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20/20 Vision: Drafting for the New Decade¹

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As the practice of law and estate planning in particular becomes more commoditized, trusts face the danger of becoming “one-size fits all” generic entities. The trust agreement is the rule book that will govern the assets subject to it for the duration of the trust’s existence which could last for several decades, or possibly several generations and require division or mergers into other trusts. These rules must be written in a manner that provides for flexibility and adaptation to changing internal and external circumstances and unforeseeable events that will occur with respect to the assets, the beneficiaries, and the world at large.

Forms provide trust drafters with tools to draft documents more efficiently and with less risk of scrivener error, but only if those forms are kept current under the existing law and contain the provisions that the drafter needs to consider based on the facts of the circumstances at hand.

The purpose of these materials is to highlight specific provisions found commonly in trusts, offer sample provisions to help supplement and update your personal forms in order to help you draft better trusts, and raise issues and points that you may not have previously considered.

I. Trustee Appointment and Removal

A. **The Concept.** Someone should have the ability to remove and replace a trustee, and appoint successor trustees, and it should be clear under what circumstances or conditions this person can act. Who can serve and who can remove a trustee is often an issue when there is change in circumstances between the trust beneficiaries and the currently serving trustee.

B. **Additional Considerations.** It is critical to have flexibility to change who will be trustee, can appoint trustees, can remove trustees and under what conditions. Rather than limiting who can serve by having a list of names, use a defined term for persons (specifically or by class) who can serve as trustee. Empower the grantor, spouse, beneficiaries and others to appoint and remove trustees, and to change who can appoint/remove trustees in the future. Give the power to

specify terms and conditions in which a person becomes a trustee, or must cease to serve. Give the power to specify roles and powers of trustees.

C. **Sample Provisions.** The following samples are different methods of listing who and under what conditions a change of trustee may occur.

1. **Sample language.**

Plan of Trustees. Any of the following persons who are not Incapacitated may establish a plan of trustees for any trust hereunder except as otherwise indicated:

- (i) me;
- (ii) Jane;
- (iii) the primary beneficiary of a Descendant Trust who has attained thirty-five (35) years of age, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (iv) my descendant who is the parent of the primary beneficiary of a Descendant Trust, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (v) a majority of the Senior Descendants of the primary beneficiary of a Descendant Trust who have attained thirty-five (35) years of age and are not Incapacitated, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (vi) a majority of the siblings of the primary beneficiary of a Descendant Trust who have attained thirty-five (35) years of age and are not Incapacitated, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (vii) a majority of my Senior Descendants who have attained thirty-five (35) years of age and are not Incapacitated; and
- (viii) a majority of the non-corporate trustees of the trust.

To the extent of any inconsistency in plans of trustees, (i) the plan established by a person in a superior position (even after the death of such person in a superior position) on the foregoing list (solely for purposes of this Article except as otherwise expressly provided in this Agreement, the “Hierarchy List”) shall take precedence over the plan established by a person in an inferior position, (ii) the plan established by the primary beneficiary of a Descendant Trust with respect to any trust created (or to be created) therefrom shall take precedence over a plan established by the primary beneficiary of a trust so created, and (iii) the later plan established by a person shall take precedence over such person’s earlier plan. The trusts hereunder need not have the same trustee or trustees, and the failure of a trustee to act as trustee of one trust shall not in itself prevent such trustee from serving as trustee of any other trust.

A plan of trustees may designate initial or successor trustees to begin serving immediately or to serve upon or until the occurrence of a specified event or contingency, may designate an initial or successor trustee for limited or general purposes and accord specific responsibilities and powers (within the mandate of rights and powers given to the trustee in this Agreement), may impose qualifications or requirements, may specify compensation of such trustees, may designate single or successive trustees, and may provide for the imposition of limitations or conditions generally or on the designation of successor trustees, additional trustees or on the removal of trustees serving hereunder, all as provided in the plan. A plan of trustees may empower any person to establish plans of trustees subject to any limitations or conditions and specify such person’s place on the Hierarchy List; provided, however, that such person’s place on the Hierarchy List may not be higher than those above the person granting the power. A plan of trustees may eliminate any person’s power to establish plans of trustees subject to any limitations or conditions and remove

such person from the Hierarchy List, but only with respect to a person in an inferior position on the Hierarchy List. Except as otherwise provided in this Article, a plan may leave a vacancy in the trusteeship unfilled. Notwithstanding the foregoing, a plan of trustees may not affect the responsibilities, powers, qualifications, requirements, compensation or impose limitations or conditions generally on the serving trustees. Any references in this Agreement to “the person(s) listed or described” in specific numbers on the Hierarchy List shall continue to refer to the same person(s) notwithstanding changes to the number after which they are listed in the Hierarchy List pursuant to a plan of trustees unless such person is removed from the Hierarchy List with respect to the particular trust.

2. Sample Language.

The term “Qualified Trustee” means only a Trustee named as such herein, a trust company or bank having trust powers, or one or more of my descendants age _____ or older at the date of appointment. Any designation of a corporate Trustee will include its corporate successors.

My Spouse, and after my Spouse’s death, the current income beneficiary in the oldest generation of each separate trust (or a majority of them if more than one), has the continuing right, by giving notice to the then acting Trustee: to remove such Trustee; or to replace such Trustee or any successor Trustee with a Qualified Trustee(s); or appoint a successor Qualified Trustee(s) to begin serving at a designated time or event. Further, such person is authorized to enter into agreements with a corporate Successor Trustee regarding the management of trust assets which the Successor Trustee requires of similar trusts prior to agreeing to serve as Trustee. The duly appointed guardian of a minor or adult incapacitated beneficiary will act on behalf of such beneficiary. If there is no such guardian, then (1) with respect to a minor beneficiary, the parent who is my relative by blood or adoption may exercise the power or if such parent is deceased or incapacitated then the other parent may exercise the power; and (2) with respect to an adult incapacitated beneficiary, the attorney in fact may exercise the power. Notwithstanding anything herein to the contrary, a beneficiary acting pursuant to this paragraph on such beneficiary’s own behalf is not subject to a fiduciary duty; but any duly appointed guardian, parent of a minor child, or attorney in fact acting on behalf of a beneficiary is subject to a fiduciary duty with regard to the beneficiary on whose behalf such individual is acting, regardless of whether such individual is also a beneficiary hereunder.

Trustee has the power to resign at any time by giving written notice specifying the effective date of resignation to those specified in the following order: (1) to a Co-Trustee, or if none, (2) to a successor Trustee if one is named herein or has otherwise been selected, or if none, (3) to me, or if I am deceased or incapacitated, (4) to an advisory committee if any is then active, or if not, (5) to the then current income beneficiary(ies) of the trust in the oldest generation. If a Co-Trustee resigns, the remaining Co-Trustee(s) will either serve alone or, if required, a successor will be appointed as provided herein. Whenever a successor Trustee is not otherwise appointed as provided in this Agreement, the one or ones receiving notice will, by majority vote, appoint a Qualified Trustee(s) as successor Trustee. Any beneficiary may, by an instrument in writing filed with the trust records, release, in whole or in part, any rights to serve as Qualified Trustee for a specified period of time. These provisions also apply upon the death of Trustee. Any successor Trustee will accept, without examination or review, the accounts rendered and the property delivered by a preceding Trustee, will not succeed to liability of any former Trustee, and will have all the powers and discretion of the preceding Trustee.

3. Sample Language.

Appointment of Successor Trustees. In the event of a vacancy in the trusteeship of any trust, howsoever caused, the successor Trustee to fill such vacancy in the trusteeship (and each further successor Trustee) shall be such one (1) or more persons or a Business Entity, or any combination thereof, as shall be designated by name or appointed in accordance with a plan of successor Trustees established by the following persons, in the order named:

- (a) the Grantor;

- (b) the Grantor's spouse;
- (c) a person who has attained thirty-five (35) years of age with respect to any Discretionary Trust of which said person is the beneficiary and each trust created therefrom; then
- (d) the then acting non-Corporate Trustee of such trust, or a majority of the then acting non-Corporate Trustees;

provided, however, that any such designation or plan shall be effective only to supplement and not to contravene any previous designation or plan which has not been revoked or cancelled pursuant to the provisions of this Article, or any subsequent plan established by a person in a prior position on the above list; provided, further, however, if any such designation or plan shall be created by the beneficiary of any separate trust, and such designation will fill a vacancy caused by the resignation of said beneficiary, then said beneficiary may only appoint an individual who is not a Related or Subordinate Party to said beneficiary. The power to establish a "plan of successor Trustees" shall include the authority to designate any other person or persons who shall have the power to name successor Trustees or to create additional plans of successor Trustees, and shall be exercisable whether or not an actual vacancy in the trusteeship exists at the time of such exercise. Except as may be otherwise provided to the contrary in this Article, the power to designate successor Trustees and to create a plan of successor Trustees shall include the power to leave a vacancy in the trusteeship unfilled.

II. Directed Trusts vs. Multiple Trustees

A. The Concept. Control over trusts can be sliced and diced in many ways. There can be different types of trustees each with different powers, such as "distribution trustees," "investment trustees" and "administrative trustees." Distribution trustees can be broken down further to "HEMS distribution trustees" and "discretionary distribution trustees." There can also be special trustees whose sole job relates to a specific asset, such as stock in a family business, such as voting the stock or approving distributions or transfers.

Another way to divide the roles is through a "directed trust." Rather than multiple trustees, there is one trustee that takes certain actions at the direction of "advisers" (e.g., distribution advisers, investment advisers, etc.). Separating these roles can put the right persons in the right jobs, and also relieve each other from responsibility and liability for the other jobs.

Clear direction is important when using directed trusts to bifurcate investment management and/or discretionary distribution authority from other trustee duties. The trust instrument should be clear that the trustee must act solely at the direction of the advisor who is vested with such authority. Language which provides that the advisor "shall have the power to direct the trustee" or that "the trustee shall follow the direction of the advisor" falls short of expressly stating that the trustee shall exercise certain specific trust powers "solely" or "exclusively" upon the written direction of the advisor. Without the express provision that the trustee shall act solely upon direction, one could argue that the language sets up a simultaneous duty for the trustee to take directions and also to act in its own discretion.

B. Additional Considerations. Whether to designate the person having control over investments a trustee or an advisor may be one consideration in selecting the structure of trust. The Supreme Court held in *Old Colony Trust Company v. U.S.*, 423 F.2d 601 (1st Cir. 1970), that no aggregation of purely administrative powers will render the trust property includable in the estate. Also in *Estate of Willard V. King v. Commissioner*, 37 T.C. 973 (1962), the Tax Court held that the decedent's powers to manage the trust's investments did not allow him to control the beneficial enjoyment of trust property under IRC Section 2036(a)(2), because such powers were exercised in good faith and subject to fiduciary duties. Nor did such powers over the enjoyment of the property rise to the power to alter, amend or revoke under IRC Section 2038. This holding, which had been reached in several other decisions (although the Service has not acquiesced), was confirmed by the Supreme Court in *United States v. Byrum*.

However, the investment trustee/advisor's power should exclude (i) voting shares of stock in a company controlled by the investment trustee/advisor (in an individual capacity) within the meaning of Section 2036(b)(2) of the Code that was transferred to the trust by the investment trustee/advisor, except if in a bona fide sale for adequate and full consideration in money or money's worth; and (ii) exercising "incidents of ownership" (within the meaning of Section 2042 of the Code) with respect to insurance on the investment trustee/advisor's life.

Bifurcation of trustee duties to create an Administrative Trustee is another common type of bifurcation. An Administrative Trustee is a trustee without power to make distributions or manage investments, but solely to handle “administrative” matters for the trust. An administrative trustee can protect the other trustees from liability by keeping accurate records, filing returns and other documents in a timely manner and preparing annual accountings. Frequently, “friends and family” trustees do not adequately handle these tasks. If a full trustee (i.e., a trustee who is not directed and still is responsible for all of the traditional trustee duties) also is acting with an administrative trustee, the full trustee still has a fiduciary duty to supervise the administrative trustee. This means full supervision and periodic review.

Typical functions of administrative trustees include:

- (a) Maintaining custody of the trust property;
 - (b) Maintaining the trust records;
 - (c) Maintaining an office for trustee meetings and other trust business;
 - (d) Preparing any necessary tax returns (to the extent such function is not delegated by the trustees);
 - (e) Receiving and distributing written notices;
 - (f) Originating and/or facilitating trust accountings, reports and other communications pertaining to the trust;
- and
- (g) Taking actions necessary to carry out the foregoing.

Some states define the minimum administrative duties that a trustee must carry out in that state in order to have sufficient nexus to avail the trust of that particular state law (e.g., Delaware). See *Lewis v. Hanson*, Del. Supr., 128 A.2d 819, 826 (1957), *aff’d sub nom. Hanson v. Denckla*, 357 U.S. 235, reh’g denied, 358 U.S. 858 (1958).

C. Sample Provisions. The first sample contains language setting forth the restrictions on the Investment Trustee’s duties. The second sample creates an Administrative Trustee. The third sample sets out additional responsibilities of an Investment Advisor to a Directed Trustee, the fourth sample provides for the appointment of a substitute trustee to control certain assets or take certain actions, the fifth sample provides a comprehensive article naming an Investment Trustee to fully direct the Trustee as to all trust investments.

1. Sample Language.

Restrictions on Investment Trustee. Notwithstanding any provision of this Agreement, an Investment Trustee shall not have any authority, duty or responsibility with respect to:

a. Any life insurance policy owned by the trust of which such Investment Trustee is an insured which prohibition includes but is not limited to the power and authority to acquire, pay premiums, contribute to, withdraw or borrow from such policy; and

b. Voting or other participation in a decision by a “controlled entity” (as hereinafter defined) to make a distribution, dissolve, liquidate, redeem interests or amend its governing instrument if such Investment Trustee at any time transferred (in his or her individual capacity) any interest in such controlled entity to, or in trust for the benefit of (including any trust hereunder), any “members of the Investment Trustee’s family” (as hereinafter defined). As used herein:

(i) “controlled entity” means a Business Entity in which the Investment Trustee and members of Investment Trustee’s family collectively own, directly or indirectly, at least fifty percent (50%) of the capital, value or profits interest;

(ii) “members of the Investment Trustee’s family” means the Investment Trustee’s spouse, the Investment Trustee’s descendants, the spouses of the Investment Trustee’s descendants, and the Investment Trustee’s siblings and their descendants.

2. Sample language.

If at any time there is more than one Trustee serving and one of those Trustees is [Delaware trustee], then the following powers, authorities and discretions (all of such powers, authorities and discretions herein the “Administrative Powers”) shall be carried out in the State of Delaware solely by [Delaware trustee], as trustee, so long as the situs of this trust is in, and this trust is governed by the laws of, the State of Delaware:

- (1) To maintain bank accounts, brokerage accounts, and other custody accounts for (i) the custody and safekeeping of the trust estate; (ii) receiving trust income; (iii) making disbursements in payment of trust expenditures; and (iv) making distributions to or for the benefit of Beneficiaries as directed by the trustee.
- (2) To maintain storage of stock certificates, tangible personal property or other evidence of ownership of assets held as part of the trust estate;
- (3) To maintain trust records;
- (4) To maintain an office for Trustee meetings and other trust business;
- (5) To originate, facilitate and review trust accountings, reports and other communications pertaining to the trust with the Grantor, any co-Trustees, Beneficiaries and unrelated third parties;
- (6) To respond to inquiries concerning the trust from either Grantor, any co-Trustees, Beneficiaries and unrelated third parties;
- (7) To execute instruments, agreements, contracts and any other documents with respect to trust account transactions; and
- (8) To retain, at the expense of the trust, accountants, attorneys, agents and other advisors in connection with the performance of the Trustee's duties.

