

Sample Trusts

by

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DISCLAIMER: This form is for educational purposes only and is only meant as a sample form, which should not be relied on as a complete trust. It is designed to be used as guidance for the attorney who should analyze each individual case before drafting each client's trust. There are many variations that the attorney can use to meet the particular client's needs. This sample form is not legal advice.

JANE DOE IRREVOCABLE TRUST

TRUST AGREEMENT, made this ____ day of December, 2016 by and between JANE DOE, residing at _____ (hereinafter referred to as the "Grantor"), and JOHN SMITH, residing at _____ and JOE SMITH residing at _____ (hereinafter referred to as the "Co-Trustee").

WITNESSETH:

WHEREAS, the Grantor desires to create a trust to hold such property itemized and described in "Exhibit A" attached hereto and made a part hereof, together with such monies, securities and other assets as the Trustee may hereafter at any time hold or acquire hereunder (said monies, securities and other assets, being hereinafter referred to collectively as the "Trust Estate") for the purposes hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Grantor agrees to execute such further instruments as shall be necessary to transfer said property to the Trust and the Trustee agrees to hold the Trust Estate for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

**ARTICLE I.
GENERAL PROVISIONS**

(1) ADDITIONS TO CORPUS

The Grantor with written notice to the Trustee may add from time to time to the Trust Estate any property by deed or Will or otherwise. The Grantor further grants to other persons the power to add additional properties to this Trust, subject to acceptance by the Trustee.

(2) LAWS GOVERNING

The Grantor is currently a resident of the State of New York, and all questions pertaining to the validity, construction, effect and administration of this Agreement shall be determined by and in accordance with the laws of New York State. This Agreement shall be construed and regulated in all respects by the laws of the State of New York.

(3) NAME OF TRUST

This Trust shall be known as the “JANE DOE IRREVOCABLE TRUST” and it shall be sufficient that it be referred to as such in any deed, assignment, bequest or devise.

(4) TRUST IRREVOCABLE

This Trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, including the Grantor, be amended, altered or modified in any manner.

(5) FAMILY MEMBERS

At the time of the execution of this Trust, Grantor's family consists of:

Grantor's spouse, **[name of Grantor's spouse]**, herein sometimes referred to as "spouse."

Grantor's children, **[name of Grantor's child 1]**, **[name of Grantor's child 2]** and **[name of Grantor's child 3]**, herein sometimes referred to as "child" or "children."

Whenever in this Trust the Grantor makes a disposition of property to persons described therein as a child, children, issue, descendants, or distributees or by any term of like import, the Grantor does intend to include their adopted children or the issue of such adopted children.

**ARTICLE II.
DISPOSITION OF TRUST ESTATE DURING GRANTOR'S LIFETIME**

The Trustee shall hold, manage, invest and reinvest the Trust Estate, and shall pay or apply the income and principal of the Trust Estate in the following manner:

(1) DISTRIBUTION OF INCOME AND PRINCIPAL

(a) INCOME DISTRIBUTIONS: The net income of the Trust shall be paid to or applied for the benefit of the Grantor during Grantor's lifetime, in convenient installments, at least quarterly. Net income shall be strictly defined as interest income, dividends and rent.

(b) PRINCIPAL DISTRIBUTIONS: During the lifetime of the Grantor, the Trustee shall pay as much of the principal from the Trust Estate as the Trustee shall deem proper, in the Trustee's sole and absolute discretion, to or for the benefit of Grantor's children or grandchildren, up to the entire amount of the trust corpus together with any accumulated income thereon (including to the Trustee(s) themselves if they are a named remaindermen). In the event any remainder beneficiary's interest is to be held in a continuing trust upon the death of the Grantor, the Trustee shall be governed by the standard for distributions contained in said continuing trust

to prevent this power from affecting said beneficiary's right to obtain or maintain government benefits, or giving said beneficiary's creditors any rights hereunder. A Trustee may only make a distribution to himself upon the consent of a co-trustee, or, in the event there is only one Trustee acting, upon the consent of a successor Trustee as a condition precedent to the Trustee making any said distributions. This paragraph is expressly intended to negate the provisions of section 10-10.1 of Estate Powers and Trust Laws of the State of New York.

Any distributions made pursuant to the provisions herein shall be considered as advancements in determining the beneficiary's respective share as provided for hereinafter.

The Trustee shall have no right to invade principal of the Trust Estate for the benefit of the Grantor or Grantor's spouse. The Grantor directs that the provisions of Section 7-1.6 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto, shall not be available to require any invasion of principal by the Trustee or any court.

(c) RESIDENTIAL REAL PROPERTY: In the event that this Trust holds residential real property (including condominiums or the shares of a cooperative apartment) used by the Grantor, then Grantor shall have the exclusive right to occupy and use the said real property (including a cooperative apartment) for residential purposes. The Grantor shall not be required to pay rent for such property, but shall be responsible for and required to pay all of the expenses of the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep of the property.

ARTICLE III.
COORDINATION WITH THE ESTATE OF GRANTOR OR GRANTOR'S SPOUSE

Upon the death of the Grantor or Grantor's Spouse, the Trustee, in the Trustee's sole and absolute discretion, may pay directly or acquire by purchase, exchange or otherwise, certain

assets from either the estate of the Grantor or Grantor's spouse to provide said estate with cash to pay: (i) the funeral expenses of the Grantor or Grantor's spouse, (ii) any and all death taxes imposed upon the estate, (iii) court filing fees of a probate or administration proceeding and any and all legal and accounting fees related to the estate, and (iv) the amount, if any required to satisfy the cash bequests made in a Will by the Grantor or Grantor's spouse.

The Trustee shall have no duty to: (i) determine the accuracy or propriety of any amount or sum; (ii) see to the application of any sum paid, or other property delivered, to the Executor of the Grantor or the Grantor's spouse; or (iii) withhold distribution of any asset, except as may be limited by other paragraphs of this Trust.

