

Provided there are no other provisions in the governing instrument that cause the Grantor or any other person to be treated as the owner of the Trust under subpart E and provided the Trust otherwise qualifies as a charitable remainder unitrust under section 664 of the Code, we conclude that the existence or exercise of the trustee's power to pay the annual premiums on the insurance policy on the Grantor's life will not cause the Trust to be deemed to be created any later than the time property is first transferred to the Trust, in accordance with section 1.664-1(a)(4) of the regulations.

No opinion is expressed as to any other provisions of the Trust or any other amendments to the provisions of the Trust. No opinion is expressed as to the federal tax consequences of the formation or operation of the trust under the provisions of any other section of the Code. Specifically, no opinion is expressed as to whether the Trust is a qualified charitable remainder unitrust under section 664.

A copy of this letter should be attached to the Trust's federal tax return for the taxable year in which the Trust is created. We are enclosing a copy for that purpose.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Frances D. Schafer
Senior Technician Reviewer
Branch 3
Office of the Assistant Chief Counsel
(Passthroughs and Special Industries)

Enclosures 2
Copy of this letter
Copy for section 6110 purposes

Internal Revenue Bulletin: 2004-27

July 6, 2004

Rev. Rul. 2004-64

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Tax reimbursement clause. This ruling addresses issues presented with respect to a trust whose grantor is treated as its owner. It addresses the gift tax consequences when the grantor pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income. It also addresses the estate tax consequences if, pursuant to the governing instrument or applicable local law, the grantor may or must be reimbursed by the trust for that income tax.

ISSUES

With respect to a trust whose grantor is treated as the owner of the trust under subpart E, part I, subchapter J, chapter 1 of the Internal Revenue Code (subpart E), what are the gift tax consequences when the grantor pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, and what are the estate tax consequences if, pursuant to the governing instrument or applicable local law, the grantor may or must be reimbursed by the trust for that income tax?

FACTS

In Year 1, *A*, a United States citizen, establishes and funds Trust, an irrevocable inter vivos trust, for the benefit of *A*'s descendants. The governing instrument of Trust requires that the trustee be a person not related or subordinate to *A* within the meaning of § 672(c) of the Internal Revenue Code. *A* appoints a trustee that satisfies this requirement. Trust is governed by the laws of State. Under the terms of Trust, *A* retains no beneficial interest in or power over Trust income or corpus that would cause the transfer to Trust to constitute an incomplete gift for federal gift tax purposes, or that would cause Trust corpus to be included in *A*'s gross estate for federal estate tax purposes on *A*'s death. However, *A* retains sufficient powers with respect to Trust so that *A* is treated as the owner of Trust under subpart E.

During Year 1, Trust receives taxable income of $10*x*. Pursuant to § 671, *A* includes the $10*x* in *A*'s taxable income. As a result, *A*'s personal income tax liability for Year 1 increases by $2.5*x*. *A* dies in Year 3. As of the date of *A*'s death, the fair market value of Trust's assets is $150*x*.

Situation 1: Neither State law nor the governing instrument of Trust contains any provision requiring or permitting the trustee to distribute to *A* amounts sufficient to satisfy *A*'s income tax liability attributable to the inclusion of Trust's income in *A*'s taxable income. Accordingly, *A* pays the additional $2.5*x* liability from *A*'s own funds.

Situation 2: The governing instrument of Trust provides that if *A* is treated as the owner of any portion of Trust pursuant to the provisions of subpart E for any taxable year, the trustee shall distribute to *A* for the taxable year, income or principal sufficient to satisfy *A*'s personal income tax liability attributable to the inclusion of all or part of Trust's income in *A*'s taxable income. Accordingly, the trustee distributes $2.5*x* to *A* to reimburse *A* for the $2.5*x* income tax liability.

Situation 3: The governing instrument of Trust provides that if *A* is treated as the owner of any portion of Trust pursuant to the provisions of subpart E for any taxable year, the trustee may, in the trustee's discretion, distribute to *A* for the taxable year, income or principal sufficient to satisfy *A*'s personal income tax liability attributable to the inclusion of all or part of Trust's income in *A*'s taxable income. Pursuant to the exercise of the trustee's discretionary power, the trustee distributes $2.5*x* to *A* to reimburse *A* for the $2.5*x* income tax liability.

LAW AND ANALYSIS

Under § 671, if the grantor of a trust is treated as the owner of any portion of the trust under subpart E, those items of income, deductions, and credits against tax of the trust that are attributable to that portion of the trust must be included in computing the taxable income of the grantor.

Section 2501 imposes a tax on the transfer of property by gift by an individual, resident or nonresident. Section 2511(a) provides that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2512(b) provides that the gift tax applies only to the extent that property is transferred for less than an adequate and full consideration in money or money's worth.

Section 25.2511-2(b) of the Gift Tax Regulations provides that a gift is complete and subject to gift tax to the extent the donor has so parted with dominion and control as to leave in the donor no power to change the disposition of the property, whether for the benefit of the donor, or any other person.

Section 25.2511-1(c)(1) provides that the gift tax applies with respect to any transaction in which an interest in property is gratuitously passed or conferred on another regardless of the means or device employed. Thus, the gift tax may apply if one party forgives or fails to collect on the indebtedness of another. Section 25.2511-1(a); *Estate of Lang v. Commissioner*, 64 T.C. 404 (1975), *aff'd*, 613 F.2d 770 (9th Cir. 1980); Rev. Rul. 81-264, 1981-2 C.B. 185. Similarly, the gift tax applies if one person gratuitously pays the tax liability of another. *Doerr v. United States*, 819 F.2d 162 (7th Cir. 1987) (donor's payment of the donee's state gift tax liability constitutes an additional gift to the donee).

Section 2036(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a *bona fide* sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to the decedent's death or for any period that does not in fact end before death the possession or enjoyment of, or the right to the income from, the property.

Section 20.2036-1(b)(2) of the Estate Tax Regulations provides that the use, possession, right to income, or other enjoyment of transferred property is treated as having been retained by the decedent to the extent that the transferred property is to be applied towards the discharge of a legal obligation of the decedent. *Estate of Prudowsky v. Commissioner*, 55 T.C. 890 (1971), *aff'd*, 465 F.2d 62 (7th Cir. 1972) (property held under the state Uniform Gifts to Minors Act was included in the decedent's gross estate under § 2036(a)(1) because decedent, as custodian, retained the power to use the property to satisfy the decedent's legal obligation to support the minor for whose benefit the custodianship was established); *Richards v. Commissioner*, T.C.M. 1965-263, *aff'd*, 375 F.2d 997 (10th Cir. 1967) (trust corpus includible in decedent's gross estate under § 2036(a)(1) because mandatory distributions of trust income to the decedent's spouse satisfied the decedent's spousal support obligation). On the other hand, § 2036 generally does not apply when trust property may be used to satisfy the decedent's legal obligations only in the discretion of the trustee, whether or not the discretion is exercised by the trustee. *Commissioner v. Estate of Douglas*, 143 F.2d 961 (3d Cir. 1944), *acq.* 1944 C.B. 7; *Estate of Mitchell v. Commissioner*, 55 T.C. 576 (1970), *acq.* 1971-2 C.B. 3.

In the present situations, Trust includes provisions that cause *A* to be treated as the owner of Trust under subpart E and, as a result, to be liable for any income tax attributable to Trust's income. Thus, even though *A* is not a Trust beneficiary, any income tax *A* pays that is attributable to Trust's income is paid in discharge of *A*'s own liability, imposed on *A* by § 671.

In *Situation 1*, *A*'s payment of the $2.5*x* income tax liability does not constitute a gift by *A* to Trust's beneficiaries for federal gift tax purposes because *A*, not Trust, is liable for the taxes. In contrast, in the situation presented in *Doerr v. United States*, cited above, the donor's payment was for the donee's tax liability and, as a result, the payment constituted an additional gift to the donee. In addition, no portion of Trust is includible in *A*'s gross estate for federal estate tax purposes under § 2036, because *A* has not retained the right to have trust property expended in discharge of *A*'s legal obligation.

In *Situation 2*, the governing instrument of Trust requires the trustee to reimburse *A* from Trust's assets for the amount of income tax *A* pays that is attributable to Trust's income. *A*'s payment of the $2.5*x* income tax liability does not constitute a gift by *A*, because *A* is liable for the tax. The trustee's distribution of $2.5*x* to *A* as reimbursement for the income tax payment by *A* is not a gift by the trust beneficiaries to *A*, because the distribution from Trust is mandated by the terms of the trust instrument.

However, *A* has retained the right to have trust property expended in discharge of *A*'s legal obligation. *A*'s retained right to receive reimbursement attributable to Trust's income causes the full value of Trust's assets at *A*'s death ($150*x*) to be included in *A*'s gross estate under § 2036(a)(1). The result would be the same if, under applicable state law, the trustee must, unless the governing instrument provides otherwise, reimburse *A* for *A*'s personal income tax liability attributable to the inclusion of all or part of the Trust's income in *A*'s taxable income, and the governing instrument does not provide otherwise.