3. Sample Language.

With regard to trust assets and trust liabilities over which the Investment Advisor has responsibility and in addition to the Investment Advisor's duties herein, the Investment Advisor shall have the duty (a) to confirm to the Trustee, in writing, the value of trust assets and liabilities at least annually and upon the request by the Trustee, (b) to direct the Trustee with respect to making any representation, warranty or covenant required to be made in order to maintain any investment, (c) to direct and instruct the Trustee on future actions, if any, to be taken with respect to such representations, warranties and covenants and (d) to direct the Trustee to sign agreements and any other documentation required in connection with the purchase of any investment and the maintenance of any such investment. The Trustee shall be entitled to rely upon the valuation provided by the Investment Advisor for all purposes in administering the trust, without incurring any liability to any party, and shall be under no obligation to inquire or to make any independent verification of the information provided to the Trustee by the Investment Advisor. Notwithstanding the foregoing, the Trustee shall have no duty hereunder to request a valuation at any time, including upon the Investment Advisor's failure to provide an annual valuation.

4. Sample Language.

Trustee has the power to appoint an individual or trust company or bank having trust powers to serve as Substitute Trustee for any assets of which the then acting Trustee is unable to take title, or of which the then acting Trustee deems it impractical to hold title, and to designate the terms and conditions under which such Substitute Trustee will act. During such time the Substitute Trustee is acting, Trustee will be deemed to have resigned as Trustee as to such property and will incur no liability for any acts or omissions of the Substitute Trustee.

5. Sample Language – Full Article

“Investment Trust Advisors

A. Direction by Investment Trust Advisor. Notwithstanding any other provision herein to the contrary, with respect to each trust hereunder for which an Investment Trust Advisor is then acting, the Investment Trust Advisor shall direct the Trustee with respect to the retention, purchase, transfer, assignment, sale or encumbrance of trust property and the investment and reinvestment of principal and income of such trust and shall have all other authority and rights granted to an Investment Trust Advisor pursuant to applicable law.

Direction by the Investment Trust Advisor to the Trustee may be upon the written or oral instructions (provided that action shall be taken only on the written direction of the Investment Trust Advisor if the Investment Trust Advisor so directs the Trustee in writing) of said Investment Trust Advisor. The Trustee of each such trust is hereby relieved of any liability for any loss sustained by such trust as a result of any decision made by the Investment Trust Advisor to act or refrain from acting with respect to the rights and powers conferred upon the Investment Trust Advisor pursuant to the provisions of this Section or the failure of the Investment Trust Advisor to make any such decision, and the Trustee shall be under no duty to review or make recommendations with respect to rights and powers conferred upon the Investment Trust Advisor pursuant to the provisions of this Section. All or any part of the rights and powers conferred upon the Investment Trust Advisor pursuant to the provisions of this Section may be relinquished at any time or from time to time by the Investment Trust Advisor by notice in writing delivered to the Trustee of the trust to which such release relates. In the exercise of the rights and powers conferred upon the Investment Trust Advisor pursuant to the provisions of this Section, the Investment Trust Advisor shall act in a fiduciary capacity and shall be subject to all of the rights, privileges, duties and obligations of a Trustee hereunder, but in no event shall the Investment Trust Advisor exercise any power which would cause assets which shall have been allocated to a Marital Trust which the Grantor’s Personal Representative has elected to qualify for the Federal estate tax marital deduction to fail to qualify for that deduction.

With respect to each trust of which there is more than one (1) Investment Trust Advisor then acting, any decision made by a majority of the then acting Investment Trust Advisors shall be deemed to be the decision of all of the then acting Investment Trust Advisors, without the imposition of any liability for such decision on an Investment Trust Advisor who does not agree thereto.

With respect to each trust created hereunder, notwithstanding any provision herein to the contrary, during any period or periods that no Investment Trust Advisor is acting with respect to such trust, then all of the rights and powers conferred upon the Investment Trust Advisor pursuant to the provisions of this Section shall be held by the Trustee of such trust.

B. Appointment of Initial Investment Trust Advisors.

(i) Revocable Trust. In the event of the death, resignation, refusal, failure or inability of the Grantor to act as Trustee of the Revocable Trust, then the Grantor’s spouse shall act as the initial Investment Trust Advisor of the Revocable Trust.

(ii) Marital Trusts and Residuary Trusts. The Grantor’s spouse shall act as the initial Investment Trust Advisor of each Marital Trust and each Residuary Trust created hereunder.

C. Appointment of Successor Investment Trust Advisors. In the event of the death, resignation, refusal, failure or inability of any person to act as Investment Trust Advisor of any trust, the successor Investment Trust Advisor to fill the vacancy in the position of Investment Trust Advisor so caused (and each further successor Investment Trust Advisor) shall be such one (1) or more persons or a Business Entity, or any combination thereof, designated by name or appointed in accordance with a plan of successor Investment Trust Advisors established by the following persons, in the order named:

(i) the Grantor’s spouse;

(ii) a person who has attained thirty-five (35) years of age with respect to any Discretionary Trust of which said person is the beneficiary and each trust created therefrom; then

(iii) the then acting non-Corporate Investment Trust Advisor of such trust, or a majority of the then acting non-Corporate Investment Trust Advisors;

provided, however, that any such designation or plan shall be effective only to supplement and not to contravene any previous designation or plan which has not been revoked or cancelled pursuant to the provisions of this Article, or any subsequent plan established by a person in a prior position on the above list. The power to establish a “plan of successor Investment Trust Advisors” shall include the authority to designate any other person or persons who shall have the power to name successor Investment Trust Advisors or to create additional plans of successor Investment Trust Advisors, and shall be exercisable whether or not an actual vacancy in the position of Investment Trust Advisor exists at the time of such exercise. Except as may be otherwise provided to the contrary in this Article, the power to designate successor Investment Trust Advisors and to create a plan of successor Investment Trust Advisors shall include the power to leave a vacancy in the position of Investment Trust Advisor unfilled.

D. Method of Appointing Successor Investment Trust Advisors. In the exercise of the power to designate successor Investment Trust Advisors of the trusts held hereunder, different successor Investment Trust Advisors may be designated or appointed for each or any trust. Any such designation may be made, or such plan established, by an instrument in writing signed by the holder of such power and delivered to the then acting individual Trustee and to each party in a prior position on the list contained in Section C of this Article, and if there is no then acting individual Trustee, to the beneficiary of the trust for which a successor Investment Trust Advisor is being designated or to which such plan relates, or by the valid Will of said holder admitted to probate in any jurisdiction. The holder of such power may, at any time or from time to time, revoke any such designation made, or amend or cancel any such plan established either by said party, by a person in a lower position on the list contained in Section C of this Article or by a predecessor Investment Trust Advisor, such revocation, amendment or cancellation to be made in the same manner as is hereinabove provided for making such designation or establishing such plan; provided, however, that no such revocation, amendment or cancellation shall be effective to remove any then acting Investment Trust Advisor. Upon any such revocation, amendment or cancellation, the holder of the power to designate successor Investment Trust Advisors of the trusts held hereunder shall have the same powers with respect to designating successor Investment Trust Advisors by name or establishing a plan in the manner above provided, as if such power had never been exercised.

E. Release of Powers to Appoint Successor Investment Trust Advisors. The power to appoint successor Investment Trust Advisors hereinabove granted pursuant to the provisions of this Article may be completely and irrevocably released at any time with respect to any one (1) or more trusts by an instrument in writing signed by the holder of such power and delivered to the then acting individual Trustee and to each party on the list contained in Section C of this Article, and if there is no acting individual Trustee, to the beneficiary of the trust with respect to which such release relates.

F. Investment Trust Advisors of Discretionary Trusts. With respect to each Discretionary Trust, subject to any plan of successor Investment Trust Advisors created pursuant to the provisions of subsections C(i) or C(ii) of this Article, but notwithstanding any other provision herein to the contrary, on the date on which the beneficiary of such trust has attained thirty-five (35) years of age, or upon creation of such trust, if subsequent thereto, the then acting Investment Trust Advisors of such trust shall immediately cease to so act and said beneficiary or said beneficiary and such one (1) or more persons or a Business Entity, or any combination thereof, designated by name by said beneficiary by an instrument in writing signed by said beneficiary and delivered to the person(s) and/or entity so designated and to the then acting Trustees of such trust shall become the sole Investment Trust Advisor(s) of such trust.

G. Successor Investment Trust Advisors. Except as provided to the contrary in this Article or by a plan of successor Investment Trust Advisors created pursuant to the provisions of this Article, upon the termination and final distribution of any trust hereunder (a “Terminating Trust”), the initial Investment Trust Advisor(s) of each new and separate trust created from such Terminating Trust (herein referred to as a “New Trust”) shall be those person(s) and/or entity(ies) who were serving as Investment Trust Advisor(s) of such Terminating Trust on the date of such termination and final distribution of such Terminating Trust and who are living or in existence (as the case may be) upon creation of each New Trust.”

III. Pot/Spray Trusts (not cannabis)

A. The Concept. A single trust for multiple beneficiaries can serve a variety of purposes. For example, owning an insurance policy until the insured’s death, owning a residence for the use and benefit of the beneficiaries, or keeping assets consolidated to simplify management while children are minors, receiving annual exclusion gifts for a group of descendants or others (which helps the withdrawal rights lapse faster).

B. Additional Considerations. Aside from the foregoing situations, keeping assets in a single trust to benefit adult children and their families will lead to dissent, tension and frayed relationships, far outweighing any benefits of a single trust. A single trust could lead to disagreements over investments, distributions and spending. Each beneficiary will have different views on investments, risk, liquidity and diversification. Some will want to invest in start-ups (including their own) or venture capital, while others will want to follow the advice of the late John Bogle of Vanguard funds and invest in no-load, low-cost index funds. Some will have more expensive lifestyles than others, or live in more expensive locations (compare Manhattan, New York City vs. Manhattan, Illinois).

Over time as the beneficiaries' families expand, their common interest diverge and where normal course of time would have allowed for a divestment of lockstep collective decision making, the pot trust forces each generation to come to an agreement about the collective family's business, life choices and financial affairs. This is not a great situation for siblings who at least grew up in the same home, but even less ideal for third and fourth generation beneficiaries who are only first or second cousins. Throw in some spouses and you have combustible material.

If a pot trust is the current ideal vehicle, consider drafting the trust to divide into separate trusts for the beneficiaries at some point. Each subtrust would be administered independently, allowing the beneficiaries to conduct their lives free of judgment and conflict with their siblings about how the trusts are being used and invested. Of course, the trust provisions can provide whatever rules regarding distributions the grantor desires, but each separate branch of the family is free to operate within those provisions.

Trusts often divide when the settlor and/or settlor's spouse is deceased, but if they live their full life expectancies, that could leave their children sharing a trust until they are in their 60s. The trust could provide the trustee discretion to terminate and divide the trust before that time, or give the trustee the power to distribute some of the assets to subtrusts before the main trust terminates.

C. Sample Provisions. The sample below is an example of a pot trust until the youngest child reaches a specific age, then the trust divides.

1. Sample Language.

Trustee will distribute from the net income and principal of the trust such amounts as Trustee deems advisable to provide for the health, education (including education beyond the undergraduate level), maintenance, and support of my descendants. Undistributed income will be added to principal. Unequal distributions will not be taken into account in the final distribution of assets. When I have no living child under _____ years old, the trust will be divided in equal shares, one for each of my then living children and one for each of my deceased children with descendants then living, and held or distributed as provided herein. Each share set aside for one of my children will be held by Trustee as provided below. Each share set aside for any descendants of my deceased children will be distributed in fee and per stirpes to such descendants.

IV. Advancement Clauses for Spray Trusts

A. The Concept: During the term of a spray trust, the beneficiaries will reach different milestones in their lives at different times, such as marriage, starting a business, buying a first home, or having a child. A beneficiary might request a relatively large distribution for these purposes, but the trustee may refrain to making the distribution (despite its merit) because \$1 to one beneficiary reduces the remainder that will eventually divide among all the beneficiaries. Give the trustee the authority (not necessarily a direction) to treat certain distributions as advancements that reduce the recipient's share of the trust upon termination. Doing so gives the trustee more comfort to make a large distribution from a spray trust without fear of suit by a beneficiary for favoring another beneficiary.

B. Additional considerations. Consider whether certain types of distributions should be excluded from the advancement treatment such as distributions for health care or education. In addition, distributions made while the beneficiary is under a certain age may be excluded. The trust could provide for interest as well as the face value of the advancement for equalizing distributions. While this may be more equitable since the beneficiary receiving the advancement was able to use and benefit from the funds for several years before the equalizing distribution was made, a provision of this nature would require determining the interest and forcing the trustee to track that interest through the life of the trust which may be more complicated than its worth. The trust provision should also consider how advancement distributions are tracked.

The trustee or another party should be charged with keeping a record, or creating a record in the event no record exists. Consider prohibiting parties from challenging the record or providing for a high burden of proof to challenge the record.

C. Sample Provisions. The following provision is an example of granting the trustee the discretion to treat certain distributions as advancement.

1. Sample Language

The trustee(s) who made the determination to make a payment pursuant to this Section to a member of a Family Line that is not for the Health or Education of such person may, in such trustee's discretion, treat any such payment as an "Advancement" for purposes of this Article. Treatment as an Advancement will reduce the amount of such Family Line's future share of the trust property. The trustee shall maintain records of payments treated as Advancements, and any payment that is not so included in the trust records or any payment for which the record is unclear as to such treatment shall not be treated as an Advancement. It is my desire, but not my direction, that the trustee not make an Advancement to a member of a Family Line pursuant to this Section if such Advancement would likely cause the aggregate amount of all Advancements made to such Family Line to exceed the estimated share of the trust property to be allocated to the Family Line upon termination of the trust.

V. Behavioral/Incentive Clauses

A. The Concept. Many clients think they have it all figured out. They will use trusts to ensure their children and grandchildren won't become "trust fund babies" doing nothing with their lives except getting bottle service with their friends every night. They will require them to graduate from college, have a professional career, submit to drug and alcohol testing, sign prenuptial agreements and be religiously observant. Otherwise, they don't get distributions from the trusts.

David tells his clients, "my trusts are not going to correct your parental mistakes. What you couldn't accomplish raising your kids 24/7 for 20 years isn't going to be solved with a 50 page trust agreement. If they are trust fund babies, there's a strong likelihood our clients raised them that way."

The consequences of these clauses may backfire, leading to unintended results, even if the client is no longer around to see it.