**ARTICLE IV.
DISPOSITION OF TRUST ESTATE UPON DEATH OF GRANTOR**

(1) DISTRIBUTION UNDER LIMITED POWER OF APPOINTMENT

The Grantor may appoint all or any portion of the principal and any accumulated and accrued income of this Trust to or among any one or more members of a class consisting of beneficiaries of the Grantor limited to Grantor's children and/or grandchildren, whether presently living or born hereafter, in such proportions and amounts, without regard to equality, outright or in further trust, as the Grantor may direct and appoint by Grantor's Last Will and Testament, submitted for probate within ninety (90) days of Grantor's death, by specific reference hereto, or by a written acknowledged instrument executed by Grantor (or any person having a valid Durable Power of Attorney for such Grantor) making specific reference to this power of appointment. No such appointment shall be made to Grantor, Grantor's spouse, Grantor's

creditors, the creditor of Grantor's spouse, Grantor's estate or the creditors of Grantor's estate, the creditors of Grantor's spouse, the estate of Grantor's spouse or the creditors of Grantor's spouse's estate.

(2) DISTRIBUTION IN DEFAULT OF EXERCISE OF POWER OF APPOINTMENT

(a) DISPOSITION IN THE EVENT GRANTOR'S SPOUSE SURVIVES THE

GRANTOR: In the event that the Grantor has not exercised the limited power of appointment conferred upon the Grantor in Section (1) of this Article as to the Trust Estate **and Grantor's spouse survives Grantor**, then the Trustee shall maintain and distribute the Trust Estate, as follows:

(i) INCOME DISTRIBUTIONS: During the lifetime of the Grantor's spouse, the Trustee, in the Trustee's sole discretion, shall pay the entire net income to or for the benefit of Grantor's spouse annually in quarterly or more frequent installments.

(ii) PRINCIPAL DISTRIBUTIONS: During the lifetime of Grantor's spouse, the Trustee, shall pay as much of the principal from the Trust Estate as the Trustee shall deem proper, in the Trustee's sole and absolute discretion, to or for the benefit of Grantor's children or grandchildren. up to the entire amount of the trust corpus together with any accumulated income thereon (including to the Trustee(s) themselves if they are a named remaindermen). A Trustee may only make a distribution to himself upon the consent of a co-trustee, or, in the event there is only one Trustee acting, upon the consent of a successor Trustee as a condition precedent to the Trustee making any said distributions. This paragraph is expressly intended to negate the provisions of section 10-10.1 of Estate Powers and Trust Laws of the State of New York.

Any distributions made pursuant to the provisions herein shall be considered as advancements in determining the beneficiary's respective share as provided for hereinafter.

In no event shall the Trustee invade principal to or for the benefit of Grantor's spouse. The Grantor directs that the provisions of Section 7-1.6 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto, shall not be available to require any invasion of principal by the Trustees or any court.

(iii) Upon the demise of Grantor's spouse, the Trustee shall pay and distribute the balance of the Trust Estate to Grantor's children, per stirpes.

(b) DISPOSITION IN THE EVENT GRANTOR'S SPOUSE PREDECEASES THE GRANTOR: In the event that the Grantor has not exercised the limited power of appointment conferred upon the Grantor in section (1) of this Article as to the Trust Estate, and further in the event Grantor's spouse predeceases the Grantor, then the Trustee shall pay and distribute the Trust Estate to Grantor's children, per stirpes.

(3) CONTINGENCY TRUST PROVISIONS

(a) DISTRIBUTION TO CONTINGENT BENEFICIARIES: In the event that none of Grantor's beneficiaries named hereunder survive to the time the Trust Estate is to vest, then, at the death of the last of them, the then remaining Trust Estate shall be distributed to Grantor's heirs at law under the laws of the State of New York.

(b) DISTRIBUTION TO BENEFICIARY UNDER AGE TWENTY FIVE: If any property comprising part of the Trust Estate shall be payable to a person under the age of twenty-five (25) years, the share of such beneficiary (being hereinafter referred to as "Beneficiary") shall not be conveyed or distributed to Beneficiary but instead shall be given to the Trustee named under sub-paragraph (d) below and held by the Trustee, in trust, pursuant to the following

provisions:

- (i) Trustee shall hold, manage, invest and reinvest each share set aside for Beneficiary in a separate trust for the benefit of Beneficiary and shall pay so much or all of the net income from such trust to or for the benefit of Beneficiary thereof, for the health, education, maintenance and support of Beneficiary, to such extent and at such time or times and in such manner as may be determined in the sole discretion of Trustee. Any net income not so paid shall be accumulated and added to principal at least annually and thereafter shall be held, administered and disposed of as a part thereof.
- (ii) Trustee may pay to or for the benefit of Beneficiary, for the health, education, maintenance and support of Beneficiary, from the principal of Beneficiary's trust, such amounts, including the whole thereof, as determined by Trustee in his or her sole discretion.
- (iii) When Beneficiary shall attain age of twenty-five (25) years, the trust for Beneficiary shall terminate and any remaining principal and income shall be paid and distributed to Beneficiary, discharged of trust. If Beneficiary dies before said termination of trust, such principal and income shall be paid and distributed to, or held in further trust for the benefit of, such one or more persons, corporations or other entities (other than Beneficiary, creditors of Beneficiary, the estate of Beneficiary, or creditors of the estate of Beneficiary), to such extent, in such amounts and proportions and in such lawful interests or estates, whether absolute or in trust, as Beneficiary may appoint by specific reference to this power of appointment in the Last Will and Testament of Beneficiary, executed after attaining majority and

admitted to probate, or absent such appointment (or absent Trustee receiving notice of the existence of such a Will within three months after the death of Beneficiary), such principal and income shall be paid and distributed to any then living issue of such Beneficiary, in equal shares, per stirpes, or if Beneficiary has no issue, to Grantor's then living issue, in equal shares, per stirpes. If Grantor has no living issue at such time, the same shall be paid and distributed to those who would take from Grantor as if Grantor were then to die without a will, unmarried and the absolute owner of the same, and a resident of the State of New York.

- (iv) JOHN SMITH is hereby appointed Trustee of the Trust for the Beneficiary. If for any reason, JOHN SMITH is unable or unwilling to serve as Trustee, JOE SMITH shall serve as successor Trustee.

**ARTICLE V.
PROVISIONS RELATING TO THE TRUST ESTATE**

(1) SPENDTHRIFT PROVISION

No interest of any beneficiary in the income or principal of any trust shall be subject to pledge, assignment, sale or transfer in any manner, nor shall any beneficiary have power in any manner to anticipate, charge or encumber his or her interest, nor shall the interest of any beneficiary be liable while in the possession of the Trustee for the debts, contracts, liabilities, engagements or torts of the beneficiary.