In *Situation 3*, the governing instrument of Trust provides the trustee with the discretion to reimburse *A* from Trust's assets for the amount of income tax *A* pays that is attributable to Trust's income. As is the case in *Situation 1* and *Situation 2*, *A*'s payment of the $2.5*x* income tax liability does not constitute a gift by *A* because *A* is liable for the income tax. Further, the $2.5*x* paid to *A* from Trust as reimbursement for *A*'s income tax payment was distributed pursuant to the exercise of the trustee's discretionary authority granted under the terms of the trust instrument. Accordingly, this payment is not a gift by the trust beneficiaries to *A*. In addition, assuming there is no understanding, express or implied, between *A* and the trustee regarding the trustee's exercise of discretion, the trustee's discretion to satisfy *A*'s obligation would not alone cause the inclusion of the trust in *A*'s gross estate for federal estate tax purposes. This is the case regardless of whether or not the trustee actually reimburses *A* from Trust assets for the amount of income tax *A* pays that is attributable to Trust's income. The result would be the same if the trustee's discretion to reimburse *A* for this income tax is granted under applicable state law rather than under the governing instrument. However, such discretion combined with other facts (including but not limited to: an understanding or pre-existing arrangement between *A* and the trustee regarding the trustee's exercise of this discretion; a power retained by *A* to remove the trustee and name *A* as successor trustee; or applicable local law subjecting the trust assets to the claims of *A*'s creditors) may cause inclusion of Trust's assets in *A*'s gross estate for federal estate tax purposes.

HOLDINGS

When the grantor of a trust, who is treated as the owner of the trust under subpart E, pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, the grantor is not treated as making a gift of the amount of the tax to the trust beneficiaries. If, pursuant to the trust's governing instrument or applicable local law, the grantor must be reimbursed by the trust for the income tax payable by the grantor that is attributable to the trust's income, the full value of the trust's assets is includible in the grantor's gross estate under § 2036(a)(1). If, however, the trust's governing instrument or applicable local law gives the trustee the discretion to reimburse the grantor for that portion of the grantor's income tax liability, the existence of that discretion, by itself (whether or not exercised) will not cause the value of the trust's assets to be includible in the grantor's gross estate.

PROSPECTIVE APPLICATION

The Internal Revenue Service will not apply the estate tax holding in *Situation 2* of this revenue ruling adversely to a grantor's estate with respect to any trust created before October 4, 2004.

DRAFTING INFORMATION

The principal author of this revenue ruling is Elizabeth Madigan of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Ms. Madigan at (202) 622-3090 (not a toll-free call).

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More Internal Revenue Bulletins

United States Tax Court.

ESTATE OF SILVERMAN V. COMMR. OF INTERNAL REVENUE

61 T.C. 338 (T.C. 1973)

ESTATE OF MORRIS R. SILVERMAN, AVRUM SILVERMAN, EXECUTOR, PETITIONER v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 6741-70.

United States Tax Court.

Filed December 6, 1973.

The decedent assigned a life insurance policy on his life to his son, approximately 6 months prior to his death. After the transfer, the son paid the insurance premiums. *Held,* the transfer of the life insurance policy was made in contemplation of death within the meaning of sec. 2035, I.R.C. 1954. *Held, further,* the quantum of inclusion is that portion of the face value equal to the ratio of premiums paid by the decedent to total premiums paid. *Held, further,* the gross estate must also include certain jewelry having a fair market value of $780 which the decedent inherited from his wife.

Moses M. Cohen, for the petitioner.

Marion L. Westen, for the respondent.

STERRETT, Judge:

Respondent determined a deficiency in petitioner's Federal estate tax in the amount of $2,155.01. However, $132.08 of said amount was attributable to the assessment of the penalty imposed by section 6651(a), I.R.C. 1954,[1] which was abated, leaving a *339 net deficiency of $2,022.93. Respondent subsequently conceded the deductibility of certain legal expenses, leaving the following issues for our consideration:

> 1. All statutory references are to the Internal Revenue Code of 1954, unless otherwise indicated.

(1) Whether the assignment of a life insurance policy by the decedent, Morris R. Silverman, to his son, petitioner Avrum Silverman, was made "in contemplation of death" within the meaning of section 2035.

(2) If such assignment was made in contemplation of death, what amount is includable in the gross estate of the decedent.

(3) Whether decedent's gross estate must include certain jewelry having a fair market value of $780 which the decedent inherited from his wife.

FINDINGS OF FACTS

Some of the facts have been stipulated and are so found. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Decedent Morris R. Silverman died testate on July 26, 1966, in New York, N.Y. Letters testamentary were issued to the petitioner, Avrum Silverman, on September 2, 1966. At the time the petition herein was filed, the petitioner resided at Watertown, Mass.

The decedent was born on March 15, 1901. On May 25, 1961, the decedent purchased life insurance policy

number 12553 from the Standard Security Life Insurance Co. of New York which insured his life and had a face value of $10,000. To keep the policy in effect, the decedent made monthly payments of $52.60. The decedent's wife Mabel Silverman was made primary beneficiary of the policy, and the petitioner was designated secondary beneficiary.

Mabel Silverman died of cancer on December 12, 1965, after an extended illness of 2 or 3 years. During the period of her illness, she required hospitalization on several occasions.

The decedent's medical history, dated December 22, 1965, states:

During the past several months patient has been under a great deal of stress. His wife has been dying and finally died about two weeks ago. He has noted some intermittent red blood in the stool during the last month and some pain in his back. In the past he had a fistula-in-ano, but he does not have any recurrence of that symptomatology. He has also eaten less and is not sleeping too well. He has lost his appetite.

On that date the decedent underwent a full physical examination. X-rays indicated a possible malignancy of the colon. No further evidence concerning the decedent's medical care was available until February 18, 1966.

On January 29, 1966, the decedent assigned to his son, the petitioner, all of his right, title, and interest in life insurance policy number 12553. From this point forward, the petitioner paid the monthly premiums of $52.60. *340

In a letter to the petitioner's attorney, Joseph Breitstone, the decedent's nephew and insurance broker, stated:

When I met with Morris Ralph Silverman to discuss the change of beneficiary, I recommended that he transfer ownership of the policy to his son Avrum since the estate would no longer reap the benefits of the marital deduction in the event of his death.

On February 18, 1966, the decedent was admitted to the Medical Arts Center Hospital in New York City, where he underwent surgery. During the operation, carcinoma (cancer) of the colon and liver involvement was found. Consequently, a transverse colostomy was carried out. In an attempt to limit the spread of cancer, chemotherapy was begun.

The decedent was discharged from the hospital on March 12, 1966, but was readmitted several times thereafter. He died on July 26, 1966.

The petitioner had made seven premium payments of $52.60 each at the time of his father's death.

OPINION

The decedent transferred ownership of a life insurance policy on his life to his son approximately 6 months prior to his death. The first issue to be decided is whether this transfer was made "in contemplation of death" thereby making such property includable in the decedent's gross estate under the provisions of section 2035.[2]

> 2. SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.
> (a) GENERAL RULE. — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.
> (b) APPLICATION OF GENERAL RULE. — If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general pow-

> er of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

Section 2035(b) creates a statutory presumption that any transfer made within 3 years of death, except a bona fide sale, is a transfer in contemplation of death. The petitioner must not only produce evidence refuting the presumption, but must also carry the burden of proof on this issue. *First Trust Deposit Co.* v. *Shaughnessy,* 134 F.2d 940 (C.A. 2, 1943); *Estate of Sumner Gerard,* 57 T.C. 749 (1972). In this decidedly factual endeavor, we must determine whether the dominant purpose in making the transfer was the thought of death or some purpose more closely associated with life motives. *United States* v. *Wells,* 283 U.S. 102 (1931); *Estate of Maurice H. Honickman,* 58 T.C. 132 (1972), affd. 481 F.2d 1399 (C.A. 3, 1973). *341

The petitioner has argued that the decedent assigned the life insurance policy to him in order to avoid further premium payments. The original primary beneficiary, decedent's wife, predeceased him. Therefore, according to the petitioner, the decedent felt he no longer needed insurance. The only witness dealing firsthand with the decedent in respect of the insurance was Joseph Breitstone, his nephew and insurance broker. Breitstone testified that the decedent originally desired cancellation of the policy but was persuaded to assign the policy because his son would pay the premiums and the policy would no longer be part of his estate. He also explained that the cash surrender value was quite low at that time. Moreover the petitioner testified that his father, the decedent, was philosophically opposed to insurance and preferred to invest in stocks.

We hold that the transfer in issue was made in contemplation of death. The assignment took place on January 29, 1966. The decedent's medical history shows that on December 22, 1965, he underwent a complete physical examination and X-rays to find the cause of acute diarrhea and bleeding. The X-rays revealed a possible malignancy of the colon. After a gap of close to 2 months in the decedent's medical history, during which time the transfer in question took place, the decedent was admitted to a hospital for an operation. Although doctors removed a cancerous tumor, spreading of the disease had occurred, and the decedent died approximately 5 months later.

Whether the decedent knew death was near is subject to conjecture. Nevertheless, because of his symptoms, the operative procedures carried out, and his postoperative treatment, we feel quite certain that he knew he was seriously ill.[3] Moreover the close proximity he maintained with his wife during her 2-3-year bout against cancer may have given him special cause to worry. Also, at the age of 65, he was not likely to take his situation lightly. Bodily condition may naturally give rise to fear of death. *United States* v. *Wells, supra* at 117; *Estate of Sumner Gerard, supra* at 760; *Estate of Oliver Johnson,* 10 T.C. 680 (1948). Petitioner's testimony has little weight on this particular point since he was in California during the early part of decedent's illness.

> 3. We were not presented any medical evidence concerning the near 2-month interlude, but we strongly suspect the decedent to have been aware of serious illness prior to his admission to the hospital.