B. Additional Considerations. There are many different types of behavioral trusts. One version may direct the trustee make distributions to beneficiaries who are following certain desired "lifestyles". Lifestyle requirements might include work, education, religious or other requirements. There are myriad problems with such clauses. First, interpretation of the clauses would be difficult. Ask ten people of the same religion what it means to be "religiously observant" and you'll get ten answers. Requiring prenuptial agreements? The trust would need to spell out what those agreements must say, and the beneficiaries could instead choose to not marry and avoid it. Those same clients with religious requirements might find their children "living in sin"!

There can be excellent reasons one cannot or chooses not to obtain a traditional college degree, such as the opportunity to start a company like Facebook or Microsoft, or due to an illness or disability. We don't even know how "college" will actually operate in 50 or 100 years; maybe everyone will just obtain certifications with online courses. Cutting of funds for failing a drug test might be worst path: paying for rehab, support and a home might get the beneficiary out of the drug universe. Such clauses can backfire, cutting a beneficiary off from funds in unintended situations.

Incentive trust is another form of a behavioral trust. Incentive provisions often take the form of matching a beneficiary's earned income. Incentive provisions are simple in concept, but the potential exceptions can swallow the rule. For example, a trust that matches the beneficiary's earned income creates these issues:

1. Can the beneficiary retire without losing trust distributions?
2. What if the beneficiary wishes to be a stay-at-home parent?
3. Beneficiaries in low-paying professions (or doing volunteer) work receive less than those making substantial incomes. For example, a law professor is paid substantially less than an equivalent practitioner.

Or a doctor working in a small rural town makes much less than he or she might working in a large urban hospital system.

4. What if the beneficiary has a mental or physical disability and cannot work or has limited work opportunities? Or if a child of the beneficiary has a disability requiring full-time care by the beneficiary?
5. At what age must one start working before the matching provisions kick in? Will they be supported through college? Graduate school?
6. Is it only the beneficiary's earned income that matters, or is it the combined earned income of the beneficiary and his or her spouse?

Rather than dictating lifestyle and work requirements, consider using guidelines as a statement of values to encourage or discourage certain behaviors or objectives. This statement would be non-binding and merely precatory and would not involve specific tests.

C. Sample Provisions. The first sample provides for drug or alcohol abuse discretion. The second and third samples contain a list of suggested values or ideals that a trustee could look for in determining whether to make a distribution to a beneficiary. The fourth sample can be used to encourage a beneficiary to enter into a premarital agreement. The final sample allows the surviving spouse to remove an unruly beneficiary so that normal trust operations can proceed during the spouse's life. However, in the wrong hands or under the wrong influences this provision could easily cause severe disruption of the estate plan and family dynamics.

1. Sample Language.

If at any time the trustee believes that a beneficiary of any trust hereunder is unable to give reasoned attention to financial matters because of an addiction to illegal substances, alcohol or prescription medications, the trustee may request that such beneficiary submit to medical testing and may withhold any mandatory distributions other than payment for any treatment sought by the beneficiary, until such time as the beneficiary has been free from use of such substances for a period of 90 days.

2. Sample Language.

I request (but do not require) that when determining whether to make a distribution to a descendant of mine from any trust hereunder and the amount of such distribution, the trustee do so in a manner that assists, encourages or rewards such descendant for exhibiting or accomplishing the following "desired behaviors":

- a. pursue an education at least through college and/or a vocational/technical school;
- b. be gainfully employed with a view toward being financially self-sufficient;
- c. be a law-abiding member of society;
- d. be a productive member of society by making meaningful and positive contributions to family, community and society;
- e. engage in entrepreneurial and/or creative activities;
- f. handle money intelligently and avoid wasteful spending;
- g. act with empathy, thoughtfulness, kindness and consideration toward others;
- h. develop healthy and meaningful relationships;
- i. make contributions of time, money or both to charity; and

- j. maintain a healthy lifestyle, both physical and mental.

The trustee should consider the societal norms in the geographical area in which a beneficiary resides, as I do not intend for the trustee to impose his own personal beliefs on a beneficiary as to what constitutes “gainful employment,” “healthy lifestyle,” or other subjective notions referred to above, although the trustee’s beliefs are certain to be a part of such determinations.

Of course, a beneficiary’s age, health, abilities and other circumstances will affect his or her ability to accomplish one or more of the desired behaviors, and should be considered in construing and applying the foregoing to any particular beneficiary. I consider full-time parents to be productive members of society and gainfully employed, and do not intend that a beneficiary be discouraged from choosing to raise a family as his or her sole occupation.

I do not expect a beneficiary to necessarily accomplish or exhibit all of the desired behaviors, and recognize that some desired behaviors may even conflict with others. It is my hope and intent that the trust property will be used to reward and enhance the quality of life of those beneficiaries that have exhibited, accomplished or are working toward accomplishing one or more of the desired behaviors, and to encourage and assist the beneficiaries to exhibit and achieve the desired behaviors. On the other hand, I also hope and intend that the trust property will not be distributed to a beneficiary who is engaging in self-destructive, abusive or illegal behavior (“undesired behaviors”), except for the beneficiary’s health, education and basic support, which may include expenses for rehabilitation and treatment or care.

If the trustee, in the trustee’s discretion, determines (1) that a beneficiary is not capable of handling money or financial affairs prudently, or (2) that a beneficiary has financial problems or marital difficulties that could result in the diversion or dissipation of trust property or property distributed from the trust, then I recommend (but do not direct) that the trustee refrain from distributing property to the beneficiary until such problems have been resolved to the trustee’s satisfaction.

The trustee shall have no duty to inquire or monitor whether a beneficiary is exhibiting or accomplishing the desired behaviors or the undesired behaviors, as the guidelines set forth in this Article are not intended to limit the trustee’s discretion to make distributions to the beneficiaries, but the trustee should consider the sentiments expressed in this Article.

3. Sample Language.

In exercising the discretion granted to the trustee under this Article, the trustee shall be guided by the following values of the grantor which the grantor expects each of her descendants to emulate:

- The pursuit of higher education culminating in a four-year degree from an accredited U.S. college or university or the foreign equivalent
- Gainful employment, including employment in the arts, academia, or the helping professions and military service
- Care for minor, disabled, and elderly family members
- Support of charitable organizations
- Healthy lifestyle choices, including avoiding abuse of or dependence on alcohol, legal or illegal drugs (other than as prescribed by the beneficiary’s physician)
- Fiscal responsibility and the avoidance of excessive debt

4. Sample Language.

When a beneficiary and that beneficiary's fiancée execute a prenuptial agreement which the trustee is advised by legal counsel is valid, then on or after the date of such beneficiary's marriage, such beneficiary may by written instrument delivered to the trustee withdraw from the principal of the trust an amount equal to five (5%) percent of the trust's accumulated net income and principal, as it is then constituted. In addition, upon the request of the beneficiary, the trustee shall reimburse the beneficiary for any and all documented expenses and legal fees incurred by either party in securing such agreement.

5. Sample Language.

My Spouse may, by written notice delivered to Trustee during my Spouse's lifetime, eliminate one or more, but not all, of my descendants as a beneficiary of this trust by specific reference to this paragraph. Any beneficiary so eliminated will cease to be a beneficiary of this trust as of the date set forth in such written notice to Trustee. For all other purposes and with respect to all trusts existing after my Spouse's death, such eliminated beneficiary will be deemed to have died immediately before my Spouse's death. My Spouse may revoke the elimination of any such beneficiary (thereby reinstating the beneficiary) by written notice delivered to Trustee during my Spouse's lifetime or by a provision contained in my Spouse's Will, in either case making a specific reference to this paragraph. Any exercise of a power of appointment in my Spouse's Will in favor of an eliminated beneficiary or any class of persons including such beneficiary will be effective with respect to such beneficiary notwithstanding any prior elimination of such beneficiary from this trust; however, my Spouse's failure to exercise any such power of appointment will not revoke any prior elimination of a beneficiary. The exercise of the powers in this paragraph by my Spouse will not be subject to a fiduciary duty even if my Spouse is also acting as Trustee. My intent is that an eliminated beneficiary lack standing or any other ability to challenge the actions of Trustee hereunder. Regardless of other provisions to the contrary, my Spouse may relinquish this power in whole or in part at any time by written notice to Trustee.

VI. Definitions of Children and Descendants

A. **The Concept.** Relationships are defined by labels. Historically, references to children or descendants may have only included natural born lineal heirs and excluded, step-children, adopted children, or children born out of the marriage. Several issues may arise when the definition of children or descendants within in the trust instrument does not match the definition of the grantor's family.

B. **Additional Considerations.** One of the obvious considerations for defining children, is the known or unknown unintended child. If grantor or grantor's spouse, is aware of a child born from another relationship whether it is their own child or a child of one of their descendants, consider specifically including or excluding such person by reference. Defining children born "of the marriage" of the grantor and grantor's spouse would exclude children from other relationships but may also exclude their own child born out of wedlock, and would not exclude a grandchild or more remote descendant. Determining whether an individual should be considered a descendant or a beneficiary can be a very personal issue and one that may not be obvious to the grantor until confronted with it. Consider asking the grantor in what circumstances would a grandchild or more remote descendant not be included as a beneficiary of a trust – would there need to be acknowledgment of the child by the parent, parental custody or support obligations or other factors.

The definition of descendants may effect gift splitting between spouses. If spouses elect to split gifts to use both of their gift exclusions or exemptions, or if they use community property to make gifts, consider defining their "descendants" collectively as children or descendants of their marriage rather than just the descendants of the grantor. In the event of a divorce, a trust created by the grantor spouse who later remarries and has subsequent children outside of the original marriage, could benefit all of grantor's children; however, if descendants mean only those from the marriage, then the first spouse's gifts and use of exclusion will not benefit the children from the subsequent marriage.

The advancement of reproductive technology has created more opportunities for families to have children, and subsequently more opportunities for the definition of descendants to fail. Posthumously born children may not fit within a trust's definition of descendants. When contemplating children born after the death of the grantor or a beneficiary consider whether there should be a time limit on when the children have to be born to avoid holding up distributions to other beneficiaries while waiting to see if posthumous children will be born. An additional restriction may be to require that a posthumously born child will only be a descendant if the use of the deceased person's reproductive material was authorized by such deceased person.

C. **Sample Provisions.** The first sample is a definition of children and the second sample is provision for excluding certain individuals as descendants. The third addresses concepts of artificial reproduction.

1. **Sample Language.**

An individual's child(ren) will include only the individual's child(ren) living on the date of this Agreement and born subsequent hereto, and those who are legally adopted prior to attaining age 18 by the individual. An individual's descendants will include only the individual's child(ren), grandchild(ren), and other persons of a lower generation of whom the individual is the lineal ancestor, including persons born subsequent hereto, and those who are legally adopted prior to attaining age 18 by the individual or any such person. Notwithstanding the preceding, references to my children mean only _____, _____, _____, and any other child hereafter born to or adopted by me.

2. **Sample Language.**

The references in paragraph [____] do not include _____ and _____ and their descendants; nor do they include any individuals, and descendants of such individuals, who are adopted by my child or my descendant.

3. **Sample language:**

In determining whether any person is a child or descendant for purposes of this trust agreement, the following shall apply:

(1) A "child" of a person includes, as of the time such determination is to be made:

(a) A child born to such person or to such person's spouse while they are lawfully married, including any child conceived by natural means with such person's genetic material or by using artificial reproductive technology with or without such person's genetic material;

(b) A child lawfully adopted through court proceedings by such person prior to the child attaining the age of 21 years;

(c) If the person is biologically female, a child (i) born to such person, regardless of whether such child was conceived with the person's genetic material, unless such birth was pursuant to a gestational or surrogacy agreement, or (ii) born to another individual but conceived with such person's genetic material, unless such person acted solely as the donor of such genetic material without the intent to become a custodial parent of such resulting child; or

(d) If the person is biologically male, a child who was conceived with the person's genetic material and who the person acknowledges as such person's child by delivering his signed, written acknowledgment to the Trustee during the person's lifetime or by marrying such child's genetic mother after the child is born; provided, however, that such individual shall not be deemed to be the child of such person for purposes of this Trust until the date on which the Trustee receives such acknowledgment or such marriage takes place;

provided, however, that in all cases an individual shall cease to be the "child" of a person when the parental rights of such person with respect to such child are terminated during such person's lifetime through adoption court proceedings.

(2) The "genetic material" of a female person refers to the ovum of such person, and the "genetic material" of a male person refers to such person's sperm.

(3) A child of a person is a "descendant" of that person and of all ancestors of that person. A person's descendants include all children of such person and such children's descendants whenever born. Except when distribution or allocation is directed to descendants per stirpes, the

word "descendants" includes descendants of every degree whether or not a parent or more remote ancestor of a descendant is also living.

(4) Notwithstanding the foregoing, a person's posthumously born child as defined above shall be deemed a "child" of such person as of such person's death only if the child is born alive no more than ten (10) months after such person's death and if such child lives for at least ninety (90) days.

VII. Including Spouses/In-Laws

A. The Concept. The vast majority of our clients want to leave most or all of their assets to their spouse, and then to their children, but then deny their children the ability to do the same – i.e. leave assets to their spouse unless their trusts have terminated. This can be a difficult topic to discuss with clients because it requires some tenacity to make sure they give it the consideration it deserves.

B. Additional Considerations. Often the estate plan is defined with benefits to the lineal family and protections from outside influences, including the lineal family's spouses. With that in mind, it is worth urging clients to allow their children the *opportunity* to leave assets to their spouses. Leaving no opportunity to direct assets to a spouse might leave the spouse with little income if the descendant spouse dies with few assets outside of trust. A testamentary broad special power of appointment could allow the descendant beneficiary to appoint the assets under their estate plan and provide for the descendant's spouse and children in a manner that best fits their needs. If the grantor is concerned with that much flexibility the power of appointment could be restricted to require that the assets must be held in trust for the spouse with the remainder to grandchildren, and the assets subject to the power could be over a percentage or dollar amount. Special powers of appointment are only useful to the surviving spouse if they are exercised, if the grantor wants to provide for the descendant's spouse, the grantor's trust could permissibly include a spouse after the beneficiary's death, but perhaps with more restrictive discretion (income only with emergency principal distributions). In the case of a non-GST exempt trust, appointing the assets to a marital deduction trust, or to a trust for the spouse and children can defer estate and GST taxes, and obtain a basis step-up at the spouse's death in the case of a marital trust. Finally, consider giving beneficiaries the ability to grant their spouse the right to appoint trustees (or be a trustee) for their children's trusts.

C. Sample Provisions. The example below allows a beneficiary to appoint trust assets to the beneficiary's spouse in further trust.

1. Sample Language.

My grandchild may appoint, by specific reference to this power in my grandchild's Will, part or all of the assets of this trust among my descendants or my grandchild's spouse (but in all instances excluding such grandchild, such grandchild's estate, such grandchild's creditors, and the creditors of such grandchild's estate), in such proportions and in such manner, outright or in trust or otherwise, as my grandchild determines; provided, however, any appointment exercised in favor of my grandchild's spouse must be in a trust that limits such spouse's interest to no more than the net income from the trust for such spouse's lifetime. Regardless of other provisions to the contrary, my grandchild may relinquish this power in whole or in part at any time by written notice to Trustee. Assets not disposed of by a power of appointment will be known as the remaining trust assets. References to my grandchild's spouse include only the person who survived my grandchild as such grandchild's widow(er).