(2) PERSON WITH A SEVERE AND CHRONIC OR PERSISTENT DISABILITY

Any provision hereof to the contrary notwithstanding, if any person (other than the Grantor or Grantor's spouse) with a severe and chronic or persistent disability as defined by Section 7-1.12 of the New York Estates, Powers and Trusts law, as amended, is entitled to a trust share hereunder, then said beneficiary's interest in the trust share shall be held and managed by the Trustee for the benefit of said beneficiary, as provided for herein.

(a) The Trustee shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustee shall deem advisable, in his or her sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of such Trust the balance of net income not so paid or applied.

(b) It is the Grantor's intent to create a Supplemental Needs Trust which conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts law, or any successor statute thereto.

The Grantor intends that the Trust assets be used to supplement, not supplant, impair or diminish any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

Consistent with that intent, it is the Grantor's desire that, before expending any amounts from the net income and/or principal of this Trust, the Trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the Trustee endeavor to maximize

the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

(c) None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

(d) The Grantor directs that the provisions of Section 7-1.6 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto, shall not be available to require any invasion of principal by the Trustees or any court.

(e) The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

(f) Notwithstanding the above provisions, the Trustee may make distributions to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the Trustee determines that (i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance; provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as provided above, without exception.

(g) Upon the demise of said beneficiary, any balance remaining of the trust share shall be distributed to said beneficiary's issue, per stirpes; and if none living, to Grantor's beneficiaries named under Article IV, as if said beneficiary predeceased the Grantor.

(h) JOHN SMITH is hereby appointed Trustee of the Supplemental Needs Trust. If for any reason, JOHN SMITH is unable or unwilling to serve as Trustee, JOE SMITH shall serve as successor Trustee.

(3) GRANTOR TRUST STATUS

The Grantor intends for the Trust to be treated as a "Grantor Trust" for income tax purposes in accordance with Internal Revenue Code Sections 671 to 678, the effect of which is that the Grantor will be taxed on the income of the Trust.

(4) COMMON DISASTER

If any beneficiary including Grantor's spouse shall die simultaneously with the Grantor or in such circumstances that there is not sufficient evidence to determine the order of our deaths, then it shall be presumed that the Grantor survived such beneficiary and the provisions of this Trust shall be construed on that assumption, unless otherwise provided herein.

ARTICLE VI. POWERS AND DUTIES OF TRUSTEE

(1) INVESTMENTS

(a) The Trustee hereunder (including any Successor Trustee) shall have the continuing, absolute and discretionary power to deal with any property, real or personal, held in such Trust(s). Such power may be exercised independently and without the prior or subsequent

approval of any court or judicial authority, and no person dealing with such Trustee shall be required to inquire into the propriety of any of the actions of such Trustee. The Trustee shall not be limited to the type and character of investments in which he or she may invest the funds of this Trust, so long as the Trustee uses reasonable prudence and judgment in the selection of investments. The Trustee shall have the following general powers, in addition to, and not by way of limitation of, the powers provided by Section 11-1.1 of the New York Estates, Powers and Trusts Law:

1. To retain any property contributed by the Grantor, so long as such retention appears advisable, and to exchange any such property for other properties and to retain such items received in exchange. The Trustee may presume that the Grantor has confidence in the property owned by the Grantor and added to the Trust Estate, and, therefore, no sale thereof shall be made solely in order to diversify investments or to convert said asset to income producing property.

2. To retain such property for any period, whether or not the same be of the character permissible for investments by fiduciaries under any applicable law, and without regard to any effect the retention may have upon the diversification of the investments.

3. To borrow monies with security upon such terms as to rate and maturity and in other respects as the Trustee may deem proper, and to secure the repayment of any and all amounts so borrowed by mortgage or pledge of any property. All such payment(s), including any Trustee's fees incurred by reason of such payments, shall be charged generally against and made from the Trust Estate; provided, however, that no such payment shall be made from the proceeds of any qualified pension or profit sharing plan received by the Trustee.

4. To lease, with or without consideration, any such property beyond the period fixed by statute for leases made by a Trustee and beyond the duration of the Trust Estate or any Trust created hereunder.

5. To invest any part or all of the principal of the Trust Estate in any common trust fund, legal or discretionary, which may be established and operated by and under the control of the Trustee.

6. To improve real property and to pay the cost out of principal.

7. To permit any person having an interest in the income of the trust to occupy real property upon such terms as the trustee deems proper, whether rent free or for the payment of taxes, insurance, maintenance and ordinary repairs, or other expenses.

8. To sell, transfer, exchange, convert or otherwise dispose of, or grant options with respect to any security or property, real or personal, held in any trust fund hereunder at public or private sale, with or without security, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as the Trustee may deem advisable.

9. To allocate in the Trustee's sole discretion, in whole or in part, to principal or income, all receipts and disbursements for which no express provision is made hereunder, which allocation shall fully protect the Trustee with respect to any action taken or payment made in reliance thereon.

Notwithstanding the above, in no event shall the Trustee adjust between income and principal if such adjustment would cause any public benefit program to consider the adjusted principal or income to be an available resource or available income or if such adjustment would otherwise supplant any governmental benefit that any beneficiary is entitled to receive.

The Trustee shall administer this trust according to its terms even if such terms conflict with New York Estates Powers and Trusts Law §11-2.3(b)(5)(A) as amended.

10. A Trustee shall not have the power to elect the optional uni-trust provisions as created under New York Estates Powers and Trusts Law §11-2.4.

11. The Trustees hereunder are empowered to act severally as to the above powers, including but not limited to transactions with financial institutions and banks.]

(2) ACCOUNTINGS

The Trustee shall render to the then current income beneficiary(s), statements of account of receipts and disbursements at least annually. In addition, a Trustee shall account to the then current income beneficiary(s) upon resignation of said Trustee within thirty (30) days from the said resignation.