Breitstone, in a letter responding to petitioner's attorney prior to the trial herein, stated that the assignment was made because "the estate would no longer reap the benefits of the marital deduction in the event of his death." In this correspondence Breitstone failed to mention that the decedent desired to cancel the policy. Rather he stated that the discussion occurred when the decedent was changing *342 beneficiaries. The mo-

tive to avoid taxes is usually intended to relieve beneficiaries of taxes after death. *McIntosh's Estate* v. *Commissioner,* 248 F.2d 181 (C.A. 2, 1957), affirming 25 T.C. 794 (1956); *Vanderlip* v. *Commissioner,* 155 F.2d 152 (C.A. 2, 1946), affirming 3 T.C. 358 (1944). The statute was specifically enacted to prevent the evasion of estate taxes. *Milliken* v. *United States,* 283 U.S. 15, 23 (1931); see also sec. 20.2035-1(c)(1), Estate Tax Regs. Moreover a significant factor in certain cases has been the reliance on an insurance agent's advice to avoid estate taxes by making transfers. *Slifka* v. *Johnson,* 161 F.2d 467 (C.A. 2, 1947); *Estate of Edwin W. Rickenberg,* 11 T.C. 1 (1948).

Lastly the petitioner has testified that the decedent rarely made gifts over $50 or $100. The decedent's assignment, in light of his frugality, appears more testamentary in nature than if large gifts were his normal manner. *Estate of Sumner Gerard, supra* at 760. In addition, if decedent truly had no paternal interest in his son and was more concerned with his own financial welfare, it would seem more likely that he would have canceled the policy and pulled down the cash surrender value for his own use.

After a careful review of all the evidence, we find that petitioner has not persuaded us that the transfer was anything other than a distribution in anticipation of death. *Estate of Berman* v. *United States,* 487 F.2d 70 (C.A. 5, 1973); *Bel* v. *United States,* 452 F.2d 683 (C.A. 5, 1971), certiorari denied406 U.S. 919 (1972).

Having found that the decedent transferred the life insurance policy in contemplation of death, we must now determine the quantum of inclusion in the decedent's gross estate. The transfer of a life insurance policy in contemplation of death normally requires inclusion in the gross estate at face value. *Estate of Maurice H. Honickman, supra* at 136; *Estate of Arthur H. Hull,* 38 T.C. 512, 528 (1962), reversed on other grounds325 F.2d 367 (C.A. 3, 1963). In the instant case however, the petitioner paid all the insurance premiums after the assignment. Of total premiums amounting to $3,261.20, petitioner paid $368.20 or 11.29 percent and the decedent paid $2,893 or 88.71 percent. Under these circumstances we feel that the petitioner contributed to the value of the policy, and it would be inappropriate to include in the gross estate that portion of the value which petitioner contributed.

Throughout its existence, including the time of transfer, the policy had a face value of $10,000. At the time of the decedent's death however, a certain number of premiums were required to keep the face value intact. It is apparent, therefore, that at the time the decedent transferred the policy, only a portion of the premiums necessary to maintain the face value payment on death had in fact been paid. The petitioner's continued premium payments were thus a vital *343 part of the consideration necessary to secure full payment on the insurance policy on decedent's death. To hold otherwise would tax the estate on an asset greater than that which the decedent transferred. *Liebmann* v. *Hassett,* 148 F.2d 247 (C.A. 1, 1945).[4] Cf. *Scott* v. *Commissioner,* 374 F.2d 154 (C.A. 9, 1967), reversing 43 T.C. 920 (1965). We are further bolstered in our decision by sec. 20.2035-1(e), Estate Tax Regs., which states: "However, if the transferee has made improvements or additions to the property, any resulting enhancement in the value of the property is not considered in ascertaining the value of the gross estate." We therefore hold that the decedent's estate must include that portion of the face value of the life insurance policy which the decedent's premium payments bore to all premium payments.[5]

4. It is surprising that neither party cited this case which, insofar as we can find, is clearly the case most directly in point.

5. Petitioner has misplaced his reliance on cases such as *Estate of Hector R. Skifter,* 56 T.C. 1190 (1971), and *Estate of Inez G. Coleman,* 52 T.C. 921 (1969). The factual situations therein did not involve the transfer of *life insurance policies* in contemplation of death.

The last issue for decision is whether decedent's gross estate must include certain jewelry having a fair market value of $780 which the decedent inherited from his wife. The petitioner did not present any proof on this issue at the trial herein. Although petitioner argued surprise in his reply brief, this issue was properly raised by the respondent in the deficiency notice, pleadings, and at the trial. We may only conclude that respondent's determination is correct. Rule 32, Tax Court Rules of Practice.

Decision will be entered under Rule 50.

INTERNAL REVENUE SERVICE
Index No.: 721.00-00
Number: **200002025**
Release Date: 1/14/2000

CC:DOM:P&SI:2 - PLR-110643-99

October 14, 1999

H =

W =

P =

Dear :

This is in response to your letter, dated May 22, 1999, written on behalf of H and W, requesting a ruling under § 721 of the Internal Revenue Code.

The information submitted provides that P is a limited partnership engaged in acquiring marketable securities for investment. H and W hold a 1 percent general partnership interest in P as community property. The remaining 99 percent partnership interest is held by H and W's three children. H and W represent that more than 80 percent of P's assets are held for investment and are readily marketable stocks or securities.

H and W propose to contribute appreciated securities to P in exchange for a limited partnership interest. H and W represent that the securities to be transferred consist of a diversified group of publicly owned securities, no one issue of which will represent more than 25 percent of the value of the total securities to be contributed, and not more than 50 percent of the value of all securities to be contributed will consist of the securities of 5 or fewer issuers. The limited partnership interest to be received by H and W in exchange for the contribution of the securities will be based on the market value of the contributed securities relative to the value of all the securities in P after the contribution.

It is further represented that after H and W's proposed contribution, the securities in P of one issuer will continue to

represent more than 25 percent of the value of its total assets and more than 50 percent of the value of all of P's assets will be invested in the stocks or securities of 5 or fewer issuers.

Section 721(a) provides that no gain or loss shall be recognized by either a partnership or its partners on the contribution of property to a partnership in exchange for an interest in the partnership. Section 721(b), however, provides that gain (but not loss) realized on such a transfer may be recognized if the partnership would be treated as an investment company within the meaning of § 351, if the partnership were incorporated.

Section 351(a) provides that no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control of the corporation.

Section 351(e)(1) provides that § 351 does not apply to a transfer of property to an investment company. Section 351(e)(1) further provides that the determination of whether a company is an investment company is to be made by taking into account all stock and securities held by the company. Section 351(e)(1)(B) provides that the term stocks and securities includes stock, money, indebtedness, and other enumerated assets.

Section 1.351-1(c)(1) of the Income Tax Regulations provides that a transfer to an investment company occurs when (i) the transfer results, directly or indirectly, in diversification of the transferors' interests, and (ii) the transferee is a regulated investment company (RIC), real estate investment trust (REIT), or a corporation more than 80 percent of the value of whose assets are held for investment and are readily marketable stocks and securities, or interests in RICs or REITs.

Section 1002 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1997) (the "Act"), amends section 351(e) for transfers after June 8, 1997, in taxable years ending after such date, subject to certain transitional relief provisions. Section 1002 of the Act is intended to expand the types of assets considered in determining whether a transfer is to a transferee described in § 1.351-1(c)(1)(ii)(c) to include certain assets in addition to "readily marketable stocks or securities" and interests in RICs or REITs. However, the Act is not intended to alter the requirement of § 1.351-1(c)(1)(i) that a transfer of property will be considered to be a transfer to an investment company under § 351(e) only if the transfer results, directly or indirectly, in diversification of the transferors' interests.

See S. Rep. No. 105-33, 105th Cong., 1st Sess. 131 (1997); H.R. Rep. No. 105-148, 105th Cong., 1st Sess., 447 (1997); H.R. Rep. No. 105-220, 105th Cong., 1st Sess. 516-17 (1997).

Section 1.351-1(c)(5) provides that a transfer ordinarily results in diversification of the transferors' interests if two or more persons transfer nonidentical assets to a corporation in the exchange. For this purpose, if any transaction involves one or more transfers of nonidentical assets which, taken in the aggregate, constitute an insignificant portion of the total value of assets transferred, such transfers shall be disregarded in determining whether diversification has occurred. If there is only one transferor (or two or more transferors of identical assets) to a newly organized corporation, the transfer will generally be treated as not resulting in diversification. Section 1.351-1(c)(5) further provides that if a transfer is part of a plan to achieve diversification without recognition of gain, such as a plan which contemplates a subsequent transfer, however delayed, of the corporate assets (or of the stock or securities received in the earlier exchange) to an investment company in a transaction purporting to qualify for nonrecognition treatment, the original transfer will be treated as resulting in diversification.

Section 1.351-1(c)(6)(i) provides that a transfer of stocks and securities will not be treated as resulting in diversification of the transferors' interests if each transferor transfers a diversified portfolio of stocks and securities. A portfolio of stocks and securities is considered to be diversified if it satisfies the 25- and 50-percent tests of § 368(a)(2)(F)(ii), applying the relevant provisions of § 368(a)(2)(F), except that government securities are included in total assets for purposes of the denominator of the 25- and 50-percent tests (unless acquired to meet the 25- and 50-percent tests), but are not treated as securities of an issuer for purposes of the numerator of the 25- and 50-percent tests.

An investment company is diversified within the meaning of § 368(a)(2)(F)(ii) if not more than 25 percent of the value of its assets is invested in the stock and securities of any one issuer and not more than 50 percent of the value of its total assets is invested in the stock and securities of 5 or fewer issuers.