VIII. Silent trusts - good or bad?

A. The Concept. Some states allow for "silent trusts" in which the trustee has no duty to inform, or can be prohibited from informing, the beneficiaries of the existence of the trust, let alone provide information about the assets and investment performance. The desire for such clauses is understandable as most clients may not want their 18 year old children to learn they really do not need to go to college or get a job because they have millions in trust for their benefit.

B. Additional Considerations. Some notice statutes require the appointment of a "designated representative" to receive information and notices about the trust on behalf of the beneficiaries. The designated representative is supposed to protect the interests of beneficiaries who may not even know of the trust. Some families may not have multiple individuals

who would serve as a designated representative which could defeat the purpose of the designation if the originally named individual is unable or declines to serve.

There are many practical issues with silent trust clauses. For example, the trustee may need to brace for an awkward meeting with the beneficiary when the beneficiary learns of the trust's existence. The trustee may feel compelled to disclose additional information to a beneficiary that is receiving distributions from the trust and K-1's from the trust to report the beneficiary's share of the DNI on a tax return, but may be restricted from doing so under the terms of the trust. If the intent of the restrictions is to keep younger beneficiaries from receiving information, consider whether the provision can be crafted in a manner that discourages an older beneficiary who knows about the trust from revealing it to their siblings or other younger trust beneficiaries.

Another consideration is the duration of the silence. Consider whether the notice restriction should only apply during the grantor's life, or while certain trustees are serving. A clause requiring notice to certain beneficiaries may also provide that the parent of a minor beneficiary can waive receiving such notices on behalf of the minor child. This allows the parents to decide when their children should learn of their trusts. Certainly if the beneficiary has the power to appoint (or remove) trustees they need to know of the trust. Without knowledge of the trust's existence, the trust beneficiary cannot accurately create their own estate plans and they may not know whether the trust assets are included in their estates will pass free of estate tax to their children. How can they exercise powers of appointment they do not know exist? There are also life decisions that might be impacted by knowledge of the trust (or lack thereof), such as ability to buy a home or take a risk to start a business. Finally, how does one educate beneficiaries about the purposes of the trust and stewardship of the assets if they are not informed?

Consider putting an age limit, such as 30, to such clauses and allow the parents to waive the clause. Ensure the beneficiaries can be informed about the trust by the time they could appoint or remove trustees. However, some trusts say the "income beneficiaries" can appoint trustees, which could include beneficiaries of a wide age range.

C. Sample Provisions. The first sample is a restriction on the trustee's obligation under the uniform trust code to provide certain notice provisions upon the trust becoming irrevocable. The second sample, is an example of a silent trust designated representative.

1. Sample Language.

Trustee will have no duty to provide notice to beneficiaries other than as provided in this paragraph but Trustee, without liability, may provide notice to beneficiaries beyond that required in this paragraph. Trustee will, within nine months after acquiring knowledge of my incapacity or death, or upon creation of a new trust hereunder, notify as Trustee determines at least one current income beneficiary, or person entitled to discretionary distributions of income or principal, age 25 or older: (a) of the existence of the trust; (b) that the trust was created by me; and (c) that the person(s) notified has the right to request a copy of the provisions of the trust agreement that apply to the beneficiary and to request annual or more periodic reports of the trust assets, liabilities, receipts, and disbursements (including the source and amount of Trustee's compensation, a listing of the trust assets and, if reasonable, their respective market values). Trustee providing notice to Trustee will not be sufficient notice under this paragraph unless, at such time, no other beneficiary is entitled to notice under this paragraph. Unless unreasonable under the circumstances, Trustee will respond to written requests for information pertaining to the administration of the trust from any current income beneficiary or person entitled to discretionary distributions of income or principal.

2. Sample Language.

Notwithstanding any other provision of this Trust Agreement and in accordance with [insert applicable state law], none of the Trustee, the Investment Adviser, the Distribution Adviser or the Trust Protector, if any, shall furnish any account statement or other account information to any beneficiary of the Trust (other than the Designated Representatives), or provide any such beneficiary with notice of the existence of the Trust or any information regarding the Trust or its terms or assets, [[unless directed in writing to do so by the Trust Protector] [until such beneficiary attains the age of thirty-five (35)] [until such time as the interest of such beneficiary in the Trust vests]].

During such time or times as the Trustee is instructed not to, or by the terms of this Trust Agreement is not permitted to, provide notice of the existence of the trust or furnish trust information to a beneficiary or beneficiaries hereunder, the Trustee shall furnish any notice, statement, accounting or other instrument permitted or required to be provided to a beneficiary under the terms of this Trust Agreement, to the Designated Representative. By delivery of said document to the Designated Representative, the Trustee will be deemed to have satisfied its duties hereunder relating to the provision of such information and shall have no liability for the failure to provide such information to the beneficiary or beneficiaries or for the actions and/or omissions of the Designated Representative. The Designated Representative shall have the authority to acknowledge receipt of any said document provided to such person. Further, the Trustee may seek a release from the Designated Representative on behalf of the applicable beneficiaries in the same manner provided in [Section ____] with respect to accountings.

Wherever the term “Designated Representative” appears in this Trust Agreement, in accordance with [insert applicable state law], it shall mean such of the following individuals in the indicated order of priority who has delivered to the trustee his or her written acceptance of the office of Designated Representative: (1) the Grantor, while living and competent; (2) each current adult beneficiary to whom the Trustee is then authorized to distribute income; or (3) if there is no current adult income beneficiary, the custodial parents or legal guardians of each current minor beneficiary to whom the Trustee is then authorized to distribute income.

For purposes of this Trust Agreement and in accordance with [insert applicable state law], any beneficiary who is prohibited from receiving notice of the existence of the Trust, whether by virtue of the confidentiality provisions of this Trust Agreement or otherwise, shall for all purposes of this Trust Agreement (including any judicial proceeding and all non-judicial matters, such as granting releases pursuant to [insert applicable state law] and measuring the limitation period in [insert applicable state law]) be represented and bound by the Designated Representative.

IX. Private decanting provisions and broad amendment powers by trust protector

A. The Concept. More and more states are enacting “decanting” statutes that allow the trustee (with notice to or approval of the beneficiaries) to transfer some or all of the trust assets to another trust for one or more of the beneficiaries of the original trust. These statutes have proven to be enormously helpful, allowing trusts to be improved or clarified in many ways, or enhancing their income or estate tax benefits. These can be negated by a trust that specifically precludes the trustee from using these statutes, or the distribution standards under the trust instrument may not match the standard under the decanting statute. Even without a state law decanting statute, a trust agreement could give the trustee a similar power, perhaps even without notice to or approval of the beneficiaries. These are known as “private decanting” clauses. Rather than granting the trustee the power to decant, the trust agreement could grant a “trust protector” or other person the power to amend an irrevocable trust.

B. Additional Consideration. As trust law evolves the ability and methods available to modify an irrevocable trust has increased to a point that one may consider whether these statutes and clauses give too much power to the trustee. The grantor’s intent may be frustrated or completely disregarded if the trustee and beneficiaries can agree to change the terms of the trust in the future. Before adding potential language to that trust that makes modifications easier consider whether your client will understand the potential consequences of making repeated changes to an irrevocable trust, and how often will they “request” the trustee do so, giving the appearance of an implied understanding about amendments which the IRS can use to include the assets in the donor’s estate. If the client was the party that inserted the private decanting clause in the trust, that might look even worse. Perhaps requiring notice or approval by the beneficiaries will limit the unfettered use and help protect against estate inclusion.

For trusts that may last a long time, the grantor may want to include additional flexibility by giving someone the power to amend certain provisions of the trust, to adapt to changes in the law or changes in the circumstances of the beneficiaries or to take into account other factors specified by the grantor (e.g. maintaining S corporation eligibility or a charitable deduction). In addition, the grantor may prefer for someone other than the beneficiary to have the power to oversee the actions of the trustee or to remove a trustee or fill a vacancy in the trusteeship. Persons appointed in this capacity are often called Trust Protectors. The grantor can specify which powers the Protector shall have and the considerations applicable to those decisions. The same benefits, and concerns, associated with decanting still exist, and if the person the client selected as trustee is their first and best person for the job, they may not have another person to serve as trust protector.

C. **Sample Provisions.** Samples one and two are provision authorizing the trustee to decant a trust under certain circumstances. The third provision prohibits the trustee from decanting. The fourth and fifth provisions authorize a trust protector to take certain actions.

1. **Sample Language.**

The Trustee of each trust hereunder is authorized to distribute, at any time, all or any part of the trust estate as said Trustee, in its sole discretion, deems advisable to the Trustee of one (1) or more other trusts created or to be created by any person, including such Trustee hereunder, for the benefit of the beneficiary of such trust hereunder, or any one (1) or more of the beneficiaries of such trust hereunder. This power may be exercised by the Trustee even though the other trust to which the trust estate is to be transferred, is to be held pursuant to provisions other than the provisions hereunder, but only if such other trust or trusts do not differ in any substantial manner from such trust hereunder; provided, however, that no such distribution shall be made to any trust which may have a duration exceeding the period after which such trust hereunder is to terminate pursuant to the provision herein entitled "Accumulations and Perpetuities". For purposes hereof, the fact that not all of the beneficiaries of the trust hereunder from which a transfer is being made are beneficiaries of the trust(s) to which the trust estate is being transferred is not considered to be a substantial difference between those trusts.

2. **Sample Language.**

The Independent Trustee may distribute so much (including one or more specific assets, a pecuniary amount or fractional share) or all of the income and principal to or for the benefit of such one or more of the descendants of my mother who are then living or born thereafter in such proportions and subject to such trusts, powers, and conditions as the Independent Trustee in the Independent Trustee's sole discretion, decides. In addition to any limitation required by state law, any trust created pursuant to an exercise of the power under this Section (1) may have fewer individual current beneficiaries than the original trust; (2) if a descendant of mine is then living, may not permit a current beneficiary other than a descendant of mine; (3) may not provide for a current or future beneficiary (including as an appointee under a power of appointment) other than a descendant of my mother (4) may not include me as a current or future beneficiary; (5) may not change the identity, succession, power or other provisions related to the appointment and removal of officeholders; and (6) may not adversely affect a federal tax benefit, unless the power exercise explicitly explains the tax effect.

3. **Sample Language.**

Except as expressly provided herein, no Trustee of a trust created by or pursuant to this agreement may exercise any statutory power granted to such Trustee under the laws of the applicable jurisdiction, including, without limitation, the power to merge or decant trusts or the power to enter into a non-judicial settlement, to the extent the exercise of such power in such contemplated manner would result in a modification of the terms and provisions of such trust.

4. **Sample Language.**

TRUST PROTECTOR

A. Notwithstanding any other provision of this agreement, there shall at all times be one or more Trust Protectors (the "Trust Protector" or "Trust Protectors") to serve in accordance with the provisions of this Section ____.

B. Initially, the Trust Protector shall be [NAME]. Any Trust Protector acting hereunder may resign at any time by delivering written notice thereof to any Trustee then acting. If at any time a Trust Protector is not willing or able to act as the Trust Protector, then the Trust Protector shall be such one or more persons as the then serving Trust Protector shall have designated. Any designation pursuant to this Subsection ____ shall be by written instrument signed and acknowledged by the person or persons making such designation and delivered to the Trustee. If

no such designation is made by the then serving Trust Protector, the Trust Protector shall be the following persons, in the order named, who are willing and able to act as the Trust Protector, including such person if such person appoints himself or herself:

C. If no such designation is made within thirty (30) days after the unwillingness or inability to serve of the Trust Protector, then the Trustee may petition the Court having jurisdiction over the trust to appoint a successor Trust Protector to serve and any costs relating to the petition shall be borne by the Trust. At no time may the Grantor or any party related or subordinate to the Grantor within the meaning of Section 672(c) of the Internal Revenue Code be eligible to serve as Trust Protector.

D. The Trust Protector may _____ [Specify which actions may be taken by the Trust Protector or with the consent of the Trust Protector (e.g., enter into compensation agreements with fiduciaries, removal and appointment of other fiduciaries, etc.).]

E. The Trust Protector of each Trust hereunder shall exercise the Trust Protector's functions in a fiduciary capacity and in a way that the Trust Protector reasonably believes to be in accordance with the purposes of this agreement. The Trust Protector shall not be under any duty to inquire into or ensure the performance by the Trustee of its duties and shall not be liable for any loss to such trust (unless such loss results from actions in bad faith or the wilful misconduct of the Trust Protector). The Trust Protector shall have no duty to monitor the conduct of [e.g., the Investment Advisor or the Distribution Advisor] and shall not be liable for any exercise or failure to exercise the powers granted herein (unless such loss result from actions in bad faith or are a result of the wilful misconduct of the Trust Protector).

F. The Trustee shall not participate in or have any liability for the selection of the Trust Protector. The Trustee shall not have any duty to seek any direction or action from the Trust Protector. While a Trust Protector is serving, the Trustee shall have no responsibility to monitor the performance of the Trust Protector or to replace the Trust Protector. In addition, the Trustee shall have no duty to communicate with, warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Trust Protector.

G. The Trust Protector shall [not] be entitled to receive compensation for serving as Trust Protector.

5. Sample Language.

AMENDMENT OF ADMINISTRATIVE PROVISIONS

Notwithstanding the preceding provisions of this Trust Agreement, the [Trust Protector or other fiduciary], acting in a fiduciary capacity, shall have the power without notice to or consent by any beneficiary or court, by separate writing filed with the trust records, to amend the administrative provisions of this trust, including provisions relating to the Trustee; provided, however, that any amendment to a provision(s) relating to the Trustee shall require the consent of the Trustee. The [Trust Protector or other fiduciary]'s exercise of this power and the provisions subject to such exercise shall be conclusive upon all persons interested in the trust. The [Trust Protector or other fiduciary] may exercise this power from time to time, and may release this power in whole or in part, provided that the [Trust Protector or other fiduciary] shall not amend the trust in a manner that would alter any beneficial interest under the trust.

X. Grants and Exercises of Powers of Appointment

A. **The Concept.** Granting a power of appointment is an incredibly simple way to add broad flexibility to a trust, allowing a beneficiary to change where and how the assets pass at his or her death (and possibly during life) in light of the circumstances life has thrown his way. It can be as simple as saying, "The beneficiary shall have the power to appoint the trust property upon his death to or in favor of any of his or her descendants." But that leaves many unanswered questions, and powers of appointment need more directions in trust agreements.

B. Additional Considerations. If a testamentary power is being used state that the power can be exercised in a will or other document. The latter would avoid having to probate a will to make the exercise effective and could keep the disposition of the trust private. However, the use of another document could result in an unintended exercise if there are not specific reference requirements, or result in multiple documents potentially exercising the same power.