**ARTICLE VII.
PROVISIONS RELATING TO TRUSTEE**

(1) COMPENSATION

The Trustee shall be entitled to receive a statutory commission for services rendered hereunder as provided for under New York law and shall also be reimbursed for all reasonable expenses incurred in the management and protection of the Trust Estate and travel and lodging expenses to and from the Trustee's residence and the residence of the Grantor or Grantor's spouse as frequently as the Trustee determines in the Trustee's sole discretion.

(2) LIMITATIONS ON TRUSTEE-BENEFICIARY

Notwithstanding anything herein to the contrary, no individual Trustee who is also a beneficiary hereunder shall have any right, power, duty or discretion hereunder concerning the Trust Estate, if such right, power, duty or discretion conferred upon said Trustee under this Agreement is determined to be a general power of appointment under Section 2041 of the Internal Revenue Code of 1986, as amended, which would cause any assets of the Trust Estate to

be included in the estate of said Trustee-Beneficiary at death. Any such right, power, duty or discretion with such effect shall be null and void with respect to said Trustee-Beneficiary. In such event, any other Trustee(s) shall have the full authority to act.

(3) BOND

No bond or other security shall be required of any non-corporate Trustee.

(4) HOLD HARMLESS

No Trustee shall be liable or responsible for any loss or damage arising by reason of any act or omission to or by the Trustee or in connection with any activities carried out under this Trust, except for the Trustee's own gross negligence, willful neglect or unlawful act.

(5) CO-TRUSTEES

In the event there are Co-Trustees hereof, the provisions applicable to the Trustee shall be applicable to each Co-Trustee.

**ARTICLE VIII.
TRUSTEES**

(1) APPOINTMENT OF SUCCESSOR TRUSTEES

(a) Upon the death, incapacity, resignation or discharge of either Co-Trustee, the remaining Co-Trustee shall continue to act alone. The remaining Co-Trustee, in his or her sole discretion, may appoint a Co-Trustee or Successor Trustee.

(b) If any Successor Trustee shall fail to serve or shall resign, the Trustee may designate in writing a Successor Trustee. If the Trustee fails to designate or said Successor Trustee fails to accept such appointment within ten (10) days, the then current income beneficiary who is of

legal age and the guardians of any incompetent then current income beneficiary shall appoint a Successor Trustee.

(2) REMOVAL AND RESIGNATION OF TRUSTEES

(a) The Grantor reserves the right to remove a trustee upon three (3) days written notice and replace said Trustee with a Successor Trustee (other than the Grantor or Grantor's spouse). In the event the Grantor removes but fails to replace the Trustee, then the Successor Trustee as provided for herein shall replace the Trustee. No Successor Trustee, whether appointed by the Settlor or designated by another, shall have the right to invade principal and/or revoke the Trust for the benefit of the Settlor.

**ARTICLE IX.
MISCELLANEOUS**

(1) PERPETUITIES SAVINGS PROVISION

Notwithstanding any provision herein to the contrary, any and all trusts created herein shall terminate no later than 21 years after the death of all of Grantor's descendants living on the date of this Agreement and, if any trust shall so terminate, all property then belonging to the income or principal shall be distributed to the beneficiary(s) named herein free of Trust.

(2) HEADINGS AND USAGES

The paragraph headings used are for convenience only and shall not be resorted to for interpretation of this Trust. Wherever the context so requires, the masculine shall include the feminine and neuter and the singular shall include the plural.

(3) VALIDITY OF PROVISIONS

If any portion of this Trust is held to be void or unenforceable, the balance of this Trust shall nevertheless be carried into effect.

IN WITNESS WHEREOF, **JANE DOE**, Grantor, **JOHN SMITH** and **JOE SMITH**, Co-Trustees, have signed and sealed this Trust Agreement.

JANE DOE, Grantor

JOHN SMITH, Co-Trustee

JOE SMITH, Co-Trustee

[Acknowledgements]

EXHIBIT A
TO THE [NAME OF GRANTOR] IRREVOCABLE TRUST

DATED: [date of execution]

[Description of assets contributed to the trust]

Receipt of the above
listed items is
hereby acknowledged
by:

[Name of Grantor], Grantor

[Name of co-trustee1], Co-Trustee

[Name of co-trustee2], Co-Trustee

DATED: [date of acknowledgment]

JOHN DOE TRUST
SAMPLE THIRD PARTY TRUST

THIS TRUST AGREEMENT made and entered into this ____ day of January, 2017, between **JANE DOE**, Grantor, with address at _____ (hereinafter referred to as the "Grantor"), and **JANE DOE**, Trustee, residing at _____ (hereinafter referred to as the "Trustee").

WHEREAS, the Grantor desires to provide for the supplemental needs of **JOHN DOE** (hereinafter sometimes referred to as "JOHN") by placing assets into this Trust to be held by the Trustee as part of the Trust Estate (said monies being hereinafter referred to collectively as the "Trust Estate") for purposes hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Trustee agrees to hold the Trust Estate, IN TRUST, NEVERTHELESS, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

ARTICLE 1
GENERAL PROVISIONS

(1) **LAWS GOVERNING**. This Agreement shall be construed and regulated in all respects by the laws of the State of New York. This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein that shall be related to or involve government entitlements such as SSI, Medicaid and or other federal benefit programs.

(2) **NAME OF TRUST**. This Trust shall be known as the "**JOHN DOE TRUST**" and it shall be sufficient that it be referred to as such in any deed, assignment, bequest or devise.

(3) **PURPOSE**. 1. This Trust is created expressly for the sole benefit of **JOHN DOE**. This Trust is to enable **JOHN DOE** to qualify or continue to qualify for medical assistance under the Medicaid program as provided for by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"). In the administration of the Trust, the Trustees shall undertake all acts necessary to establish and maintain **JOHN DOE**'s eligibility for medical assistance under the Medicaid program.

(4) **TRUST IRREVOCABLE**. This Trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be amended, altered or modified in any manner.

Notwithstanding the above to the contrary, in the event that the Trust Estate is challenged or faces imminent invasion by any governmental department or agency in such a way as to affect **JOHN DOE**'s eligibility for benefits available under any governmental program, the Trustee or a Court of competent jurisdiction is empowered to amend this Trust so as to maintain **JOHN DOE**'s eligibility for benefits under such governmental program.