After applying the law to the facts submitted and representations made, we conclude that the transfer of the diversified portfolio of stocks and securities (within the meaning of § 1.351-1(c)(6)(i)) to P by H and W would not be transfers to an investment company (within the meaning of § 351)

if P were incorporated. Accordingly, gain or loss will not be recognized on the proposed contribution of securities by H and W to P under § 721(a).

Except as specifically ruled above, we express no opinion concerning the federal tax consequences (including any estate and gift tax consequences) of the transaction described above under the cited Code provisions or any other provision of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this ruling is being sent to H and W.

Sincerely yours,

J. THOMAS HINES
Senior Technician Reviewer
Branch 2
Office of the Assistant
Chief Counsel
(Passthroughs and Special
Industries)

Enclosures: 2
Copy of this letter
Copy for 6110 purposes

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: January 14, 2011
[redacted]
AGENCY: Oneida
FH #: 5700969R

In the Matter of the Appeal of

[redacted]

from a determination by the Oneida County Department of Social Services

DECISION AFTER FAIR HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on July 8, 2011, in Oneida County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Social Services Agency
Waiver of personal appearance; Evidentiary packet submitted
Mr. Kirley , Fair Hearing Representative, via telephone

ISSUE

Was the Agency's determination that Appellant has excess resources, including 44,000 shares of stock valued at $99,000 for the purposes of determining eligibility for Medical Assistance correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On June 30, 2010, an application for Medical Assistance ("Medicaid") was made on behalf of the Appellant, age 85, a resident of [redacted], a Residential Health Care Facility ("RHCF").

2. By manual Notice dated November 19, 2010, the Agency determined to deny the Appellant's June 30, 2010 application for Medical assistance due to excess resources, [noting as follows]- enough to private pay through July 2010 with $2,476.07 to apply to the August NAMI. The Agency subsequently withdrew this notice..

3. By CNS Notice dated November 20, 2010, the Agency advised Appellant that he was approved for Medical Assistance effective August 1, 2010. Said authorization required that the Appellant apply $2,886.79 per month of Net Available Monthly Income ("NAMI") towards the cost of the Appellant's medical care. The Agency subsequently withdrew this notice.

4. By CNS Notice dated November 30, 2010, the Appellant was advised that the Agency had recalculated the Appellant's NAMI, from $2,886.79 to $2,800.14, effective August 1, 2010. The Agency subsequently withdrew this notice.

5. By manual Notice dated January 10, 2011, the Appellant was advised that the Agency had recalculated his NAMI, from $2,800.14 to $2,724.14 effective January 1, 2011 to reflect the increase in Medicare premiums. The Notice further advised that the amount of the adjustment was $76. The Notice advised Appellant that for the month of February 2011, his NAMI would be reduced from $2,724.14 to $2,648.14 to reflect the one month period in which the adjustment was not budgeted, and that effective March 1, 2011, his NAMI will be $2,724.14.

6. By manual Notice dated May 5, 2011 and as revised by manual Notice dated May 11, 2011, the Agency advised Appellant as to his monthly NAMI for the period July 1, 2010 as well as to amount of his resources to be used in determining eligibility.
The Agency subsequently withdrew these two notices.

7. By manual Notice dated June 22, 2011, Notice of Intent to Establish Liability toward Chronic Care, the Agency advised the Appellant that effective July 1, 2010 through December 31, 2010, the Appellant was required to apply $2,800.14 per month of Net Available Monthly Income ("NAMI") towards the cost of the Appellant's medical care.

8. The Agency calculated the amount of the Appellant's Net Available Monthly Income as of July 2010 as follows:

Appellant's Gross Social Security	$1714.70		
Pension (A1 Life Assurance)	$114.61		
Pension (Lehman Bros)	1202.18		
Total Income		$3031.49	
Less:			
Health Insurance Premiums		$26.65	
Medicare premium		$157.70	
Personal Needs Allowance		-$50.00	
Total Allowable Offsets			$231.35
Appellant's Net Available Monthly Income ("NAMI")			$2800.14

9. Effective January 2011, the Appellant also incurred $31.10 monthly for the cost of his prescription drug coverage income related monthly adjustment amount/Part D Medicare coverage.

10. The June 22, 2011 Notice also advised Appellant as to the amount of his resources; the Agency determined that Appellant had available resources totaling $192,489.62. Allowing an exemption of $13,800, a burial fund of $12,735 and applying outstanding Medical bills of $159,618.00, the Agency found that there remained $6,336.62 to be applied towards the July 2010 cost of care.

11. The Agency's calculation as to Appellant's resources for the purposes of determining eligibility, was as follows:

Bank accounts	$ 16,146.83
Homestead	$ 77,342.79
Stock holdings	$ 99,000.00
Countable resources	$192,489.62
Medical Assistance level	$ 13,800.00
Excess resources	$178,689.62
Burial fund	$ 12,735.00
Medical bills	$159,618.00
Remaining Excess	$ 6,336.62

12. The Appellant owns 44,000 shares of stock in [redacted]., a privately held corporation (as held in the [redacted] Revocable Living Trust).

13. In connection with the Appellant's application for Medical assistance, the Agency was advised that the Appellant had previously sold shares of [redacted], the proceeds of which were used towards the cost of Appellant's care. The stock was sold as follows:

As of 1/1/2006, the Appellant owned 206,000 shares of [redacted] stock

In 2007, Appellant sold 102,000 shares @$1.50 per share for $153,000.

In 2008, Appellant sold 35,000 shares @ $2.00 per share for $70,000
In 2009, Appellant sold 25,000 shares @ $3.00 per share for $75,000

14. By letter dated June 28, 2010, from the CFO of [redacted] to the Appellant, (a copy of which was provided to the Agency), the Appellant is advised that he currently owns 44, 000 shares of stock; that [redacted] is a privately held company and there is no public trading, that there is no determinable stock price; that in order to sell his shares of stock, he must find a qualified buyer and privately negotiate a price.

15. By letter dated July 22, 2010, Appellant's daughter and attorney in fact, advised the Agency that the Trust still owns 44,000 shares of stock, that the shares are privately held and

are not public traded, that since there is no market for the shares, we can only estimate that prospective buyers will look to pay an average of the historical share process. The price ranges have been from $1.50 to $3.00 per share. Prospective buyers are being sought out for the remaining shares.

16. On January 14, 2011, the Appellant requested this fair hearing.

APPLICABLE LAW

Under provisions of Section 366.1(a)(5) of the Social Services Law and Section 360-4.8 of the Regulations, a person who is permanently disabled, and who has not qualified for Medical Assistance ("Medicaid") by reason of financial eligibility for receipt of Public Assistance or Federal Supplemental Security Income (SSI) but who may otherwise be eligible for SSI, may be eligible for "Medicaid" if he or she meets certain financial and other eligibility requirements under the Medicaid program.

Sections 360-4.1 and 360-4.8(b) of the Regulations provide that all income and resources actually or potentially available to a Medicaid applicant or recipient must be evaluated, and such income and/or resources as are available must be considered in determining eligibility for Medicaid. A Medicaid applicant or recipient whose net available non-exempt resources exceed the resource standards will be ineligible for Medicaid coverage until he or she incurs medical expenses equal to or greater than the excess resources. In 2010 the Medicaid resource standard (a general exemption) for a single individual is $13,800.

Section 360-1.4(c) of the Regulations defines Chronic Care budgeting as a procedure used for individuals who are in "Permanent Absence" status. For such individuals, Chronic Care budgeting begins as of the first day of the calendar month following the month in which the individual is determined to be in permanent absence status.

To determine financial eligibility, a person's net income must be calculated. Ordinarily, for cases NOT involving Chronic Care, net income is derived by deducting exempt income and allowable deductions from gross income. Section 360-4.6 of the Regulations sets forth allowable exemptions, disregards and deductions from income. In determining net income for a person in Chronic Care, the amount required for payment of health insurance premiums is allowed as a deduction, and the amount of $50 is deducted as a monthly Personal Needs Allowance (PNA) for a resident of a Residential Health Care Facility (RHCF) or a person in permanent absence status in an acute care hospital. Residents of psychiatric care facilities, developmental centers or intermediate care facilities under Article 31 of the Mental Hygiene Law is allowed a PNA of $35. A PNA of up to $90 is allocated to a person receiving a pension under 38 U.S.C.5503(f) or who has elected a greater compensation benefit under 38 CFR 3.701 in lieu of such pension. An amount will be set aside to meet maintenance needs of dependents in the Appellant's former household. 18 NYCRR 360-4.9.

In addition pursuant to 18 NYCRR 360-4.9, certain income of a person residing in a RHCF who does not have a spouse living in the community is also not required to be applied toward the cost of medical care:

A Medicaid authorization may be issued for necessary medical costs exceeding the net available income (NAMI).

An initial authorization for Medical Assistance will be made effective back to the first day of the first month for which eligibility is established. A retroactive authorization may be issued for medical expenses incurred during the three month period preceding the month of application for Medical Assistance, if the applicant was eligible for Medical Assistance in the month such care or services were received. 18 NYCRR 360-2.4(c).

DISCUSSION

It is noted that the Appellant was not present at the hearing. Two of the Appellant's children, a son and a daughter, appeared, acting pursuant to the terms of a Durable General Power of Attorney, as executed by the Appellant on August 24, 2006. (A third child, residing out of state, is also appointed as Appellant's attorney in fact, but did not attend the hearing). In addition, the Appellant was represented by counsel. Appellant's counsel expressly waived his client's right under Varshavsky v. Perales, 202 AD2d 155, (1st Department 1994) to participate in the hearing process via a home hearing, and requested a Decision on the merits, which request was accept.