In a minority of states, a residuary clause in a person's Will that does not specifically exclude any powers of appointment can exercise a power of appointment if that power does not have specific requirements for its exercise.² Providing the power is only exercised "by specific reference to this power" in the powerholder's Will may be sufficient. The more specific the reference requirements the more likely the powerholder will fail to meet those requirements and prevent an intended exercise of the power.

State that the power can be effective at a later date. For example, if a beneficiary spouse has a testamentary power of appointment over a trust that owns insurance on the other spouse's life, the beneficiary spouse likely would prefer the exercise of the power be effective (i.e., the disposition occurs) at the grantor spouse's death if the beneficiary spouse predeceases the grantor. Otherwise, the policy could be transferred to the children or separate trusts for their benefit, making it more difficult to maintain and administer the policy.

State whether the power holder can exercise the power in further trust, and whether those trusts can grant powers of appointment to the beneficiaries that are even broader than the original power. If the power could be exercised outright in favor of the objects (who could then use or dispose of the assets as they wish), there does not seem to be a policy reason against allowing powerholder that ability to grant the object a broader power of appointment.

State that, if exercised in trust and all potential objects of the power subsequently die, the remainder can pass to others. Otherwise the appointed assets would not be allowed to continue through the powerholder's estate plan and may have to revert to the original donor's estate. State whether property added to the trust after the exercise is effective also passes according to the exercise of the power of appointment.

Rather than set out all the defining parts of a power of appointment when it is granted, which can be very long and cumbersome and result in repetitious provisions within the trust, the general rules regarding all powers of appointment may be set out in a definitions or miscellaneous section of the trust instrument. However, this may result in the powerholder having to review multiple provision of the trust agreement in order to know how to effectively exercise of the power.

Drafting the exercise of the power of appointment is equally as important as drafting the power itself. To avoid ineffectively exercising a power the powerholder must comply with the requirements for exercise, such as in a will with specific reference to the trust and power of appointment. The power holder must exercise the power only in favor of proper objects of the power. If the power is limited to a specific class of individuals whether outright or in trust, the powerholder should confirm the definition of that class. The definition of descendants or spouse in the granting trust may be different than the powerholder's trust. The powerholder should ensure any trust created by the exercise (or trust to which assets are added) does not violate the rule against perpetuities clause of the original trust. Unless the power is a general power of appointment, avoid exercising the power in favor of powerholder's revocable trust. Under state law, assets directed to the powerholder's revocable trust may be subject to the trust's estate support clause and could be used to pay debts and estate taxes, which would exceed the authority under the power of appointment. Instead consider exercising the power in favor of a subtrust to be created under the powerholder's revocable trust agreement.

C. Sample Provisions. The first sample provides the terms and requirements to exercise a power of appointment. The second sample provides an exercise of a power of appointment.

1. Sample Language.

Exercise of Powers of Appointment. Any exercise of a power of appointment granted pursuant to this Agreement that is to be effective during the life of the holder of such power shall be exercised by a signed instrument delivered to the trustee that expressly refers to such power. Any exercise of a power of appointment granted pursuant to this Agreement that is to be effective upon the death of the holder of such power shall be exercised either by (1) a signed instrument delivered to the trustee, the last such instrument to control, or (2) the Will of such holder admitted to probate in any jurisdiction, provided that such instrument or Will expressly refers to such power. In the event of any conflict between the last such instrument delivered to the trustee and such Will, the

provisions of such Will shall control. In the absence of a specific reference to a power of appointment granted hereunder, any exercise of such power shall be ineffective.

Except as otherwise expressly provided in this Agreement:

1. The exercise of a power of appointment shall be effective on the date indicated in the instrument or Will, as the case may be (the “distribution date”), and may be amended or revoked by the holder prior to the distribution date unless otherwise provided in the exercise; provided, however, that the distribution date may not be after the date on which the trust with respect to which such power was exercised would terminate in default of the exercise of such power, and during the course of administration, the trustee shall not consider the terms of any exercise of a power of appointment prior to the distribution date unless the exercise of such power specifically provides otherwise.

2. The exercise of a power of appointment may direct that the property subject to the power be disposed of outright or in trust, may impose limitations or conditions, and may grant additional powers of appointment to the object of the power exercisable by Will and/or during life. Such additional powers of appointment granted to an object of the power shall be exercisable only in favor of permissible objects of the power of appointment held by the holder who granted such powers unless such holder is authorized to appoint outright to the object of the power in which case the objects of such additional powers of appointment need not be permissible objects of the power of appointment held by the holder.

3. If a power of appointment is exercised over all, a percentage or a fraction (and not a specified dollar amount) of trust property, unless otherwise provided in the instrument exercising such power of appointment, any property added to such trust after the effective date of such exercise shall be disposed of in the same manner as though it had been part of the property of such trust as of the effective date of such exercise (i.e., it shall be disposed of as directed in such exercise).

4. The exercise of a power of appointment may appoint a different trustee to administer a trust created by the exercise of the power and may change the situs of the trust administration and direct that the trust shall be governed by the law of the new situs or any other jurisdiction. If the exercise of the power does not direct otherwise, a trust created by the exercise of the power shall be administered by the trustee hereof subject to the same management powers conferred on the trustee.

5. If a power of appointment is exercised in further trust and the last surviving permissible object of the power who is a beneficiary or remaindermen of such trust dies, then notwithstanding any provision of such trust, the remaining trust property shall be disposed of as directed in the Article titled “Ultimate Contingent Beneficiaries,” and any such appointment that so provides is valid.

2 Sample Language.

My _____ created a trust agreement on _____. I am given a [special/general] power of appointment in paragraph _____ of said trust agreement. I hereby exercise said power of appointment and appoint the assets subject to such power to the Trustee of my Revocable Trust to be administered under Article _____.

XI. Trustee power to grant or eliminate a power of appointment

A. The Concept. Estate tax inclusion is generally preferred if it results in less overall tax. This applies to inclusion in estates to create a new transferor for GST tax as well as inclusion for income tax basis.

B. Additional Considerations. If a trust is not GST exempt, it may be subject to generation-skipping tax at the beneficiary’s death unless it is included in such beneficiary’s taxable estate in which event the beneficiary becomes the

transferor for the portion of the trust property included in such beneficiary's estate. Inclusion in the beneficiary's estate is generally preferred even if it subjects the trust property to estate tax because:

- a. The estate tax rate will always be equal to or less than the GST tax rate (which would be applied to a tax-inclusive taxable termination);
- b. Property included in the beneficiary's estate receives a full basis adjustment to its current fair market value, whereas the basis of property subject to GST tax is only increased by the amount of GST tax attributable to the unrealized gain (unless a taxable termination by reason of death occurs, in which the assets receive a full basis step-up);³ and
- c. The estate tax credit for prior transfers (Section 2013) does not apply to property subject to GST tax.⁴

Estate inclusion can be triggered by granting a general power of appointment (GPA). However, if the distribution of the trust property at the beneficiary's death will not be a generation-skipping transfer, it may be preferable that the beneficiary not have a GPA. For example, if the beneficiary does not have descendants and the property will pass to his siblings upon his death, no GST tax will be imposed because the property will not pass to skip persons. Therefore, inclusion in the beneficiary's estate could subject the property to an unnecessary estate tax. Similarly, if the beneficiary is expected to exercise the power in a manner that would be damaging to the family (e.g., by distributing stock in the family business to an outsider), the power would be undesirable. Nonetheless, absent such circumstances, subjecting property to estate tax is preferable to GST tax.

Most existing trusts do not contemplate intentionally triggering estate inclusion for GST exempt assets; however, the current high federal gift and estate tax exclusions amounts have created a new planning opportunity by intentionally including trust assets in a beneficiary's estate in order to receive a basis adjustment at the beneficiary's death. Unlike the decision between estate tax and GST tax, the inclusion for income taxes is not always the best choice. Over inclusion of trust assets could result in paying an estate tax when the estate was otherwise under the taxable amount, and inclusion of assets with built-in losses cancels a potential tax benefit. Rather than always including a general power of appointment for basis purposes which would be difficult to draft in a manner that contains the necessary flexibility for future circumstance while maintaining enough certainty to meet the requirements of a valid power of appoint, consider a provision that provides the trustee with authority to nominate an independent person who could grant the power of appointment.

C. Sample Provisions: The first sample gives a disinterested trustee the power to grant or remove a general power of appointment for GST tax purposes, but only at the beneficiary's request. Otherwise, the trustee could be liable for exercising or not exercising the power. The second sample grants the trustee the power to appoint another person to who may grant a general power of appointment. The third sample grants a general power of appointment over assets that are subject to GST tax.

1. Sample Language.

Contingent General Power of Appointment. Upon the primary beneficiary's death, if any portion of the trust property is not GST Exempt, the trustee shall dispose of that portion of the trust property that, if allocated or distributed pursuant to the Section of this Article titled "Final Distribution of Trust Property" (ignoring exercises of any powers of appointment by the primary beneficiary), would result (but for the provisions of this Section) in a generation-skipping transfer (as defined in Section 2611 of the Code), as the primary beneficiary may appoint to or in favor of the creditors of his estate.")

2. Sample Language.

Trustee (other than a beneficiary) may, by filing written notice with the trust records, appoint an Independent Person who may, by filing written notice with the trust records, grant to any beneficiary a power to appoint all or any portion of the trust assets to the creditors of the beneficiary's estate, or revoke any such power previously granted under this provision. Such portion may be described by reference to specific assets, income tax basis, fair market value, by formula or otherwise, and may be conditioned on the consent of a non-adverse person within the meaning of section 2041 of the Code. The Independent Person will not be a fiduciary but will be liable for acts of bad faith, willful misconduct and self-dealing. In addition, Trustee who is a

beneficiary may, by filing written notice with the trust records, designate an individual as a fiduciary to be a limited purpose Trustee solely to act under this subparagraph. The purpose of this subparagraph is to enable minimization of federal and state income and estate and inheritance taxes. Notwithstanding the foregoing, no such power may be granted with respect to a trust qualified under sections 2056, 2056A or 664 of the Code. Trustee (including a limited purpose Trustee) will have no duty to act, nor any liability for acting or declining to act, in good faith under this subparagraph.

3. Sample Language.

My child may appoint, by specific reference to this power in my child's Will, any part or all of the "applicable portion" of the assets held in my child's trust that would incur, but for the existence and/or exercise of this power, a tax imposed by Chapter 13 at my child's death to the creditors of my child's estate. The "applicable portion" means assets having a value equal to the greatest dollar amount which produces the lowest sum of (1) estate and inheritance taxes (but exclusive of interest and penalties) payable with respect to such child's estate (taking into consideration applicable deductions and credits) and (2) tax imposed by Chapter 13 payable with respect to this trust. Unless such child directs otherwise by specific reference to this paragraph, Trustee will pay directly or to the personal representative of such child's estate the amount of incremental estate and inheritance taxes imposed (including interest and penalties thereon, if any) and any tax imposed by Chapter 13 on such estate by reason of any assets of this trust being included therein. Assets not disposed of by a power of appointment will be known as the remaining trust assets.

XII. Change of situs/governing law clauses

A. The Concept. A clause allowing the trustee to change the situs and/or governing law of the trust can be very useful to allow one to take advantage of more favorable trust laws or state income taxes.

B. Additional Considerations Consider the effects of change in the perpetuities period originally applicable to trust if the trust's governing law or situs is changed. The trust agreement should say that any change in situs or governing law does not affect the perpetuities period or the rule against perpetuities. Depending on how the terms are drafted, a change in the trust situs may merely change the administration of the trust (i.e. the trustee's powers and duties) without changing the law that construes or interprets the trust. This may result in a trust be administered in one state but subject to the laws of another. Because there may be more favorable jurisdictions for different beneficiaries under different circumstances, consider whether the trust instrument should relieve the trustee from duty to monitor the law in all jurisdictions. Leave it to the beneficiaries or their counsel to suggest changes to the trustee.

C. Sample Provisions. The samples below provide different methods of declaring the original situs and governing law and allowing for a change to that original designation.

1. Sample Language.

This Agreement shall be construed and administered, and the validity of each trust hereunder shall be determined, in accordance with the laws of the State of [____], without giving effect to its conflicts of law principles. The trustee may amend this Section and take any other action in order to change the jurisdiction whose law shall govern the construction, administration and validity of any trust hereunder, and to amend any other provision of this Agreement solely for such purposes, but any such change shall not affect the original term of the trust pursuant to the Section titled "Rule Against Perpetuities." The jurisdiction whose law governs the construction, administration and validity of any trust may, but need not, be the same as the situs of the administration of such trust.

The trustee may transfer the situs of the administration of any trust hereunder and/or the location of any trust property to another jurisdiction within or without the United States as often as the trustee deems it advantageous; and the trustee may take whatever action is necessary or desirable (including, without limitation, the commencement of an appropriate judicial proceeding) in order to effectuate such a transfer of trust situs administration or of the location of trust property; and if necessary for the transfer of the situs of the administration of a trust, the persons in the Article

titled “Successor and Additional Trustees” empowered to establish a plan of trustees of the trust, or if none, the trustee may designate a person or corporate trustee to assume office as a co-trustee of that trust, and thereafter may act as adviser to such substitute trustee and may receive reasonable compensation for so serving.

The trustee shall have no duty to monitor the laws of other jurisdictions in order to determine whether the powers to change the situs or the jurisdiction whose law shall govern the construction, administration and validity of any trust hereunder should be exercised.

2. Sample Language.

The principal place of administration of the trust shall be _____ and the trust shall be governed by the law of _____ for all purposes, including construction, validity, interpretation, and administration. The trustee shall have the power at any time or from time to time to elect to move the principal place of administration and to have the law of such other jurisdiction govern the administration of the trust upon the written request of any beneficiary delivered to the trustee.

3. Sample Language.

The independent trustee shall have the power at any time or from time to time change the principal place of administration of the trust to any jurisdiction within or without the United States and, upon so doing, to elect to have the law of the principal place of administration govern the administration of the trust, if the independent trustee believes this to be in the best interests of the beneficiaries. Notwithstanding the foregoing, the independent trustee shall be under no duty to monitor the law of any other jurisdiction to determine whether and when to exercise this power.

XIII. Crummey rights

A. The Concept. Giving a beneficiary a right to withdraw a gift can qualify the gift for the gift tax annual exclusion under Section 2503. Under *Crummey v. Comm’r*⁵ and *Estate of Clyde W. Turner, Sr. v. Comm’r*⁶, written notice (and perhaps actual notice) is not even required, but are advisable. The IRS often asks for copies of any notices in gift tax audits.

B. Additional Considerations. One can include their spouse as a beneficiary of a trust primarily intended for their kids for added flexibility and access to the assets. The spouse can also be given Crummey withdrawal rights, allowing for an additional \$15,000 to be contributed to the trust each year. However, if GST exemption is allocated to the trust, make sure the spouse’s cannot withdraw more than the greater of \$5,000 or 5% of the trust value, and that the spouse’s withdrawal right will lapse in full within 60 days. Otherwise, the “estate tax inclusion period” (ETIP) will apply and preclude timely allocation of GST exemption until the spouse’s withdrawal right lapses.