(5) FAMILY MEMBERS. At the time of the execution of this Trust, **JOHN DOE**'s Family consists of:

LIST FAMILY MEMBERS

(6) ADDITIONS TO CORPUS. Grantor, with written notice to the Trustee, may add from time to time to the Trust Estate any property by deed, Will or otherwise. In no event can **JOHN DOE** add his own assets to the Trust Estate.

ARTICLE II
DISTRIBUTION OF INCOME AND PRINCIPAL DURING
LIFETIME OF JOHN DOE

The Trustee shall hold, manage, invest and reinvest the trust share for **JOHN DOE**'s benefit, as provided for herein.

(a) The Trustee shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of **JOHN DOE**, in-kind, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustee shall deem advisable, in his or her sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of such Trust the balance of net income not so paid or applied.

(b) It is Grantor's intent to create a Supplemental Needs Trust that conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts law, or any successor statute thereto.

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

(c) USE OF INCOME OR PRINCIPAL. None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for

which **JOHN DOE** may otherwise be eligible or which **JOHN DOE** may be receiving.

(d) EPTL §7-1.6. Grantor directs that the provisions of Section 7-1.6 of the Estates, Powers and Trust Law of the State of New York, or any successor statute thereto, shall not be available to require any invasion of principal by the Trustees or any court.

(e) **JOHN DOE** does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

(f) In the event that the Trust Estate shall be challenged or in any way threatened with invasion of its funds by any governmental agency or creditor of **JOHN DOE** or his estate, the Trustee is authorized and empowered, in the Trustee's sole and absolute discretion, to terminate the Trust or any part thereof, and to distribute the remaining trust corpus and any accumulated or accrued income to the beneficiaries named herein as if **JOHN DOE** is deceased.

(g) FOOD AND SHELTER. Notwithstanding the above provisions, the Trustee may make distributions to meet **JOHN DOE**'s need for food, shelter or health care even if such distributions may result in an impairment or diminution of **JOHN DOE**'s receipt or eligibility for government benefits or assistance but only if the Trustee determines that: **JOHN DOE**'s needs will be better met if such distribution is made, and (ii) it is in **JOHN DOE**'s best interests to suffer the consequent effect, if any, on his eligibility for or receipt of government benefits or assistance

(h) NULLIFICATION OF PARAGRAPH (g). Provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to Paragraph(g) shall result in **JOHN DOE**'s loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as provided above, without exception.

(i) Notwithstanding the above provisions to the contrary, if in order to qualify the funding of this Trust as a Medicaid exempt transfer by the Grantor and to qualify this Trust as an unavailable resource for purposes of Medicaid eligibility of **JOHN DOE**, then the Trustee shall provide for the spending of the Trust assets for the benefit of **JOHN DOE** on a basis that is actuarially sound based on **JOHN DOE**'s life expectancy.

(j) OTHER NEEDS AND COMFORTS. The Trustee has discretion to use income and/or principal to insure that the beneficiary enjoys the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, entertainment and any other need and/or comforts **JOHN DOE**

may require to enhance his quality of life. This discretion shall include the use of income for needed medical care not paid for by private health insurance or government entitlements. This provision shall include the purchase of any equipment, treatment, computer, services or goods that would enhance the quality of **JOHN DOE**'s life.

ARTICLE III
ADMINISTRATION OF THE ESTATE OF JOHN DOE

Upon **JOHN DOE**'s death, the Trustee, in the Trust's sole and absolute discretion, may pay directly or indirectly: (i) funeral expenses of **JOHN DOE**'s, (ii) any and all death taxes imposed upon **JOHN DOE**'s estate, (iii) court filing fees of a probate, administration or estate proceeding and any and all legal and accounting fees related to **JOHN DOE**'s estate.

ARTICLE IV
DISPOSITION OF TRUST ESTATE UPON JOHN DOE'S DEMISE

(1). **DISTRIBUTIONS.**

- (a) In the event **JOHN DOE** predeceases the Grantors, then the Trust shall terminate and the Trustees shall pay and distribute the Trust Estate to the issue of **JOHN DOE**, per stirpes and subject to the provisions of Article V herein. In the further event **JOHN DOE** predeceases the Creators leaving no surviving issue, the Trustees shall pay and distribute the Trust Estate to the issue of the Creators, per stirpes.
- (b) In the event Creators predecease **JOHN DOE**, then upon the death of **JOHN DOE**, the Trustees shall immediately pay and distribute the Trust Estate to the issue of **JOHN DOE** per stirpes and subject to the provisions of Article V herein. In the event **JOHN DOE** leaves no surviving issue, the Trustees shall pay and distribute the Trust Estate to the issue of the Creators, per stirpes.

(2). **DISTRIBUTION TO CONTINGENT BENEFICIARIES.** In the event that none of Grantor's beneficiaries names hereunder survive to the time the Trust Estate is to vest, then, at the death of the last of them, the then remaining Trust Estate shall be distributed to Grantor's heirs at law under the laws of the State of New York.

(3) **DISTRIBUTIONS TO BENEFICIARIES UNDER AGE TWENTY FIVE.**

Notwithstanding any above provision to the contrary, if under this Article any such share shall become payable to a beneficiary who is less than twenty-five (25) years of age, then the Trustees shall distribute the entire balance of the principal so held in one lump sum to said

beneficiary at age twenty-five (25), and, in the meantime, the Trustees shall pay as much of the net income and/or principal of said share as the Trustees shall deem necessary or proper in the Trustees' sole discretion to or for the benefit of said beneficiary and his or her legal dependents, if any, including education. In the event said beneficiary does not attain age twenty-five (25), then the balance of said share shall be distributed to said beneficiary's issue, per stirpes.

(4) PERSON WITH A SEVERE AND CHRONIC OR PERSISTENT DISABILITY

Any provision hereof to the contrary, if any person (other than the Grantor) with a severe and chronic or persistent disability as defined by Section 7-1.12 of the New York Estates, Powers and Trusts law, as amended, is entitled to a trust share hereunder, then said beneficiary's interest in the trust share shall be held and managed by the Trustee for the benefit of said beneficiary, as provided for herein.

A. The Trustee shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustee shall deem advisable, in their sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of such Trust the balance of net income not so paid or applied.