The record shows that the Agency determined by its most recent notice dated 6/22/2011 to accept the Appellant's June 30, 2010 application for Medical assistance, with a monthly NAMI of $ 2800.14, for the period July 1, 2010 through December 31, 2010. In calculating the Appellant NAMI, the Agency also determined that Appellant had available resources totaling $192,489.62. Allowing an exemption of $13,800, a burial fund of $12,735 and applying outstanding Medical bills of $159,618.00, the Agency found that there remained $6,336.62 to be applied towards the July 2010 cost of care. In determining the amount of resources, the Agency included 44,000 shares of stock, which the Agency valued at $2.25 per share or $99,000. The record shows was that by Notice dated January 10, 2011, the Agency adjusted the Appellant's NAMI, from $2800.14 to $2724.14 to reflect an increase in the Appellant's Medicare premiums.

At the hearing, the Appellant's attorney argues that the Agency erred in its calculations, specifically, (1) that the 44,000 shares of stock in a closely held corporation, had no actual market value and should not have been counted as a resource since it was not actually available; (2) that the Appellant's NAMI for 2011 is incorrect as the Agency did not deduct the Appellant's additional Medicare Part D health insurance premium of $31.10 monthly, (3) that in light of the above referenced adjustment/corrections, the Agency should have applied the balance of the outstanding nursing home bills to the Appellant's NAMI.

At the hearing, the Agency stipulated and agreed to allow a deduction for the additional $31.10 Medicare Part D premium and to adjust the NAMI for 2011 accordingly. This stipulation was acceptable to Appellant's counsel.

Thus the remaining issue for review is the Agency determination to include as part of the Appellant's resources, 44,000 shares of [redacted] stock valued by the Agency at $99,000.

The Agency asserts that the stock was properly included as a resource and using the historical data provided by the Appellant's daughter, establishing that the Appellant had previously sold shares at prices ranging from $1.50 per share in 2007, $2.00 per share in 2008, and $3.00 per share in 2009, the Agency averaged such sales to establish a price of $2.25 per share for a total valuation of $99,000.

The Appellant's counsel asserts that the stock was not an available resource since it had no market value because, despite diligent efforts, it could not be sold and had no public market.

In support of this position, Appellant's counsel explained that [redacted] is a privately held/closely held corporation and its stock is not publicly traded. Appellant's counsel in his written Memorandum notes that [redacted] asserts that the company has very little liquidation value since its only real asset is intellectual property. Appellant's counsel notes that Appellant's 44,000 shares represent less than one percent of the outstanding 5.1 million shares. Appellant's counsel notes that for the fiscal year ending September 30, 2009, the company lost between [redacted] but became marginally profitable in 2010. Appellant's counsel further notes that Appellant's three children have been unsuccessful in selling the Appellant's remaining shares.

At the hearing, the Appellant's son, who is also the founder , president and CEO of [redacted] explained that due to his position in the company he is disqualified from soliciting buyers, except to the four members of the company's board, who declined to purchase the shares. The Appellant's son also explained that the company was founded in 1996, it has approximately 30 employees and that the company has never paid dividends.

At the hearing the Appellant's son also described his brother's attempt to obtain a buyer for the stock; the Appellant's son explained that his brother is [redacted], who resides out of state and who actively tried to sell the shares in and about June 2010 to no avail.

At the hearing, Appellant's counsel provided two pages of handwritten notes by the Appellant's son who resides out of state, setting forth the names of the prospective buyers, the dates of contact and the outcome.

At the hearing, the Appellant's daughter also testified that she is a [redacted] of a major bank and she holds a securities license and as such, it would take a lot of "red tape" to allow her to solicit buyers.

Lastly, Appellant's counsel argues that a predictable consequence of the Agency's inclusion of such stock as part of the Appellant's resources, when such stock cannot be sold, is that the Agency will twice benefit financially, once when the Agency reduces it liability by valuing the stock at $99,000 and then a second time, when Appellant dies owning the stock. As a preferred creditor, any value that the stock has will be applied first to reimburse the Medicaid program for expenditures made on his behalf.

The Agency's determination to include the Appellant's 44,000 shares of stock in [redacted] as part of the Appellant's countable resources was correct. Nothing under the regulations exempts or disregards from countable resources shares of stock in a closely held corporation. There was no legal impediment to the sale of such stock. Appellant's counsel's assertion that the shares of stock have no market value simply because the Appellant's children could not locate an actual buyer is not persuasive. The mere introduction of evidence that the asset may not have been able to be sold as of June 2010 does not mean that the asset had no value as of June 2010. (See In the Matter of Raymond M. FH# 5536023Q). The fact that the stock could not readily be liquidated does not mean that the stock has no value. Moreover, as to any inability to sell the shares, even accepting the Appellant's son and daughter's claim as to their limited ability to solicit buyers, scant evidence was presented to show that a diligent effort had been made to sell the shares. Here, the two pages of notes made by Appellant's son who resides out of state as to his efforts to sell the stock is of little probative value as the notes did not indicate at what price per share the stock was offered.

All resources are reviewed to determine their availability and value as of the first day of the month for which the applicant is applying. In determining the fair market value of publicly traded stock, the closing price on the date of application may be verified by consulting the following day's financial or local newspaper. Stock of a closely held corporation is generally held by only a few individuals and there is no established market price to determine its worth. While Appellant's counsel's fair hearing Memorandum touches upon several factors which might serve to diminish the stock's value (consistent with some of the factors set forth in IRS Revenue Ruling 59-60, which lists eight factors to be considered in valuing the stock of a privately held/closely corporation), such submission standing alone, does not establish that the stock has no value nor is the fair hearing Memorandum the equivalent of a market valuation.

In this case, the record shows that the Agency's determination to value the shares of stock using the prior sales data was reasonable as no other valuation was provided. However, taking into consideration the Appellant's argument as to the potentially diminished value of such stock, the determination will not now be implemented; the case is remanded back to the Agency to allow the Appellant the opportunity to provide a business appraisal or other valuation of the stock.

DECISION AND ORDER

The Agency's determination that Appellant has excess resources, including 44,000 shares of stock valued at $99,000 for the purposes of determining eligibility for Medical Assistance was correct; however, the Agency is directed to take the following action:

1. Afford the Appellant a reasonable opportunity to submit a business appraisal or other valuation of such stock, and there after render a new determination as to the Appellant's financial eligibility for Medicaid.
2. Advise the Appellant of its determination i

As stipulated and agreed, the Agency is directed to allow a deduction for the additional $31.10 Medicare Part D premium and to adjust the NAMI for 2011 accordingly.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
08/17/2011

NEW YORK STATE OFFICE OF
DEPARTMENT OF HEALTH

By

Katherine Vuck

Commissioner's Designee

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST November 5, 2001
CASE #
CENTER Columbia
FH # 3622131Y

In the Matter of the Appeal of :

Clifford Campbell : DECISION AFTER FAIR HEARING

from a determination by the Columbia County Department of Social Services :

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR (hereinafter Regulations), a fair hearing was held on April 19, 2002, in Columbia County before Jeanine S. Behuniak, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Louis W. Pierro, Esq.; Jeanne D. Morris, paralegal; Liliane E. Campbell, Appellant's wife; Carl Campbell, Appellant's son; Christa Proper, Appellant's daughter

For the Social Services Agency

Veronica Kosich, Esq.; Christine Coffey, Senior Social Welfare Examiner; Melissa Kinnicutt, Senior Social Welfare Examiner

ISSUES

Did the Agency incorrectly consider the transfers, totalling $120,000.00, made by Ms. Campbell to her grandchildren as available to the Appellant for purposes of Medical Assistance (Medicaid) eligibility?

Did the Agency incorrectly consider the transfers, totalling $8300.00, made by Ms. Campbell to Christa Proper as available to the Appellant for purposes of Medicaid eligibility?

Did the Agency improperly disregard the 35% discount for the Appellant's fractional interest in his real property as reflected in his gift tax return in determining the value of property transferred?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On November 30, 2000, an application for Medicaid was filed on behalf of the Appellant seeking Medicaid coverage retroactive to August 1, 2000.

2. The Appellant was born in the year 1923.

3. By notice dated September 26, 2001, the Agency determined that the Appellant was not eligible under Medicaid for nursing facility services because resources valued at $250,979.65 were transferred for $1.00 which is less than fair market value.

4. The Agency determined to impose a penalty period of 44.60 months, during which time the Appellant may not receive Medicaid coverage for the cost of nursing facility services. The Agency calculated the 44.60 month penalty period by dividing $250,978.65, the uncompensated value of transferred resources, by $5267.00, the applicable monthly regional rate.

5. Based upon the penalty period of 44.60 months, the Agency determined that the Appellant was not eligible for nursing facility services until December 2002.

6. By notice dated October 3, 2001, the Agency determined that the Appellant was not eligible under Medicaid for non-institutional services due to excess resources in the amount of $117,242.44 for the time period from August 1, 2000 through November 30, 2000.

7. By notice dated October 3, 2001, the Agency also determined that the Appellant was not eligible under Medicaid for non-institutional services due to excess income of $303.28 per month and excess resources of $7751.22 beginning December 1, 2000.