The trust agreement can provide that the trustee “should” give notice to the beneficiaries, but not require that such notice be in writing. This gives the trustee the most flexibility and a stronger argument if the IRS claims the withdrawal right was not effective because the trustee failed to comply with the trust. The notice should *not* give the beneficiaries an option to waive or release the withdrawal rights. Under section 2514(e), a lapse of a general power of appointment (withdrawal right) is not a gift to the extent it does not exceed the greater of \$5,000 or 5% of the trust value, but this exception does not apply to an affirmative “release” of a general power/withdrawal right. A release would be treated as a gift. The notice should simply notify them of their rights.

C. Sample Provisions. The following provision is an example of the grantor’s instruction to the trustee regarding notice of withdrawal rights.

1. Sample Language.

Notice of Withdrawal Rights. The trustee should notify each person granted a withdrawal right of the existence of such right (other than a person who has actual knowledge of such right), but the trustee’s failure to provide such notice shall not affect such person’s withdrawal right. If a person notifies the trustee of his intention to make annual Additions, the trustee may provide a single

notice containing the foregoing information to each person who will be granted a withdrawal right with respect to such annual Additions. If a person granted a withdrawal right is Incapacitated, notice of his withdrawal rights shall be given to his agent under a power of attorney, if any, otherwise to the representative of his estate, if any, otherwise to the guardian of such person, or if no guardian has been appointed, to his parent (other than the donor) or a person with whom he resides (other than the donor), but if there is no such person, to a person who is serving as trustee of such trust (in his individual capacity and not as trustee); provided, however, that the person to whom notice of an Incapacitated person's withdrawal right would be given pursuant to the foregoing provision may designate another person to receive such notice by a signed instrument delivered to the trustee.

XIV. Grantor Trusts

A. The Concept. A trust can be treated for income tax purposes as separate entity or depending on the terms of the trust, the trust income may be taxed to the grantor. This type of trust is a grantor trust and Sections 671-679 of the Code set forth the different rules and methods for creating a grantor trust. There are multiple methods for creating grantor trust status and a trust instrument may include more than one method, such as:

1. Including the grantor's spouse as a beneficiary (IRC Section 677), which also provides flexibility to reach the assets;
2. Giving the grantor (or another party), in a nonfiduciary manner, the power to substitute property of equivalent value;
3. Granting the trustee the power to use trust income to pay premiums of insurance on the grantor's life and to lend to the grantor without adequate security; and
4. Appointing a non-adverse party as trustee who has the power to affect beneficial enjoyment (generally not limited by ascertainable standards and with *more* than half of the trustees related or subordinate to the grantor, unless the trustee has the power to add beneficiaries).

B. Additional Considerations. Toggling between grantor trust and non-grantor trust status may be another consideration. A trust instrument may contain clauses that expressly allow the trustee to release specific trustee powers that cause grantor trust status. In the event the acting trustee is concerned that a disgruntled beneficiary will question the trustee's action that triggered the trust to start paying its own taxes, consider including include a clause that releases and indemnifies the trustee from any liability for releasing a power that discontinues a trust's grantor trust status. Also the trust instrument may give the grantor (or other party) the power to release the power to substitute assets of equivalent value, and to change the trustees so that Section 674 of the Code (relating to adverse parties as trustees or less than a majority being related/subordinate) does not apply. If there are trust protectors who can change trust terms and affect beneficial enjoyment, they might need to be changed or release their powers. A concern with a power of substitution in a directed trust is that the Trustee may not be the person with the correct information to determine the equivalency in value of the substituted property. The Trustee may require that the investment advisor certify the values are equivalent rather than the trustee in a directed trust context.

One of the simplest ways to turn grantor trust back "on" is to utilize Section 674 and reappoint trustees who are related or subordinate to the grantor (at least half or else with power to add beneficiaries) who can control beneficial enjoyment. There may be substantial adverse income tax consequences to turning off a trust's grantor trust status, such as triggering gain if the trust's liabilities exceed its basis in the trust assets, or if the trust owns a partnership and the trust's pro rata share of partnership liabilities exceeds the partnership's basis in its assets. The parties should review the consequences and be cognizant of the potential issues prior to making a change to a trust's grantor trust status.

Tax reimbursement for the grantor may be another consideration in drafting a grantor trust agreement. The trust instrument could give an unrelated/non-subordinate trustee the discretionary power to reimburse the grantor for the income tax attributable to the trust, as permitted under Rev. Rul. 2004-64; 2004-27 IRB 7, Jul. 6, 2004. However, before using this clause, applicable state law should be reviewed to determine whether this provision will cause any of the trust property to be reachable by the grantor's creditors which could result in estate inclusion in the grantor's estate. In any event, this is limited to taxes attributable only to the immediately preceding calendar year to limit the total amount that is potentially distributable to the grantor (as such amount could be reached by the grantor's creditors depending on state law). Based on the revenue

ruling, unless the IRS can show an implied or express agreement or understand that the trustee *will* reimburse the grantor, this provision should not cause estate inclusion under Section 2036. Decanting to make a trust a grantor trust may require notice to the Grantor so he or she has an opportunity to challenge the decanting.⁷ There is an open question whether a power to reimburse the grantor for tax obligations makes the grantor a beneficiary of the trust to whom the trustee owes other duties. A trustee will need to consider whether a change in tax status is in the best interests of the beneficiaries of the trust in determining whether to exercise such a power. If the grantor is not a beneficiary of the trust, turning off grantor trust status may be challenging to justify.

C. Sample Provisions. The first two examples below are provisions for the power to substitute assets (the second for a trust where there is an Investment Advisor with sole responsibility for the investment of trust assets). The third provision grants the trustee the discretion to make distributions for tax payments.

1. Sample Language.

I may in a non-fiduciary capacity acquire or reacquire by giving written notice to Trustee all or a portion of trust assets by substituting assets of equivalent fair market value (as determined by Trustee); provided this substitution does not shift benefits among the trust beneficiaries. This power is intended to be one described in section 675(4)(C) of the Code and will be interpreted accordingly. I may relinquish this power at any time by written notice to Trustee. My duly appointed guardian, or if there is no such guardian, my attorney in fact may exercise or relinquish this power. Trustee (unless I am serving as Trustee) may reimburse me for income taxes incurred as a result of this paragraph.

2. Sample Language.

The Grantor or Trust Protector shall exercise the Power to Substitute granted pursuant to Section ____ by an instrument in writing signed by the Grantor or Trust Protector and delivered to the Trustee and the Investment Adviser, which certifies to the Trustee and the Investment Adviser that the substituted property and the Trust property for which it is substituted are of equivalent value. Within 30 days of receiving written exercise of the Power to Substitute, the Investment Adviser shall provide the Trustee with a written confirmation that (i) certifies that the property proposed to be substituted by the Grantor or Trust Protector is of equivalent value with the Trust property for which it will be substituted, and (ii) directs the Trustee as to the actions necessary and appropriate to affect the substitution. In the event the Investment Adviser fails to provide the written confirmation described in the preceding sentence or provides notice to the Trustee that the assets or property proposed to be substituted are not of equivalent value with the property to be acquired by the Grantor or Trust Protector, the Investment Adviser will be deemed to have directed the Trustee not to take any action to affect the proposed substitution. The Trustee may, but shall not be required to, seek a judicial determination by a Court of competent jurisdiction that the requirement of equivalent value is satisfied. The reasonable expenses of such independent determination, including any judicial determination, shall be borne by the Grantor exercising each power.

The Trustee shall have no duty or responsibility to inquire into or examine (i) whether the certifications made by the Grantor or Trust Protector and the Investment Adviser hereunder are true and accurate, or (ii) whether any actions directed (or deemed directed) to be taken by the Investment Adviser under this Section ____ will result in any adverse tax consequence to the Trust, the Grantor, or any beneficiary of the Trust. Further, the Trustee shall have no duty or responsibility to monitor or otherwise confirm that the Investment Adviser is complying with his duties under this Section _____. The Trustee shall not be liable to any person, including any beneficiary, for any loss to the trust or any other person as a consequence of actions directed (or deemed directed) to be taken under this Section or for any breach resulting from reliance on the certifications provided hereunder or from following the direction (or deemed direction) of the Investment Adviser.

3. Sample Language.

I hereby waive any right of reimbursement under any applicable law for my tax liability (whether federal, state or otherwise), if any, attributable to a trust being treated as a “grantor trust” as to me under Code Sections 671 through 679. If (i) in any calendar year, a trust created hereunder is treated as a “grantor trust” as to me under Code Sections 671 through 679 and (ii) Revenue Ruling 2004-64 has not been modified, revoked or withdrawn and may be relied upon as precedent in the jurisdiction in which the trust is administered as it pertains to situation 3 described in Revenue Ruling 2004-64 (or if it has been modified, revoked or withdrawn if other binding precedent then exists that reaches the same holding as currently set forth in Revenue Ruling 2004-64 for situation 3), the trustee may, in the trustee’s discretion, pay directly to the taxing authorities or reimburse me out of the trust property such amount equal to the amount by which my Federal, state and local income taxes for the immediately preceding calendar year exceed the amount of such taxes that would have been imposed if the trust’s income, gains, losses and deductions had not been included in the determination of my income tax liability (the “Incremental Taxes”); provided, however, the trustee shall have no discretion to pay directly to the taxing authorities or reimburse me out of the trust property any amount pursuant to this Section if such discretion, combined with any applicable state law which would subject the trust property to the claims of *my* creditors, would cause inclusion of the trust property in my gross estate for federal or state estate tax purposes. If it is finally determined for income tax purposes that the trustee reimbursed me an amount in excess of the Incremental Taxes, I shall repay such trust such excess amount within thirty (30) days of the final determination of the Incremental Taxes. It is intended that the trustee’s exercise of discretion to reimburse me for any such income taxes not be considered a gift from the trust beneficiaries to me and that the existence of such power shall not be considered a retained right or interest that will cause inclusion of any part of any trust created hereunder in my estate for federal and state estate tax purposes; this Section and this Agreement shall be construed in accordance with this stated intent. Notwithstanding any other provision of this Agreement, only a trustee who is not related or subordinate to me within the meaning of Section 672(c) of the Code, may exercise the powers to reimburse me granted to the trustee pursuant to this Section. This provision supersedes any otherwise applicable provision of law governing payment or reimbursement of my taxes, including any right I would otherwise have to such payment or reimbursement.

XV. Funding Charitable and Non-Charitable Distributions at 2nd death:

A. The Concept. Sometimes married couples want to make specific bequests to various friends, family and charities but only after the second spouse’s death ensuring that the money will first provide for the surviving spouse before others. The difficulty lies in the uncertainty as to where the assets will be at the surviving spouse’s death. Some assets may be in the survivor’s revocable trust while others could be in a credit shelter trust or marital trust created under the predeceased spouse’s revocable trust. Further, there could be multiple marital trusts and credit shelter trusts, some GST exempt, some not, some for which a state QTIP election was made or both a federal and state QTIP election.

B. Additional Considerations. It is critical to specify from which sources each bequest may or *must* be made to maximize the tax benefits and minimize current estate taxes, and to avoid paying the bequests multiple times from different sources. For example, one might want the GST exempt assets to pass to the children and grandchildren rather than friends.

In the case of distributions to charitable entities, in order to obtain an estate tax charitable deduction, the trusts must *require* that such distribution be paid from assets included in the surviving spouse’s estate (e.g., such spouse’s revocable trust or a marital trusts included in the spouse’s estate). Absent such a direction, the estate tax charitable deduction might be partly or completely denied because an estate tax charitable deduction can only be obtained for property included in a person’s estate that passes to charity. That determination is made as of the time of death.

For example, each spouse’s revocable trust provides that \$1 million is to be distributed to charity upon the death of the surviving spouse, and includes that provision in the survivor’s revocable trust, the predeceased spouse’s marital trust for the surviving spouse and the predeceased spouse’s credit shelter trust for the surviving spouse. At the time of surviving spouse’s death it is uncertain whether the \$1 million distribution to charity will be paid from assets included in the estate (revocable trust and marital trust), or from assets not included (the credit shelter trust). If the distribution is made from the credit shelter trust, the estate is *not* entitled to a charitable deduction.

It is important to have provisions that coordinate among the revocable trust, marital trusts and credit shelter trusts to (a) pay the bequests only once in the aggregate, (2) pay the charitable bequests only out of assets included in the estate (and preferably from non-GST exempt assets) and (3) indicate who should receive or benefit from the GST exempt assets.

C. Sample Provisions. The example below could be used in each spouse's Revocable Trust and contemplates that the distribution could be made from either spouse's trust assets but will only be made once. This sample is styled as a specific bequest to be made from the surviving spouse's assets. This provision sets aside the general survivorship provisions that might be located elsewhere within the trust instrument and each spouse's trust would provide for one spouse to be the designated survivor. This provision also provides for an exception for any tax allocation which could be removed if the taxes are paid from the residue of the estate.

1. Sample Language.

If my Spouse does not survive me (and for purposes of this provision my Spouse will be deemed to [survive/predecease] me if we die under such circumstances that the order of our deaths cannot be determined), Trustee will make the following distributions from the trust fund, as soon as reasonably possible after my death [, and, notwithstanding the apportionment called for in my Will and the preceding paragraph, Trustee will pay from the trust fund all estate and inheritance taxes, without apportionment, in respect of property distributed by this paragraph]. Such distributions will bear interest and otherwise be treated in the same manner as if made as bequests in my Will:

XVI. Expanded Investment Provisions

A. The Concept. Some grantors may want to give a trustee additional flexibility in making trust investments – perhaps they want to waive the duty to diversify or to waive in advance a conflict of interest that might arise if the trust invested in assets or funds to which the trustee provides advice or services. The grantor of a long-term trust may also want to consider expanding the types of investments to accommodate type of assets that have not yet been conceived.

B. Additional Considerations. These need to be reviewed with the grantor and used carefully because some of the duties that are waived are ones put in place by statute or under common law to protect beneficiaries.