B. It is the Grantor's intent to create a Supplemental Needs Trust which conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts law, or any successor statute thereto. The Grantor intends that the Trust assets be used to supplement, not supplant, impair or diminish any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is the Grantor's desire that, before expending any amounts from the net income and/or principal of this Trust, the Trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

C. None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

D. No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by Section 7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).

E. The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

F. Notwithstanding the above provisions, the Trustee may make distributions to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the Trustee determines that:

(i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance; provided, however, that if the mere existence of the Trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the Trustee's authority to make such distributions shall cease and shall be limited as provided above, without exception.

G. Upon the demise of said beneficiary, any balance remaining of the trust share shall be distributed to **JACK DOE**; or, if **JACK DOE** shall not then be living, then to the surviving issue of the parent of the beneficiary *per stirpes* and subject to the provisions of **ARTICLE IV (4)** herein.

ARTICLE V **PROVISIONS RELATING TO THE TRUST ESTATE**

(1) **SPENDTHRIFT PROVISION.** No interest of any beneficiary in the income or principal of any trust shall be subject to pledge, assignment, sale or transfer in any manner, nor shall any beneficiary have power in any manner to anticipate, charge or encumber his or her interest, nor shall the interest of any beneficiary be liable while in the possession of the Trustee for the debts, contracts, liabilities, engagements or torts of the beneficiary.

(2) **GRANTOR'S POWERS.** The Grantor reserves the power to reacquire the Trust principal by substituting other property of an equivalent value.

ARTICLE VI **POWERS AND DUTIES OF TRUSTEE**

(1) **INVESTMENTS.** The Trustee of each Trust established hereunder (including any Successor Trustee) shall have the continuing, absolute and discretionary power to deal with any property, real or personal, held in such Trust(s). Such power may be exercised independently and without the prior or subsequent approval of any court or judicial authority, and no person dealing with such Trustee shall be required to inquire into the propriety of any of the actions of such Trustee. The Trustee shall not be limited to the type and character of investments in which the Trustee may invest the funds of this Trust, so long as the Trustee uses reasonable prudence and judgment in the selection of investments. The Trustee shall have the following general powers, in addition to, and not by way of limitation of, the powers provided by Section 11-1.1 of the New York Estates, Powers and Trusts Law:

1. To retain any property so long as such retention appears advisable, and to exchange any such property for other properties and to retain such items received in exchange.

2. To retain such property for any period, whether or not the same be of the character permissible for investments by fiduciaries under any applicable law, and without regard to any effect the retention may have upon the diversification of the investments.

3. To lease any such property beyond the period fixed by statute for leases made by a Trustee and beyond the duration of the Trust Estate created hereunder.

4. To borrow money for any purpose from any source including the Trustee hereunder, and to secure the repayment of any and all amounts so borrowed by mortgage or pledge of any property.

5. To invest any part or all of the principal of the Trust Estate in any common trust fund, legal or discretionary, which may be established and operated by and under the control of the Trustee.

6. To allocate in the Trustee's sole discretion, in whole or in part, to principal or income, all receipts and disbursements for which no express provision is made hereunder, which allocation shall fully protect the Trustee with respect to any action taken or payment made in reliance thereon. We have added language to prevent assets being available to Medicaid.

7. To retain and pay for the benefit of the estate and any beneficiary hereunder attorneys, accountants, financial planners, social workers, health care professionals and any other professional required in the sole discretion of the Trustee, subject to the limitations of Article II.

8. To sell, transfer or exchange any and all Trust assets, real or personal, including the Grantor's residence.

(2) ADDITIONAL POWERS. The foregoing provisions notwithstanding, it is recognized that the Trustee is neither licensed nor skilled in the field of social services. The Trustee may seek the counsel and assistance of **JOHN DOE's** guardian, if any, of **JOHN DOE's** physician(s), and of any state and local agencies that have been established to assist the handicapped or mentally disabled, and similar resources. The Trustee may use these resources to aid **JOHN DOE's** guardian, if any, as appropriate, in identifying programs that may be of social, financial, developmental or other assistance to **JOHN DOE**. However, the Trustee shall not in any event be liable to **JOHN DOE** the remainder beneficiaries of the Trust or any other party for his acts as Trustee hereunder so long as he acts reasonably and in good faith. For example, the Trustee, as well as **JOHN DOE's** guardian, if any, shall not be liable for the failure to identify each and every program or resource that might be available to **JOHN DOE** on account of his disabilities.

(3) ACCOUNTINGS. The Trustee shall render to the then current income beneficiary(s), statements of account of receipts and disbursements at least annually, upon the written request of a beneficiary. In addition, a Trustee shall account to the then current income beneficiary(s) upon resignation of said Trustee within thirty (30) days from the said resignation.

(4) LIMITATIONS ON TRUSTEE-BENEFICIARY. Notwithstanding anything

herein to the contrary, no individual Trustee who is also a beneficiary hereunder shall have any right, power, duty or discretion hereunder concerning the Trust Estate, if such right, power, duty or discretion conferred upon said Trustee under this Agreement is determined to be a general power of appointment under Section 2041 of the Internal Revenue Code of 1986, as amended, which would cause any assets of the Trust Estate to be included in the estate of said Trustee-Beneficiary at death. Any such right, power, duty or discretion with such effect shall be null and void with respect to said Trustee-beneficiary. In such event, the other Trustee(s) shall have the full authority to act.

ARTICLE VII TRUSTEES

(1) APPOINTMENT OF TRUSTEES. Grantor hereby nominates **JANE DOE** as Trustee.

(2) APPOINTMENT OF SUCCESSOR TRUSTEES. Upon the death, incapacity, resignation or discharge of **JANE DOE, JACK DOE**, residing at _____, shall be the Successor Trustee.

(3) REMOVAL AND RESIGNATION OF TRUSTEES.

- (a) A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) **JOHN DOE**; (ii) the Guardian of **JOHN DOE**, if any; (iii) any Successor Trustee; (iv) the Grantor; and (v) the local Social Service agency.
- (b) The Grantor reserves the right to remove any Trustee upon three (3) days written notice and replace said Trustee with a Successor Trustee. In the event the Grantor removes but fails to replace the Trustee, then the Successor Trustee as provided for herein shall replace the Trustee.