8. On November 5, 2001, this fair hearing was requested by or on behalf of the Appellant.

APPLICABLE LAW

Sections 360-4.1 and 360-4.8(b) of 18 NYCRR (herein referred to as "the Regulations") provide that all income and resources actually or potentially available to a Medicaid applicant or recipient must be evaluated, but only such income and/or resources as are found to be available may be considered in determining eligibility for Medicaid. A Medicaid applicant or recipient whose available non-exempt resources exceed the resource standards will be ineligible for Medicaid coverage until he or she incurs medical expenses equal to or greater than the excess resources.

Under Section 360-4.4 of the Regulations, "Resources" are defined to include any liquid or easily liquidated resources in the control of an applicant or recipient, or anyone acting on his or behalf, such as a conservator, representative, or committee. Certain resources of a Medicaid-qualifying trust, as described in Section 360-4.5 of the Regulations, may also be counted in evaluating Medicaid eligibility.

Section 366.5(d) of the Social Services Law and Section 360-4.4(c)(2) of the Regulations govern Transfers of Assets made by an applicant or recipient or his or her spouse on or after August 11, 1993.

Generally, in determining the Medicaid eligibility of a person receiving nursing facility services, either as an in-patient in a nursing facility (including an intermediate care facility for the mentally retarded), as an in-patient in a medical facility at a level of care such as is provided in a nursing facility, or as a recipient of care, services, or supplies at home pursuant to a waiver under section 1915(c) of the federal Social Security Act ("waivered services"), any transfer of assets for less than fair market value made by the person or his or her spouse within or after the "look-back period" will render the person ineligible for nursing facility services.

The "look-back period" is the 36-month period immediately preceding the date that a person receiving nursing facility services is both institutionalized and has applied for Medicaid. However, in the case of payments to or from a trust which may be deemed assets transferred by an applicant or recipient, the "look-back period" shall be a 60-month period instead of the thirty-six month period. A person is institutionalized if the person is a patient in a nursing facility, or if the person is in a medical facility receiving the level of care provided in a nursing facility, or if the person is receiving waivered services.

However, a person will not be ineligible for Medicaid as a result of a transfer of assets if:

(a) the asset transferred was other than a homestead and was disregarded or exempt asset under Section 360-4.4(d), 360-4.6, and/or 360-4.7 of the Regulations; or

(b) the asset transferred was a homestead, and title to the homestead was transferred to:
    (1) the person's spouse; or
    (2) the person's child, who is blind, disabled, or under the age of 21; or
    (3) the person's sibling, who has an equity interest in the homestead and was residing in the homestead for a period of at least one year immediately before the date the person entered long-term care (either in a nursing facility or otherwise); or

(4) the person's child, who was residing in the homestead for a period of at least two years immediately before the date the person became institutionalized as described above, and who provided care to the person which permitted her or him to continue residing at home rather than enter into a facility for long-term care; or

(c) the asset was transferred:
- (i) to the person's spouse or to another for the sole benefit of the spouse; or
- (ii) from the person's spouse to another for the sole benefit of the spouse; or
- (iii) to the person's child who is blind or disabled, or to a trust established solely for the benefit of such child; or
- (iv) to a trust established solely for the benefit of a disabled person under 65 years of age.

(d) a satisfactory showing is made that:
- (i) the person or his or her spouse intended to dispose of the asset either at fair market value, or for other valuable consideration; or
- (ii) the asset was transferred exclusively for a purpose other than to qualify for Medicaid; or
- (iii) all assets transferred for less than fair market value have been returned to the person; or

(e) it is determined that the denial of eligibility will result in an undue hardship. Denial of eligibility will result in an undue hardship if:
- (i) the person is otherwise eligible for Medicaid;
- (ii) said person is unable to obtain appropriate medical care without the provision of Medicaid; and
- (iii) despite his or her best efforts, said person or his or her spouse is unable to have the transferred asset returned or to receive fair market value for the asset. Best efforts include cooperating, as deemed appropriate by the commissioner of the social services district, in efforts to seek the return of the asset.

A transfer for less than fair market value, unless it meets one of the above exceptions, will cause an applicant or recipient to be ineligible for nursing facility services for a period of months equal to the total cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average cost of care to a private patient for nursing facility services in the region in which such person seeks or receives nursing facility services on the date the person first applies or recertifies for Medicaid as an institutionalized person. For purposes of this calculation, the cost of care to a private patient in the region in which the person is seeking or receiving such long-term care will be presumed to be 120 percent of the average Medicaid rate for nursing facility care for the facilities within the region. The average regional rate is updated each January first.

The period of ineligibility begins with the first day of the first month during or after which assets have been transferred for less than fair market value, and which does not occur in any other period of ineligibility under Section 360-4.4(c) of the Regulations for any other prohibited transfer.

DISCUSSION

In determining the Appellant's eligibility for Medicaid coverage, the Agency considered and counted transfers of resources made by the Appellant's wife. Between March 1999 and July 1999, the Appellant's wife gave each of her ten grandchildren gifts of $10,000.00. Between December 1999 and January 2000, the Appellant's wife gave two additional grandchildren $10,000.00 each. In the year 2000, Ms. Campbell transferred $8300.00 to her daughter Christa Proper. The Agency counted the sum of these transfers which totaled $128,300.00 in its assessment of the Appellant's eligibility for Medicaid.

At the hearing, the Appellant's representative maintained that none of Ms. Campbell's transfers should have been considered by the Agency when it determined the Appellant's eligibility for Medicaid. The Appellant's representative emphasized that the Appellant and Ms. Campbell were estranged spouses. Considerable testimony was presented by the Appellant's family to the effect that the Appellant and Ms. Campbell were not husband and wife. Christa Proper and Carl Campbell testified that the Appellant and Ms. Campbell did not get along, that the Appellant had left Ms. Campbell, and that when the Appellant returned to live in the same home as Ms. Campbell, it was because there was no other alternative for the Appellant's lodging.

However, the Agency appropriately did not exclude Ms. Campbell's transfers on this basis. The Appellant and Ms. Campbell were legally married. At the fair hearing, Ms. Campbell indicated that she had spoken to a friend, not an attorney, regarding the possibility of a divorce. The Appellant and Ms. Campbell filed joint tax returns. The Appellant and Ms. Campbell lived in the same home prior to the Appellant's admission to the nursing home. If the Appellant and Ms. Campbell had disliked each other to the extent claimed in the testimony at the hearing, it is not probable that the Appellant and Ms. Campbell would have resided in the same home. Furthermore, it seems that at least one family holiday was celebrated by the Appellant, Ms. Campbell, and their family together in the couple's home.

In addition, Ms. Campbell appeared to have some knowledge regarding the Appellant's finances. At one point during the hearing, Ms. Campbell interrupted one of her children to clarify that the Appellant had paid for his Home Health Aides from his Social Security Pension. Ms. Campbell knew who wrote the check for payment, who signed the check, and from which bank the check was drawn.

Furthermore, Ms. Campbell's demeanor at the hearing cast doubt upon the credibility of her claim that she and the Appellant were estranged.

Although Ms. Campbell began the hearing with an attitude of complete hostility toward the Appellant, her demeanor towards the end of the hearing was much less severe. While Ms. Campbell still verbally stated that she and the Appellant were estranged, it seemed that Ms. Campbell was concerned about the Appellant's well-being. Ms. Campbell even acknowledged that on occasion when she was in the nursing home - visiting others - she had stopped in by herself to see the Appellant.

The credibility of Ms. Campbell's claim that she and the Appellant were estranged also is in doubt based on the actions taken by herself and the Appellant. At the hearing, Ms. Campbell claimed that she and the Appellant had become estranged in 1986, when the Appellant moved into Christa Proper's former bedroom. However, the following year, Ms. Campbell and the Appellant moved into Carl Campbell's former house. The Appellant and Ms. Campbell both lived there until August 1996 when the Appellant moved out. Then in May 1998 the Appellant moved back into the basement of the house. It is noted that the Appellant's basement apartment did not have a complete kitchen. It apparently lacked a stove, an oven and a kitchen sink. Eventually due to complications related to a hernia operation, the Appellant moved back into the upstairs portion of the home. The Appellant was having difficulty in ambulating, and he was restricted to a wheelchair. The Appellant's consent to live in the same home as Ms. Campbell, and Ms. Campbell's consent to allow him to move back are not the actions of an estranged couple, as Ms. Campbell attempted to portray.

Based on the evidence presented, it was reasonable for the Agency to treat the Appellant and Ms. Campbell as a married couple. Ms. Campbell's claim that she and the Appellant were estranged is not credible. Consequently, the general rule that any transfer of assets for less than fair market value made by the applicant or his spouse within or after the "look-back period" will render the applicant ineligible for nursing facility services applies to this case. Thus the transfers made by Ms. Campbell were properly reviewed by the Agency in the context of the Appellant's application for Medicaid.

Furthermore, even if the Appellant and Ms. Campbell were not found to be estranged, it was argued that the transfers made by Ms. Campbell should not be counted in the Appellant's eligibility determination because no one associated with the Appellant had ever considered the possibility that he might eventually reside in a nursing home. The Appellant's representative asserted that the onset of the Appellant's need for institutional care began in April 2000 with the sudden and unexpected complications which resulted from distension, diagnosed as Ogilvie's syndrome, and dangerously low potassium levels. The Appellant's children testified that the Appellant was adamantly opposed to nursing homes and that no one in the family had previously contemplated having to place him in one. Ms. Campbell confirmed their statements and indicated that she had not made her transfers with the Appellant's receipt of Medicaid in mind..