C. Sample Provisions. Below are three samples of different types of expanded investment provisions.

1. Sample Language.

WAIVER OF PRUDENT INVESTOR RULE, RULE AGAINST SELF-DEALING AND DUTY OF LOYALTY

With the written consent of (i) the Grantor, if living, or (ii) if the Grantor is not then-living, the Primary Beneficiary, [or (iii) if the Primary Beneficiary is a minor or otherwise incapacitated or disabled, a majority of the Notice Recipients,] the Trustee shall have the power to acquire and retain investments not regarded as traditional for trusts, including, without limitation, investments that would be forbidden or would be regarded as imprudent, improper or unlawful under 12 Del. C. § 3302, any applicable jurisdiction's "prudent person" or "prudent investor" rule, any rule or law concerning the duty of loyalty, any rule or law limiting, prescribing, or voiding or making voidable any interested party or self-dealing transaction, or any other rule or law which restricts a fiduciary's capacity to invest. The Trustee may invest in any type of property, wherever located, including, but not limited to, any type of security or option, improved or unimproved real property, and tangible or intangible personal property, and in any manner, including direct purchase, joint ventures, partnerships, limited partnerships, limited liability companies, corporations, mutual funds, business trusts or any other form or participation or ownership whatsoever. Furthermore, the Trustee may acquire property from, transfer property to, obtain services from, provide services to, and otherwise enter into contracts, understandings, arrangements, and other dealings, of any kind or nature, with any person or entity (each such person or entity hereinafter referred to as a "Third Party") whether or not the Third Party is in any manner related to, or affiliated with, the Trustee or any other person or entity related to, or affiliated with, the Trustee and without regard to whether the Trustee, acting in its corporate or personal capacity or in any other capacity, or any person related to, or affiliated with, the Trustee

has other contracts, understandings, arrangements or dealings, whether or not for remuneration with the Third Party. Notwithstanding any duty otherwise existing hereunder or at law or in equity, in making investments the Trustee may disregard any or all of the following factors:

- Whether a particular investment, or the Trust investments collectively, will produce a reasonable rate of return or result in the preservation of principal.
- Whether the acquisition or retention of a particular investment, or Trust investments collectively, is consistent with the Trustee's duty of impartiality. No duty of impartiality shall exist.
- Whether the acquisition or retention of a particular investment or any aspect of the administration of such investment violates any duty of loyalty or rule against self-dealing. No duty of loyalty shall exist to the extent such duty would limit or preclude self-dealing transactions.
- Whether the Trust is diversified. No duty to diversify shall exist.
- Whether any or all of the Trust investments would traditionally be classified as too risky or speculative for trusts. The entire Trust may be so invested. The Investment Fiduciary shall have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy.

To the extent the Trustee is directed hereunder as to the exercise of investment powers, the party providing such direction (the "Investment Fiduciary") shall have the authority to direct the Trustee to make any investment which the Trustee is authorized to make under this Section _____. The purpose in granting the foregoing authority is to modify the "prudent person" rule, "prudent investor" rule, the application of 12 Del. C. § 3302, the duty of loyalty, the rule against self-dealing, or any rule or law which restricts a fiduciary's ability to invest insofar as any such rule or law would prohibit an investment or investments because of one or more factors listed above, or any other factor relating to the nature of the investment itself.

2. Sample Language.

INVESTMENT IN AND RETENTION OF SECURITIES MANAGED, ISSUED, UNDERWRITTEN OR DISTRIBUTED BY TRUSTEE OR AFFILIATE; OTHER DEALINGS AND TRANSACTIONS WITH AFFILIATES

The Trustee is authorized, directly or at the direction of the Investment Adviser, if one is serving, to invest in, retain or otherwise deal in any securities or other property, real or personal (within or without the United States), including without limitation: any security as defined by the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of the Commodity Exchange Act, shares or interests in any private investment fund, private equity or venture capital fund, hedge fund, common trust fund, joint venture, general or limited partnership, limited liability company, statutory or common law trust, real estate investment trust or an open-end (including any mutual fund) or closed-end management type investment company or unit investment trust, whether registered under the Investment Company Act of 1940 or unregistered, any money market instrument, bank deposit account (including but not limited to savings, time, certificate of deposit and transaction accounts), precious metal, foreign exchange, structured product, insurance contract, options, options on futures and variable forward contracts, swaps, caps, collars and other derivative instruments of a financial nature, notwithstanding the fact that the Trustee, investment manager or custodian, its respective parent or any affiliate, provides services (whether as manager, issuer, underwriter, distributor, custodian, advisor, agent, or otherwise) with respect to any such investment and further notwithstanding that the Trustee, investment manager, custodian or its respective parent or any Affiliate may receive compensation with respect to any such investment (in addition to Trustee's compensation), so long as the total compensation received is reasonable, and neither the Trustee nor the Investment Adviser shall have any duty to make the disclosure described in Section 3312(c) of Title 12 of the Delaware

Code or, to the fullest extent permitted by law, pursuant to any other otherwise applicable law. To the extent permitted by local law, this provision is intended to be a specific override of any contrary provision of law prohibiting such additional fees or otherwise requiring either a reduction in the Trustee's compensation or investment advisory or other fees or commissions or an election between such compensation and such additional fees or commissions. Any diversification requirement under applicable law that would otherwise apply is expressly negated and shall not apply to the trust.

3. Sample Language.

**EMPLOYMENT OF AND DEALINGS WITH AFFILIATED AGENTS, INCLUDING
BROKER-DEALERS AND OTHER AFFILIATED CORPORATIONS**

Conflicts of interest may arise by virtue of the powers granted to the Trustee in this Trust Agreement. The Trustee is therefore expressly exempted from the adverse operation of any rule of law that might otherwise apply to the Trustee in the performance of its fiduciary duties by reason of conflict of interest. Notwithstanding any duty otherwise existing hereunder or at law or in equity, the Trustee shall have no greater burden to justify its acts as a fiduciary by reason of conflict of interest than it would have in the absence of any conflict.

The Trustee is authorized without notice to or consent by any beneficiary or court and without any disclosure otherwise required pursuant to 12 Del. C. § 3312(c) or other applicable law, to engage any corporation, partnership, limited liability company or other entity that is a subsidiary or affiliate of a corporate trustee serving hereunder and/or any individual who is a partner, director, member, manager, officer or employee of any such subsidiary or affiliate (individually and collectively, an "Affiliate"), to act as agent of or render services to the trust, to delegate discretionary authority to any Affiliate and to pay customary fees and compensation to such Affiliate without reduction of any compensation paid to the Trustee. Subject to the Investment Adviser's direction with respect to any investment powers set forth below, the Trustee, and any Affiliate appointed by the Trustee, is hereby authorized:

1. To appoint one or more Affiliates to manage in its or their sole discretion the investment of all or any portion of the trust's assets or to provide non-discretionary investment advice;
2. To appoint one or more Affiliates to act as custodian of all or any portion of the trust's assets and, in connection therewith, to cause such assets to be held in any jurisdiction by or in the name of any nominee of the Trustee or an Affiliate;
3. To engage one or more Affiliates to provide trust administration or recordkeeping services for the trust;
4. To use, engage or hire any Affiliates as broker, dealer, principal or agent in the purchase or sale of stocks, bonds or other securities or property for the account of the trust;
5. To purchase from or sell to any Affiliate any stock, bonds or other securities or property and to engage in agency cross transactions with any Affiliate, in each case at such price and upon such terms as the Trustee and such Affiliate may deem advisable;
6. To invest any funds in the trust in any stocks, bonds, or other securities or property, real or personal, or whatsoever kind or nature, which may be distributed, underwritten, managed or issued by or through an Affiliate, and from which an Affiliate may receive fees or other compensation;
7. To make any investment or enter into any transaction which may directly or indirectly benefit any Affiliate or in which any Affiliate has an interest; and

8. To grant proxies to any Affiliate or to exercise any voting or consent rights pertaining to any securities or other property held in the trust in a manner which may directly or indirectly benefit or advance the interests of any Affiliate.

4. Sample Language.

In making investments, the trustee is authorized to invest in and retain concentrated positions in assets or asset classes and is expressly relieved of any duty to diversify trust assets. I direct the trustee to take into consideration all other assets known to the trustee to be owned by me or held in trust for my primary benefit, including without limitation any other grantor retained annuity trust of which I am the annuitant, for purposes of setting investment objectives, determining asset allocation, and evaluating the suitability of particular investments.

5. Sample Language.

The Trustee is expressly authorized to retain until the termination of the trusts created herein, or for any shorter period, any stock of [the _____ Company] which may at any time or times be a part of the trust estate of any trust created herein. In connection with the foregoing authorization, the Grantors are aware that corporate trustees ordinarily do not retain shares of their own stock in trusts. However, the Grantors have complete confidence not only in the Trustee and its management, but also in its ability to determine fairly and for the best interests of the trusts created herein and the beneficiaries thereof whether all or any part of the stock of [the _____ Company] should be retained as an investment, and for what period or periods of time, and the Grantors desire to give the Trustee this authority even though it entails, on its part, a determination regarding its own stock. Accordingly, the foregoing authorization is given to the Trustee to retain stock of [the _____ Company] notwithstanding that said [the _____ Company] is named as Trustee hereunder, and also notwithstanding the fact that such stock may constitute a large part of the trust estate of any trust hereunder and such trust estate may therefore lack the diversification ordinarily considered prudent for trust investments.

Notwithstanding the provisions in the foregoing paragraph, the Trustee shall vote stock of [the _____ Company] held in any trust hereunder only in accordance with directions received in writing from a majority of the income beneficiaries of the trust who have attained age 21 and who are not incapacitated.

6. Sample Language.

The Trustees are expressly empowered to retain as an investment, without liability for depreciation in value, any and all securities issued by [the _____ Company], however and whenever acquired, irrespective of the proportion of the trust property invested therein.

XVII. Statement of Intent

A. **The Concept.** The role of grantor intent as the guiding principal of trust administration is paramount in many US jurisdictions⁸, including Illinois.⁹ Generally, trustees and courts attempt to discern the grantor's intent from the terms of the trust. Now that trust modifications and decantings are permitted with limitations that they not violate a material purpose of the trust, determining the grantor's intent and material purposes becomes even more important. The statement of intent can provide insight in to the grantor's purposes, philosophy, and objectives and can be more conversational in tone and easier for the beneficiaries to understand than complex transfer provisions. It can be a place to describe family history and the grantor's values. It can be helpful in avoiding post-mortem misunderstandings.

B. **Example.** It is my intention in creating this trust to augment and supplement the income earned by my descendants in order to provide them the flexibility to pursue creative, charitable, public interest, and family oriented pursuits in the same manner that the provisions my grandparents made for me enabled me to pursue my own career. It is my expectation that the trust will endure for multiple generations, rather than being expended immediately after my death. It is not my intent that the principal of this trust be invaded for the support, maintenance or health care needs of any descendant

unless all other sources of support are exhausted. This is not done with any punitive intention as I love my children and grandchildren dearly. I have every confidence in their ability to provide for themselves and hope that my provision of this legacy for multiple generations will inspire them. However, in the event a beneficiary experiences a true need, I expect my trustees to expend funds as needed to maintain them in safety and good health to the extent practicable, even to the point of exhausting the principal.

XVIII. Illinois Trust Code Related Provisions

A. The Illinois Trust Code became effective January 1, 2020. Other than those items specified in 760 ILCS 3/105, the provisions of the trust code are default rules and can be replaced by specific provisions in the trust instrument. Below are some provisions to consider when drafting trusts governed by the Illinois Trust Code.

B. Under 760 ILCS 3/813.1, the default rule is that a trustee must send statements and notices and a copy of the trust agreement (upon request) to all qualified beneficiaries, a term which includes both current distributees of income and principal as well as those persons to whom the principal would be distributed if the trust terminated immediately. If the grantor prefers to limit the trustee's obligation to provide statements, notices and copies of the trust agreement to the current beneficiary, consider language like the following:

(1) Sample provision:

Notwithstanding the provisions of 760 ILCS 3/813.1, I direct the trustee to provide accountings, statements, notices and a complete copy of the trust agreement only to those persons who from time to time must or may receive current distributions of income and principal from any trust hereunder and not to provide such information or documentation to any other beneficiary. I also direct that the trustee provide similar information to each Protector, Investment Advisor and other fiduciary acting from time to time.

(2) Sample provision:

Notices, Disclosure and Trust Accountings.

(i) **Notices.** With respect to each trust created hereunder, to the extent permissible under applicable law, all notices or other information required to be given by a Trustee to any qualified beneficiary under applicable law are hereby waived and the Trustee shall be under no duty to provide any said notice or other information to any qualified beneficiary of such trust unless specifically provided to the contrary in this Declaration of Trust.

(ii) **Disclosure of Trust.** With respect to each trust created hereunder, to the extent permissible under applicable law, any requirement to disclose or provide a copy of the Declaration of Trust (whether certain provisions or the trust in its entirety) to any qualified beneficiary is hereby waived and the Trustee shall be under no duty to disclose or provide a copy of the Declaration of Trust (whether certain provisions or the trust in its entirety) to any qualified beneficiary of such trust; provided, however, upon request of a beneficiary of such trust, said Trustee shall be required only to provide said beneficiary with the specific provision or provisions which specifically enumerate the distributions said beneficiary is currently entitled to receive.

(iii) **Trust Accountings.** With respect to each trust created hereunder, to the extent permissible under applicable law, all trust accountings required to be given by the Trustee to any qualified beneficiary are hereby waived and the Trustee shall be under no duty to provide any said trust accountings to any qualified beneficiary of such trust; provided, however, a Trustee shall provide a trust accounting sufficient under applicable law upon the written request of a beneficiary of such trust.

C. Under 760 ILCS 3/307, a grantor can appoint a "Designated Representative" to receive information and otherwise act on behalf of any beneficiary other than a current beneficiary who is over age 30 and not incapacitated. Below are two types of provisions to consider including under different circumstances.

(1) I hereby appoint the descendant of mine who is the primary beneficiary of any trust created under this instrument and who is an adult and not under any legal disability to act as the Designated Representative under 760 ILCS 3/307 for all descendants of such primary beneficiary who may be qualified beneficiaries of such trust, other than any descendant of such beneficiary who is a current permissible distributee of income or principal who is over the age of 30 and not incapacitated.

(2) Notwithstanding any other provision of this instrument, pursuant to 760 ILCS 3/307, I appoint my wife, JANE DOE, as the Designated Representative for all qualified beneficiaries of this trust for whom she may act under the terms of the Illinois Trust Code.

D. Under 760 ILCS 3/301, a representative may represent and bind another beneficiary or other person for purposes of receiving notices, information, accountings, reports and taking actions like entering into an agreement on behalf of a beneficiary. Subsection (d) establishes a priority of different possible representatives (guardians, power of attorney agent, parent, etc.), including the holders of powers of appointment listed second in priority. For trust instruments that routinely incorporate lifetime powers of appointment, the representative afforded by Section 3/301 of the Illinois Trust Code is vast.

Sample provision:

Holder of a Power of Appointment. The holder of any presently exercisable or testamentary power of appointment, including a general power of appointment and any limited power of appointment regardless of the class of appointees, and regardless of any conflict of interest, may represent and bind all persons, including but not limited to those persons within the class of appointees and those persons whose interests would be eliminated by the exercise or non-exercise of such power of appointment. Notice, information, accountings or reports given to the holder of any such power of appointment shall have the same effect as if given directly to the person represented. Similarly, actions, including but not limited to, the execution of an agreement, taken by the holder of any such power of appointment, are binding on the person represented to the same extent as if the actions had been taken by the person represented. The holder of a power of appointment is not a fiduciary and shall not be subject to any fiduciary duties. The foregoing representation provisions shall not apply to (i) any matter involving fraud or bad faith, or (ii) a power of appointment held by a person while said person is acting as the sole Trustee of such trust. As used in this subsection, the term “power of appointment” does not include a power of a Trustee to make discretionary distributions of income and/or principal.

E. The Illinois Trust Code grants trustees a power to decant a trust under Article 12 and includes various mechanisms for modification of trusts under Articles 1 and 4. For those grantors who want to prohibit modifications, consider including language like the following:

(1) Except as expressly provided herein, no Trustee of a trust created by or pursuant to this agreement may exercise any statutory power granted to such Trustee under the laws of the applicable jurisdiction, including, without limitation, the power to merge or decant trusts or the power to enter into a non-judicial settlement, to the extent the exercise of such power in such contemplated manner would result in a modification of the terms and provisions of such trust.