(4) HOLD HARMLESS. No Trustee shall be liable or responsible for any loss or damage arising by reason of any act or omission to or by the Trustee or in connection with any activities carried out under this Trust, except for the Trustee's own gross negligence, willful neglect or unlawful act.

(5) COMPENSATION. The Trustee shall be entitled to receive compensation for services rendered hereunder as may be allowable under the laws of the State of New York and shall also be reimbursed for all reasonable expenses incurred in the management and protection of the Trust Estate and travel and lodging expenses to and from the Trustee's residence and the residence of the beneficiary hereunder as frequently as the Trustee determines in the Trustee's sole discretion.

(6) BOND. No bond or other security shall be required of any Trustee or Successor Trustee named hereunder.

ARTICLE VIII
MISCELLANEOUS

(1) **PARAGRAPH HEADINGS**. The paragraph headings used are for convenience only and shall not be resorted to for interpretation of this Trust. Wherever the context so requires, the masculine shall include the feminine and neuter and the singular shall include the plural.

(2) **VALIDITY OF PROVISIONS**. If any portion of this Trust is held to be void or unenforceable, the balance of this Trust shall nevertheless be carried into effect.

IN WITNESS WHEREOF, **JANE DOE**, Grantor, and **JANE DOE**, Trustee, have signed and sealed this Trust Agreement.

JANE DOE, Grantor

JANE DOE, Trustee

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

On the _____ day of _____, in the year 2017, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that (s)he executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

Notary Public

Exhibit A to the **JOHN DOE** Trust DATED January , 2017:

Receipt of the above listed items is hereby acknowledged by:

JANE DOE, Trustee

DATED:

WITNESS

Anatomy of a Trust:
Irrevocable Medicaid Income
Only Trusts

ELIZABETH FORSPAN, ESQ.

April 2017



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Basic Medicaid Eligibility Rules

- Overview of the Medicaid Asset and Income Requirements
- Medicaid Transfer Penalties
- Exempt Transfers
- Non-exempt Transfers

Overview of the Medicaid Asset and Income Requirements

1. Assets:
 - The Medicaid applicant may keep up to \$14,850 plus exempt assets
 - The well spouse in the community may keep \$74,820 or ½ of the couple's assets, but no greater than \$120,900
2. Income:
 - For Nursing Home care (Institutional Medicaid), a Medicaid applicant may only keep a \$50 personal needs allowance plus any cost of health insurance premiums
 - The well spouse in the community can keep up to \$3,022.50 of the total household income
 - For Home Care (Community Medicaid), a Medicaid applicant may only keep \$825/month (\$1,209/month for a couple) + \$20 disregard for a total of \$845/month
 - An Applicant for Home Care may keep income in excess of the Medicaid allowable limits through the use of a Pooled Trust
3. A spouse can sign a Spousal Refusal – but again, beware of spousal suits!
4. The five year look-back period applies to Nursing Home Medicaid, but NOT to Community Medicaid

Medicaid Transfer Penalties

- When an individual applies for Medicaid nursing home care, Medicaid will look back 5 years to see what assets the applicant and spouse (if any) had, and what assets were gifted away.
- If money was gifted during the look-back, Medicaid calculates a so-called “*penalty period*” that will cause the applicant to become ineligible for Medicaid coverage for a period of time.
- For NYC applicants, every \$12,157 (\$12,198 for Northern Metro area and \$12,811 for Long Island) that is gifted away during the look-back will create a one month period of ineligibility
- Period starts when applicant is institutionalized, applies for Medicaid benefits and is “otherwise eligible” except for gifts.
- For example, a transfer of \$121,570 within the 5-year lookback period will create a 10 month period of ineligibility (for NYC applicants using the NYC regional rate).

Exempt Transfers

- “Exempt transfers” refer to gifts made during the look-back that will not cause a Medicaid penalty period
- Exempt transfers include:
 1. Transfers to the well spouse... but beware of spousal limits and spousal lawsuits
 2. Transfers to applicant’s blind or disabled child of any age... but beware of any effect on the child’s own benefits (e.g. Medicaid, SSI)
 3. Transfers for fair market value
 4. Transfers made exclusively for a purpose other than qualifying for Medicaid (difficult to get)
 5. Transfers that have been returned (“Return of Gift”)

Exempt Transfers of the Home

- Exempt transfers of the primary residence (the “Homestead”)
 1. Transfer of the home to a spouse
 2. Transfer of the home to a disabled, blind or minor child (but consider the child’s benefits!)
 3. Transfer of the home to a sibling of the A/R with an equity interest and who resided in the home for one year prior to institutionalization
 4. Transfer of the home to an adult caregiver child who resided in the home for at least two years prior to institutionalization (“Caretaker Child” exception)

Home Equity Limitation: The Deficit Reduction Act of 2005 signed by President Bush on February 8, 2006 expanded the look-back to 5 years and also provided for a limitation on the equity value of a home in order to qualify for Medicaid

- The equity limitation is currently \$840,000
- Value of homes, condos & co-ops in NYC, Westchester and Long Island often exceed \$840,000
- Equity limitation does not apply if there is a spouse or a minor, blind or disabled child living in the home

Tax Implications of Outright Transfers vs. Transfer to Trusts

- Transfers of Real Property Including Principal Residence
- Transfer of Liquid Assets
- Basis Issues

Outright Transfers (Gifts)

- Carryover Basis
- No Sec. 121(a) for Donor
- Creditor Issues
- Pre-deceased child/Donee
- Divorce

Transfers to Trust

- Basis Step-Up
- Sec. 121(a) is available for Grantor(s)
- Asset Protection

Outright Transfer of Home Subject to Life Estate (primary residence)

- Starts the Medicaid penalty period for nursing home Medicaid eligibility
- Penalty period is reduced by the value of the life estate
- Basis step-up at the time of death – Includable in the taxable estate under IRS Section 2036 (a)
- Value of life estate is not considered an asset for Medicaid eligibility
- Example: Mom transfers her home, bought for \$12k but now valued at \$700k, to her 2 children subject to a life estate
- BUT, PROBLEM IF SOLD DURING LIFETIME: No full \$250,000 exclusion (IRS Section 121 (a)) on entire home, **and** value of life estate is deemed an asset (ineligibility period)
- Section 121(a) exclusion will only apply as to the value of the life estate