However, this argument is not persuasive. At the time Ms. Campbell began transferring funds, the Appellant was approximately 75 years old. As a general rule, as persons age, they are more likely to be in need of medical attention. Consequently, at the time the transfers began in 1999, it was reasonable to foresee that the Appellant would likely need additional medical care in the future. Also the Appellant's statements that he loathed nursing homes and would never enter one do not provide a basis for overturning the Agency's determination. Very few persons wish to be confined to nursing homes, and many people express their opposition to nursing homes to both their families and friends. A loathing of nursing homes was not a feeling unique to the Appellant. It is noted that even though nursing home care is frequently not desired, it nevertheless is often anticipated in terms of estate planning. Furthermore, the possibility of seeking Medicaid and the planning for such an eventuality would not be limited to persons who anticipate nursing home care. Thousands of elderly persons are in receipt of Medicaid, yet not in nursing homes.

It was also argued that Ms. Campbell's transfers to her grandchildren should not render the Appellant ineligible for Medicaid because the resources were transferred exclusively to benefit the grandchildren. At the hearing, Ms. Campbell testified to her alleged intent regarding her transfer of $120,000.00 to her grandchildren. Ms. Campbell asserted that the transfers were made exclusively to help provide for the education of her grandchildren. Ms. Campbell repeatedly indicated that there was no alterative motive in her distribution of assets. Her grandchildren's education was very important to her.

Although considerable testimony was presented regarding the transfers to the grandchildren, a satisfactory showing was not made to establish that the assets were transferred exclusively for a purpose other than to qualify for Medicaid. Ms. Campbell's intent to help meet the high costs of education for her grandchildren is definitely generous. However, Ms. Campbell's testimony at the hearing did not meet the exclusivity portion of the exemption. Although Ms. Campbell presented herself as a generous person who had cared for her children all of her life and who had worked for 28 years as a devoted employee of the Rheinstroms, at various points in the hearing Ms. Campbell's testimony and demeanor indicated that she was informed regarding financial matters. As noted above, Ms. Campbell interrupted one of her children regarding a matter of the Appellant's finances. Ms. Campbell, although she claimed to be estranged from her husband, filed joint tax returns with him based upon the advise of a certified public accountant. Ms. Campbell transferred sums of $10,000.00 to each of her grandchildren based upon the tax advise of Mr. Rheinstroms's accountant. Ms. Campbell also had contacted her attorney to confirm the amount of money which she could give to each of her grandchildren without gift tax consequences. It is also noted that Ms. Campbell made all of these transfers within a rather brief time period. She did not distribute the $10,000.00 gifts to each of her grandchildren at the time of his or her graduation from high school. Instead the full $120,000.00 was transferred by Ms. Campbell in less than a one year time period. The approach taken by Ms. Campbell to distribute the funds to her grandchildren sooner rather than later is arguably the better approach for qualifying for Medicaid.

The Appellant's representative cited two cases in which each Court determined that the facts surrounding the transfers at issue rebutted the presumption that the transfers were made for the purpose of qualifying for Medicaid. Thus the Courts indicated that the transferred resources at issue in those cases could not be considered for Medicaid eligibility purposes. See Albert v. Perales, 156 A.D.2d 619, 549 N.Y.S.2d 426 (2nd Dept. 1989) and Saviola v. Toia, 63 A.D.2d 849, 405 N.Y.S.2d 854 (4th Dept. 1978).

However, the Albert and the Saviola cases are distinguishable from the case at issue in this hearing. In Albert the Court determined that the record supported the claim that the transfer of funds to the son, his wife, and a daughter-in-law constituted consideration for past services performed for the transferrer by the son, his wife and the daughter-in-law. The transferrer in Albert had resided with her daughter-in-law who paid the household expenses, and the son and his wife had assisted in caring for the transferrer. At the Campbell hearing, no claim was made that the transfer of $120,000.00 by Ms. Campbell to her grandchildren constituted consideration for past services. Consequently, the facts of the Albert case and the Campbell case differ significantly.

The Saviola decision also was fact specific to that transferrer's circumstances. The transferrer in Saviola had lived with one of her daughter's for several years. The transferrer had made gifts of $5000.00 to each of her four daughters. The Saviola Court found that the transferrer made the gifts to her daughters out of affection for them and a desire to see them enjoy the gifts during her lifetime. The Saviola Court did not indicate that the transferrer in that case had on at least two occasions sought the advise of accountants, as Ms. Campbell had done. The Saviola Court did not indicate that the transferrer in that case had sought the advise of her attorney regarding the transfer, as Ms. Campbell had done. The Saviola Court did not make a finding that the transferrer in that case was not entirely credible. Such a finding has been made based on Ms. Campbell's demeanor and testimony at this hearing.

Based on the above, the decisions in the Albert and Saviola cases are not controlling. Each decision was based on fact specific findings and determinations. Ms. Campbell's situation and actions differ significantly from those of the transferrers in the Albert and Saviola decisions.

It is also noted that Ms. Campbell has had health difficulties. Ms. Campbell indicated that in 1995 she had a four-way heart bypass surgery. Ms. Campbell indicated that at that time, she had realized that life was too short. At the hearing, Ms. Campbell stated that she feels fully recovered now.

Based on the totality of the evidence presented, Ms. Campbell did not establish that the assets transferred to her grandchildren were transferred exclusively for a purpose other than to qualify for Medical Assistance.

In determining the Appellant's eligibility for Medicaid, the Agency also considered and counted the two transfers of resources made by Ms. Campbell to Christa Proper. In September 2000 and November 2000, Ms. Campbell transferred $5000.00 and $3300.00, respectively, to Christa Proper.

At the hearing, the Appellant's representative maintained that these transactions constituted a loan from Ms. Campbell to Christa Proper, and not outright gifts. Christa Proper testified that her mother had loaned her the $8300.00 to enable her to meet expenses she incurred while building a new house. Ms. Proper confirmed that the $8300.00 was a loan, and not a gift. Based on this testimony, the Appellant's representative argued that the Agency should redetermine the Appellant's Medicaid eligibility without considering the $8300.00 loan as available to meet the expenses of the Appellant's medical care.

However, the circumstances surrounding this transaction do not indicate that it was a loan. There were no loan documents, and there was no due date on the loan. As of the fair hearing date, Christa Proper had paid back only $500.00. Ms. Campbell indicated that she believes her daughter will pay her back someday. Furthermore, neither Christa Proper nor Ms. Campbell presented any evidence regarding interest payments.

The transfer of $8300.00 between a mother and a daughter with no loan terms, no documentation and a payment of only $500.00 after approximately 17 months was reasonably deemed by the Agency to be a transfer of resources for less than fair market value made by Ms. Campbell within the "look-back period".

In determining the Appellant's eligibility for Medicaid, the Agency also reviewed the transfers of resources made by the Appellant himself. The Agency considered and counted the transfer of interest in real property located on Bloody Hill Road made by the Appellant to Carl Campbell and Christa Proper.

The Appellant and his son Carl Campbell had been partners in a business. Each partner had a 50% interest. This partnership was discontinued on December 30, 1999. After the partnership was discontinued, the Appellant transferred his 50% interest in the real estate at Bloody Hill Road, equally to Carl Campbell and Christa Proper. In other words, the Appellant transferred two 25% interests in the property. The Appellant transferred one 25% interest to Christa Proper and the other 25% interest to Carl Campbell, who already had owned a 50% interest in the real property.

When the Agency reviewed and assessed the value of the transfers for Medicaid eligibility purposes, the Agency relied upon an appraisal of the real property, deducted 50% to reflect the Appellant's prior ownership interest in the land, and did not implement the additional fractional interest discount set forth in the Appellant's 1999 Gift Tax Return.

At the hearing, the Appellant's representative argued that the Agency should have taken the additional fractional interest discount of 35% into consideration when assessing the value of the transferred interest. The Appellant's representative asserted that the fractional interest discount is appropriate under the circumstances because the Appellant was not transferring a full ownership interest in real estate. Instead the Appellant was transferring a fractional interest in real estate. The Appellant's certified public accountant completed an affidavit explaining why the 35% discount had been taken in the Appellant's 1999 Gift Tax Return. The accountant stated that the two 25% interests in the parcel of land each represented a minority interest. The accountant stated, "A 'fractional interest discount' reflects the inefficiency and possible difficulties associated with ownership by more than one person of a parcel of land by taking into consideration the lack of complete control over the entire parcel, the risk of disagreement about the use or disposition of the parcel and the possible partition costs associated with the co-ownership of real property i.e. broker's commissions, professional fees, capital gains taxes, etc." The accountant cited to case law to support his position.

In response, the Agency representative maintained that the Agency values property at its fair market value and is not required to implement a fractional interest discount used for purposes of a Gift Tax Return. The Agency representative indicated that the Agency appropriately valued the Appellant's transferred property based on an appraisal of the real property. The Agency representative also indicated that the affidavit of the Appellant's certified public accountant did not actually address the issue at hand. The Agency representative stated that the affidavit set forth "'[t]he value of interest transferred as computed for gift tax purposes...', and not for Medicaid eligibility."

The Agency representative also stated that as a result of this transfer, Carl Campbell now controls a majority interest in the property. Carl Campbell has his original 50% interest plus the 25% interest transferred to him by the Appellant. The Agency representative stated that if Carl Campbell wanted to transfer or sell his interest in the future, he would not be affected by concerns such as a lack of control, interest in size or liquidity. The Agency representative disputed the statement of the Appellant's certified public accountant that each of the two 25% interests in the parcel of land represented a minority interest.