Irrevocable Medicaid Income Only Trust: Required Terms of Trust

- Trust Requirements:
 - Must be Irrevocable
 - Settlor should not serve as Trustee (best practice)
 - Ensure that no principal goes to the Grantor
 - Any principal or income that can be distributed to the Grantor or Grantor's spouse will be considered available for Medicaid purposes
 - Discretionary payments to Grantor / Grantor's spouse will be available even if subject to an ascertainable standard
 - "HEMS" will not be acceptable for Medicaid purpose
 - 5 x 5 power is not good
 - Ensure Trustee discretion
 - Be careful with the ability to swap assets and changing Trustees

Irrevocable Medicaid Income Only Trust:

- **Advantages:**
 - Considered a completed transfer for Medicaid purposes
 - Decision-making can be easier and more efficient
 - Can provide protection against children's creditors
 - Income tax benefits
 - Real Estate tax exemptions
 - IRC Section 121 Exemption can be maintained
 - Can preserve step-up in basis upon Settlor's death
 - Can reserve limited power of appointment to make limited changes to beneficiaries

Irrevocable Medicaid Income Only Trust:

- Disadvantages:
 - Loss of control/independence
 - More costly / complicated
 - Difficult to mortgage real estate
 - Excess income considerations –
i.e. Does the trust provide income to the Settlor? Will that result in high spend-down if Medicaid is needed at a later date
 - If so, consider giving income to another beneficiary
 - Beware high trust income tax rates

Protecting Residence Within Irrevocable Trust:

Transfers of Real Property Including Principal Residence to a Trust

- Ability to live in home
- Ability to receive rental income (if desired)
- May direct Trustees to sell property and exchange for new property
- Section 121 Exclusion
- Maintain basis step-up
- Asset included in estate of Settlor
- Limited Power of Appointment
- Maintain degree of control/independence

IRC Section 121(a)

- Up to \$250,000.00 of gain excluded from gross income
- On sale/exchange of property
- Property **owned** and used as principal residence for periods aggregating 2 years or more

Section 121- Ownership Requirement

- Single owner entity disregarded for federal tax purposes (i.e. single member LLC) satisfies requirement
- Grantor trusts – satisfies requirement
- Limited partnership – does not satisfy requirement
- Regs 1.121-1(c)(3)

Transfers of Liquid Assets

- **Transferring Brokerage Accounts to a Trust**
- Low basis versus high basis assets will inform decision in many cases
 - Maintain step-up for low basis assets
 - Completed gift and no estate inclusion for high basis assets (less relevant now in NY given the high NYS exclusions)
 - Consider income tax consequences for beneficiaries
- Consider Grantor Trust so Grantor will pay income taxes regardless of who receives income
- Consider income being generated for Medicaid purposes

Transfers of Liquid Assets

- **Transferring a Non-qualified Annuity to a Trust**
- Cash value is considered an asset for Medicaid purposes: non-exempt asset
- Certain pre-DRA 2005 annuity rules apply: Medicaid may treat as income stream and not asset, but must meet DRA requirements
- Goal is to maintain tax-deferred status
- May only be transferred to a grantor trust
- IRC Section 72(u)

Annuity Contract- IRC 72(u)

- If held by a person who is **NOT A NATURAL PERSON**, generally not treated as an annuity contract
- **TRAP:** Income on the contract for any taxable year of the policyholder shall be treated as ordinary income received or accrued by the owner during such taxable year
- Exception: Will remain tax deferred if held by a trust “as an **agent** for a natural person.”
 - Will depend on the beneficial ownership – i.e. is the beneficial owner a natural person?
 - Legislative history and multiple PLRs suggest that where annuity held in trust for the benefit of a natural person, annuity is treated as owned by the natural person for tax deferral purposes.
- Consider two trusts in the case of a married couple

Tax Consequences of Medicaid Trusts

- Income Taxes
- Estates Taxes
- Real Estate Tax Exemptions

Tax Consequences of Medicaid Trusts: Income Taxes

- **Calculating Taxable Income**
- In general, income earned by trust property is income earned by the trust
- Party responsible for trust income taxes will depend
 - Trust itself where trust receives the income
 - Income Beneficiaries (can be Grantor or some other party)
 - Grantor in the case of a Grantor Trust

Tax Consequences of Medicaid Trusts: Income Taxes

- **Calculating Taxable Income (cont.)**
- Trusts are taxed like individuals (however, rates vary significantly)
- Trusts may deduct certain expenses
- Trusts may have tax exempt income
- Personal exemptions apply
- No Standard deduction

Tax Consequences of Medicaid Trusts: Income Taxes

- **Calculating Taxable Income (cont.)**
- General Rule for Trust Income Taxes
 - Income retained by the trust is taxed to the trust
 - Income distributed to beneficiaries are taxed to the beneficiaries
- Exceptions to General Rule
 - Grantor Trusts
 - Where Grantor retains an interest in the trust or if another person has a power of appointment over trust income or principal, the trust income will be taxed to either the Grantor or the holder of the power of appointment
 - Charitable Remainder Trust
 - Charity is tax exempt so retained income is not taxable to the trust (distributions to beneficiaries will be, however)

Tax Consequences of Medicaid Trusts: Income Taxes

- **Calculating Taxable Income (cont.)**
- Allowable Trust Deductions
- Generally, the same as those allowed for an individual
- Examples of allowable deductions:
 - Administrative expenses (e.g. trustee fees, bank fees, etc.)
 - State, local and real estate taxes
 - Estate expenses (check the governing instrument!)
 - Miscellaneous itemized deductions (2% floor of AGI)

Estate and Gift Taxes

- Unified credit - \$5,490,000.00
- Annual Gift Exclusion:\$14,000 (\$28,000 if married)
 - However, this amount is considered a “gift” for Medicaid purposes and will cause a period of ineligibility
- Estate tax: 40% top rate
- Gift tax: 40% top rate
- New York State **Current** Exclusion: \$4,187,500 (with many added complications! e.g. the “Cliff”)

Anatomy of a Trust: **Irrevocable Medicaid Income** **Only Trusts**

ELIZABETH FORSPAN, ESQ.

April 2017



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