The Agency representative speculated that the Appellant may have transferred his interest in the property in two 25% shares specifically to gain a tax advantage. The Agency representative noted that if the Appellant had transferred his entire 50% interest to Carl Campbell, Carl Campbell would have had full ownership. In that case, the Appellant would not have been able to claim a fractional discount interest in his gift tax return. However, by transferring his interest in two 25% shares to his son and his daughter, the Appellant was able to provide Carl Clifford a majority interest, and the Appellant was able to take advantage of a tax savings. The Agency representative asserted that the Agency should not be obligated

to value the Appellant's transferred interest in real property at a discounted value because the Appellant transferred the interest in a manner which alleviated some of his own gift tax liability.

It is hereby found that the Agency correctly valued the Appellant's transfer of a 50% interest in real property to Carl Campbell and Christa Proper. In assessing the Appellant's Medicaid eligibility, the Agency had relied upon an appraisal of $117,500.00 for the full value of the real property located on Bloody Hill Road. The Agency then discounted this value by 50% to reflect the Appellant's 50% interest in the property and the amount transferred. The Agency thus valued the Appellant's transfer at $58,750.00 for Medicaid eligibility purposes. The Agency properly did not apply an additional fractional interest discount to further reduce the value of the transfer.

The applicable statutes and regulations addressing Medicaid eligibility do not incorporate or authorize the fractional interest discount for gift tax returns in an Agency's Medicaid eligibility review. The cases cited in the affidavit of the Appellant's certified public accountant specifically authorized the discounts for gift tax returns, but did not address such discounts in the context of Medicaid eligibility determinations. See Ward v. Commissioner, 87 T.C. 78 (1986) and Drybrough v. United States, 208 F.Supp. 279 (1962). Consequently, the Appellant has presented no authority for applying a fractional interest discount to transferred items in the context of a Medicaid eligibility review.

In summary, the cited case law is not determinative of the Medicaid eligibility issue at hand. The Agency's determination not to incorporate the fractional interest discount from the Appellant's 1999 Gift Tax Return in assessing the value of the transferred real property for Medicaid purposes was correct.

Based on the totality of the evidence presented at the hearing, it is hereby found that the Agency correctly considered and counted the transfers made by Ms. Campbell to her grandchildren and to Christa Proper as available to the Appellant for purposes of Medicaid eligibility. Also the Agency properly assessed the value of the 50% interest in real property transferred by the Appellant to Christa Proper and Carl Campbell. This sum was correctly considered and counted by the Agency in its Medicaid eligibility determination for the Appellant.

DECISION

The Agency correctly considered the transfers, totalling $120,000.00, made by Ms. Campbell to her grandchildren as available to the Appellant for purposes of determining the Appellant's Medicaid eligibility.

The Agency correctly considered the transfers, totalling $8300.00, made by Ms. Campbell to Christa Proper as available to the Appellant for purposes of determining the Appellant's Medicaid eligibility.

The Agency correctly did not apply the 35% discount reflected in the Appellant's 1999 gift tax return when it determined the value of the interest in property transferred by the Appellant to Carl Campbell and Christa Proper.

DATED: Albany, New York
August 27, 2002

NEW YORK STATE DEPARTMENT
OF HEALTH

By

Marie G. Ridel

Commissioner's Designee

14 A.D.3d 766
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of Clifford CAMPBELL, Petitioner,
v.
COMMISSIONER OF the NEW YORK STATE DEPARTMENT OF HEALTH et al., Respondents.

Jan. 6, 2005.

Synopsis
Background: Applicant commenced article 78 proceeding to review determination of Commissioner of Health finding him ineligible to receive Medicaid medical assistance (MA) benefits.

Holdings: On transfer from the Supreme Court, Columbia County, the Supreme Court, Appellate Division, Mugglin, J., held that:

[1] applicant and his wife were not estranged at time she made transfers to their grandchildren, for purposes of determining applicant's eligibility to receive MA benefits;

[2] substantial evidence supported including transfer of $8,300 by applicant's wife to their daughter in eligibility determination; and

[3] appraisal of fair market value of farm was substantial evidence of value of applicant's 50% interest in farm which he conveyed to his son and daughter.

Petition dismissed.

Attorneys and Law Firms

****492** Pierro & Associates, L.L.C., Albany (Louis W. Pierro of counsel), for petitioner.

Eliot Spitzer, Attorney General, New York City (Marion R. Buchbinder of counsel), for Commissioner of Health of New York State, respondent.

****493** Veronica M. Kosich, Catskill, for Commissioner of Social Services of Columbia County, respondent.

Before: PETERS, J.P., MUGGLIN, LAHTINEN and KANE, JJ.

Opinion

***767** MUGGLIN, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Columbia County) to review a determination of respondents which found petitioner ineligible to receive Medicaid benefits.

Petitioner applied to the Columbia County Department of Social Services (hereinafter DSS) on November 30, 2000 for Medical Assistance (hereinafter MA) retroactive to August 1, 2000. DSS determined petitioner to be not then eligible to receive MA because he and his wife had transferred assets valued in excess of $250,000 for no consideration. At issue is (1) a gift of $10,000 by petitioner's wife to each of their 12 grandchildren, (2) the transfer of $8,300 by petitioner's wife to their daughter, and (3) petitioner's conveyance of his 50% interest in a farm property to his son and daughter. It being undisputed that these uncompensated transfers occurred after August 10, 1993 and within the applicable 36–month "look-back" period which immediately preceded petitioner's institutionalization and his application for MA (*see* 18 NYCRR 360–4.4[c][2][I][c]), the statute which governs is Social Services Law § 366(5)(d)(3). That section provides, in pertinent part, that

> "[i]n determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period *shall render* the individual ineligible for nursing facility services for the period of time specified in subparagraph four of this paragraph" (Social Services Law § 366[5][d][3] [emphasis added]).

Consequently, petitioner's arguments that he has rebutted the presumption that the transfers were made for the purpose of qualifying for MA are inapposite. That standard applies only to transfers made between April 10, 1982 and October 1, 1989 (*see* Social Services Law § 366[5][b]).

By applying the general rule found in the quoted statute, DSS found petitioner to be ineligible. Petitioner now argues that (1) one of the statutory exceptions applies to the transfers made by his wife to their grandchildren because a satisfactory showing was made that these assets

were transferred "exclusively for a purpose other than to qualify for medical assistance" (Social Services Law § 366[5][d][3][iii][B]), (2) the $8,300 transfer from his wife to their daughter was a loan, not a gift, and (3) a *768 "fractional interest discount" should be applied to reduce the value of his 50% interest in the farm that he transferred to his son and daughter, thus reducing the length of time that he would be ineligible to receive MA.

Our task is to review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law (*see Matter of Bendtson v. New York State Dept. of Social Servs.*, 166 A.D.2d 853, 855, 563 N.Y.S.2d 185 [1990]). "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 331, 763 N.Y.S.2d 518, 794 N.E.2d 660 [2003], quoting *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180, 408 N.Y.S.2d 54, 379 N.E.2d 1183 [1978]). Petitioner **494 bears the burden of proving eligibility (*see Matter of Brunswick Hosp. Ctr. v. Wing*, 249 A.D.2d 385, 386, 671 N.Y.S.2d 123 [1998]; *Matter of Bendtson v. New York State Dept. of Social Servs., supra* at 855, 563 N.Y.S.2d 185).

[1] After full review of the record, we conclude that petitioner has not sustained his burden of proof. We also conclude that with respect to the gifts to the grandchildren and the transfer of $8,300 to the daughter, while evidence exists that would support a contrary conclusion, there is substantial evidence to support the agency determinations. First, with respect to the transfers to the grandchildren, petitioner argues that he and his wife were estranged and therefore she should not be considered to be his spouse for MA eligibility purposes. He also asserts that the transfers were made for the exclusive purpose of providing for the educational needs of these children. DSS's rejection of both arguments is supported by substantial evidence. Petitioner's wife continued to express a genuine concern for her husband's health, visited him at the nursing home, filed joint income tax returns with him, participated in at least one family holiday celebration with him, never sued for divorce and lived in the same house with him for the majority of the time during which she was making the gifts to the grandchildren. These factors support the agency determination that the parties were not estranged. Moreover, the transfers were made within the look-back period when petitioner's health was beginning to deteriorate and while they were sharing the services of the same tax adviser.

[2] With respect to the $8,300 transferred to the parties' daughter, while both testified that it was a loan, not a gift, no documentation supporting this contention was produced and, although a substantial period of time had elapsed, only $500 had been returned by the daughter. Moreover, there was no apparent *769 interest rate set, and no time limit or fixed schedule for repayment. Thus, we find that substantial evidence exists demonstrating that the administrative determination has a rational basis in the record (*see Solarski v. Glass*, 225 A.D.2d 868, 869, 638 N.Y.S.2d 812 [1996]).

[3] Petitioner's third argument concerning the fractional interest deduction is a tacit admission that this transfer rendered him ineligible for benefits. While petitioner may be correct that the Internal Revenue Service will recognize a fractional interest discount for gift tax purposes, there is nothing in the Social Services Law which recognizes this concept nor which authorizes anything other than what the agency did—that is—obtain an appraisal of the fair market value of the farm and divide it in half to establish petitioner's 50% interest. The only appraisal in the record was submitted by DSS and constitutes substantial evidence of value (*see Matter of De Santis v. Wing*, 289 A.D.2d 953, 955, 734 N.Y.S.2d 774 [2001]).

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

PETERS, J.P., LAHTINEN and KANE, JJ., concur.

All Citations

14 A.D.3d 766, 787 N.Y.S.2d 491, 2005 N.Y. Slip Op. 00058

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