XIX. Issues in 2020

A. SECURE Act.

1. **The Concept.** The Setting Every Community Up for Retirement Enhancement (SECURE) Act became law as of January 1, 2020. The SECURE Act made many significant changes to retirement account rules (applicable to both defined contribution retirement plans and individual retirement accounts), including to the “stretch” rules applicable to the duration designated beneficiary on a retirement account can defer income recognition on the retirement account assets.

2. **Additional Considerations.** Under the SECURE Act, absent an exception applicable to certain eligible designated beneficiary, a new 10-year payout requirement is imposed. Thus, many trusts designated as beneficiaries on a decedent’s retirement account which come to own retirement account assets will only be able to defer taxation of the

retirement account assets for a period of 10 years. Eligible designated beneficiaries of retirement accounts not subject to the 10-year payout requirement include: surviving spouses, minor children (but only until attaining the age of majority), disabled and chronically ill individuals, and persons who are not more than 10 years younger than the decedent.

Dispositive and administrative trust provisions are often drafted so that a trust will qualify for the maximum income tax deferral available under the law. In light of the 10-year payout requirement in the SECURE Act, drafting attorneys are reviewing their trust terms, and their recommendations for designating trusts as beneficiaries of retirement plan assets.

B. Change in Administration in Washington, D.C. If the Democrats control both the Executive and Legislative Branches of the U.S. federal government after the November 2020 election, then it is possible (if not likely) that there will be significant changes to the gift, estate and GST tax exemptions well before the already scheduled sunset of the temporarily doubled exemptions at the end of 2025 (which per part of the 2017 Tax Cuts and Jobs Act).

1. Gift, Estate and GST Tax Exemptions.

a. The Concept. Presidential candidate Joe Biden has proposed returning the estate, gift and GST exemptions to 2009 levels. This is presumed to include non-indexed estate and GST tax exemptions of \$3.5 million, a gift tax exemption of \$1 million, and a 45% top marginal transfer tax rate.

b. Additional Considerations. Most trusts created by married couples include funding formulas which will defer the payment of any eventual federal and state estate tax until the death of the surviving spouse. This is typically achieved via funding formulas included in the trust to allocate assets between a Marital Trust and a Family (or Residuary) Trust. Likewise, many trusts will allocate assets between GST exempt and GST non-exempt trusts for children and more remote descendants when both spouses are deceased. Well drafted funding formulas should still achieve the common objective to obtain “maximum” tax benefits (including estate tax deferral in the case of the surviving spouse; and optimal capture of all available GST exemptions for descendants) under both rising and falling exemption amounts. However, provisions which may have been appropriate in a Family Trust when the applicable exemption was \$11.58 million (such as including descendants as current beneficiaries of the Family Trust) may no longer be desirable in an environment where the Family Trust can only be allocated \$3.5 million. Flexibility can be added to the Family Trust by eliminating the descendants as current beneficiaries, and instead allowing them to be permissible appointees of a limited lifetime power of appointment held by the surviving spouse over the Family Trust. The same issue can apply in GST exempt trusts established for the benefit of children when the applicable GST exemption is reduced nearly 70%. The appropriateness of many other trust provisions warrant review if applicable estate, gift and GST exemptions are dramatically reduced.

c. Sample Provisions – Lifetime LPOA for Surviving Spouse over Residuary Trust.

Limited Powers of Appointment. Subject to the provisions of Section 16.4 of Article XVI hereof, with respect to each Residuary Trust created upon the Grantor’s death pursuant to the provisions of Article ____ hereof, the Trustee, upon receipt of written direction as herein provided, shall distribute pursuant to this limited power of appointment from the trust estate of such trust such amount or amounts as the Grantor’s spouse may appoint to or for the benefit of all or any one (1) or more of the Grantor’s descendants and/or their respective spouses (or surviving spouses), as the Grantor’s spouse may designate by an instrument in writing, signed by the Grantor’s spouse and delivered to the Trustee, and/or upon the death of the Grantor’s spouse, as the Grantor’s spouse may designate by the valid Will of the Grantor’s spouse admitted to probate in any jurisdiction.

16.4 **Restrictions on Exercise of Limited Powers of Appointment.** Except as may be specifically provided herein by express reference to this Section 16.4 to the contrary, no power of appointment granted hereunder shall be exercised or exercisable to any extent in favor of the donee of such power, or the estate, the creditors or the creditors of the estate of said donee, or to discharge or satisfy a legal obligation of said donee, or for the pecuniary benefit of said donee. Except as may be specifically provided herein to the contrary, no exercise of any power of appointment by the donee thereof shall be effective unless the written instrument or the valid Will of the donee by which the donee exercises such power shall be executed subsequent to the date of the execution of this Declaration of Trust; provided, however, that any such written instrument or Will must specifically refer to and exercise any such power of appointment in order for such power to be effectively exercised.

2. Basis Step-Up Issues.

a. **The Concept.** Candidate Biden has also proposed the elimination of the step-up in basis for appreciated assets passing from a decedent. Presumably some amount of exemption(s) would apply before an income tax would be imposed on the transfer of appreciated property at death (or via lifetime gift).

b. **Additional Considerations.** An income tax on the transfer of appreciated property would almost certainly impact more property held in trust than the gift, estate and GST taxes apply to under the current exemption amounts. If an income tax is due on the transfer of assets held in trust at death, then additional attention would need to be given to various provisions in a trust instrument including but not limited to:

- General tax allocation and payment provisions;
- “Grossing-up” distributions of specific bequests of appreciated property to account for payment of tax;
- Allocation of illiquid assets among trusts and legatees receiving outright legatees; and
- Qualification for possible deferral of tax payment (perhaps similar to Code section 6166).

XX. Favorite Boilerplate Clauses

A. **The Concept.** Black’s Law Dictionary defines boilerplate as “ready-made or all-purpose language that will fit in a variety of documents.” (11th ed. 2019) Some provisions are so important that they should be included in every trust either because they are necessary in all situations or because they are critical in the event a rare situation actually occurs.

B. **Additional Considerations.** Boilerplate provisions are likely scattered through the trust agreement. A majority of them may reside in the trustee powers section or located in a specific section identified as “miscellaneous” or “other provisions”. It may be helpful to identify those provisions that are mandatory in all trust agreements versus those that may be removed under certain circumstance. For example, the mandatory trustee powers may be listed as the first ten with a notation that powers eleven through the end are subject to review and revision given the circumstances.

It is important to periodically review boilerplate provisions to see if they are absolutely necessary and should remain as mandatory provisions in the trust agreement, and to confirm that they are currently up to date both under existing law and as they apply to the changes made to other provision within the trust agreement. If there has been substantial customization to a dispositive provision of the trust, the boilerplate provisions should also be reviewed to avoid conflicts and ambiguities.

C. **Sample Provisions.** Because this topic is broad, each sample listed below may contain an introductory explanation for the specific provision.

1. **Special Needs Trusts:** To protect future beneficiaries from having the trust counted against them for resource benefit purposes, considering granting the trustee the power to convert a trust into a “supplement needs” or “special needs” trust so that a beneficiary can continue to qualify for Medicaid, Social Security disability, or other government benefits. The three samples below allow for the same concept with different degrees of discretion.

a. **Sample Language.**

To convert a beneficiary’s interest to a “supplemental needs interest” (as hereinafter defined) that would allow the trust (with respect to that beneficiary) to qualify as a trust for a disabled beneficiary under applicable law or to qualify as a “qualified disability trust” (as defined in Section 642 of the Code) if the conversion is necessary for the beneficiary to qualify for benefits from a federal, state or local government or agency thereof and the conversion is in the beneficiary’s best interests. The amendment implementing a conversion to a supplemental needs interest may provide for the possibility that the beneficiary’s

interest may be converted back to its original form hereunder if such a reconversion would be in the beneficiary's best interests.

b. Sample Language.

It is my intention that no part of the income or principal of this trust be used to supplant or replace public assistance benefits of any county, state, federal, or governmental agency that may otherwise be available to a beneficiary of the trust. For purposes of determining the eligibility of any beneficiary for any county, state, federal, or governmental agency benefits, no part of the principal or income of this trust may be considered available to such beneficiary and Trustee will deny any request by any public or governmental department or agency to release principal or income for which benefits would be available in the absence of this trust. In addition, Trustee may petition the court having jurisdiction over this Agreement or any trust hereunder at any time to modify or amend this Agreement to ensure this trust complies with the laws dealing with the qualification for means-tested benefits to accomplish the purpose of this paragraph and to provide for a beneficiary's complete care without sacrificing governmental benefits for which such beneficiary otherwise might be eligible to receive. Provided, however, this paragraph will not apply to any trust described in sections 2056, 2056A or 664 of the Code or to the extent it would cause the loss of a charitable or marital deduction or prevent the beneficiaries of my estate plan from being a "designated beneficiary" as defined in the regulations.

c. Sample Language.

Notwithstanding the other provisions of this Article, after [my child's] death, if any share is created for a beneficiary with a disability, regardless of age, who is receiving public assistance benefits because of such disability at the time of distribution, or, in the discretion of the Trustee, will likely become eligible in the future for public assistance benefits, then, instead of any other provision herein for the distribution of such beneficiary's share, the terms of this paragraph will control. The Trustee will pay over such beneficiary's share to the Trustee of an existing third-party special needs trust for the benefit of such beneficiary, or will establish a third-party special needs trust for such beneficiary to receive such share (including without limitation a private trust or a pooled trust account such as the [State Pool Trust]). The special needs trust selected by the Trustee to receive such share (whether then existing or established by the Trustee as a private trust or an [State Pooled Trust] or other pooled trust) must be established for the benefit of such beneficiary, with income and principal to be applied for such beneficiary during such beneficiary's lifetime, in the complete discretion of the Trustee taking into account other resources and public assistance benefits available to such beneficiary, with any remaining funds in such trust or pooled trust account upon such beneficiary's death to be distributed in the same manner and to such beneficiaries as would have received such beneficiary's share hereunder if such beneficiary had predeceased [my child]. The Trustee has the authority to pay over the share, or a portion thereof, to an ABLE Act account for such beneficiary.¹⁰

2. **Incapacity definition:** Rather than leaving the determination of incapacity to applicable state law, consider defining the parameters, method or persons responsible for deciding whether a person is incapacitated. Consider whether different provisions should apply to the grantor, trustee, beneficiaries, advisors or other parties.

a. Sample Language.

For purposes of this Agreement, a person shall be considered "Incapacitated" if (i) such person is a minor or is under a legal disability (under the laws of such person's domicile); (ii) such person is incarcerated and such incarceration has

lasted for more than thirty (30) consecutive days; (iii) such person's whereabouts are unknown and either a "Qualified Beneficiary" of the trust or the trustee of the trust has not been able to locate him for at least ninety (90) days; (iv) a licensed physician, within six (6) months after examining such person, signs a letter stating that such examination has occurred and that such person, due to illness or physical, mental or emotional disability, is not able to manage business affairs in a prudent and intelligent manner, and such person shall be considered Incapacitated upon the date such letter is signed; or (v) such person fails to produce a "Qualifying Letter" within ninety (90) days after a written request is made by a "Qualified Beneficiary" or trustee of the trust; provided, however, no person shall be required to produce a Qualifying Letter more than once during any one year period. A "Qualifying Letter" shall mean a letter signed by a licensed physician after examining a person, which examination shall have occurred no more than six (6) months prior to the date of the request, stating that such examination has occurred and that such person is able to manage business affairs in a prudent and intelligent manner. A "Qualified Beneficiary" shall mean a person (A) to whom the trustee is directed or authorized to currently distribute net income and/or principal (a "current beneficiary"), or (B) who, upon a certain event, will receive, or who will be a current beneficiary of a trust that will receive, all or a portion of the trust property, assuming nonexercise of all powers of appointment and assuming that such person survives until the event. If a person has been considered "Incapacitated" pursuant to this provision but subsequently provides a Qualifying Letter to the trustee, such person shall no longer be considered Incapacitated.

b. Sample Language.

An individual Trustee shall cease to act as Trustee hereunder if he or she is under a legal disability or if by reason of illness or mental or physical disability, in the written opinion of two doctors then practicing medicine, he or she is unable to manage his or her personal or financial affairs. If an individual Trustee is found to be incapable of managing his or her personal or financial affairs, he or she must be reevaluated in the same manner each year thereafter, and, if later found again to be capable of managing his or her personal or financial affairs, he or she again may act as Trustee for so long thereafter as he or she remains so.

In making the determination of whether or not she is unable to manage her personal or financial affairs, the Grantor understands that her physicians, her other health care providers and others who may be authorized to collect and share medical information (the "Health Care Providers") may be restricted by provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") from disclosing so-called "individually identifiable health information" about her or from making her medical records available to others. For purposes of determining whether or not she is unable to manage her personal or financial affairs, as defined in the first sentence of this paragraph, the Grantor directs the Health Care Providers to consider any successor Trustee set forth herein or appointed as herein provided, as her personal representative under HIPAA and to treat requests made and instructions given by such successor Trustee as though they were made or given by her (insofar as the disclosure of such information or release of her medical records are concerned).

Any individual Trustee who refuses to consent to the disclosure of his or her health information to the designated successor trustee upon such designated successor trustee's reasonable request shall be deemed to be unable to manage his or her financial affairs and unable to act as Trustee on the ninetieth day after such reasonable request.

3. **Divorce clause in irrevocable trusts:** Explaining and deciding to include divorce clauses can require delicate conversations especially if the drafting attorney represents both spouses. Considerations should include whether both spouses should have the same rights eliminated such as beneficial interests and the right to serve as or appoint trustees, or whether one spouse should have greater or continued rights after a divorce, perhaps because that spouse contributed the assets to the trust. Also consider whether other beneficiaries or persons qualified to serve as trustee should be impacted by the divorce. Finally, consider what event in time triggers this clause.

a. Sample Language.

If my Spouse and I dissolve our marriage, the trust will be administered, during my life and after my death, as though my Spouse is deceased, and my Spouse may no longer exercise any power of appointment, will not be eligible to receive distributions of income or principal, and may no longer serve as Trustee. For purposes of this Trust Agreement, our marriage will be deemed dissolved at the initiation of divorce proceedings by me or my Spouse. Provided, however, this provision will not limit any withdrawal rights which my Spouse has on the date of the dissolution of our marriage.

b. Sample language.

In the event I file or my spouse files a petition for legal separation or dissolution of marriage, my spouse, my spouse's parents, all descendants of my spouse's parents who are not my descendants and all spouses of such persons who are not descendants of my parents shall be deemed to have died intestate on the date of such filing for all purposes of this Agreement (other than for purposes of the Section titled "Rule Against Perpetuities") and (i) any exercises of powers of appointment by such persons that have not become effective prior to the date of such filing shall be null and void and (ii) all Plans created by such persons in their individual, fiduciary and representative capacities shall be null and void; provided, however, that if court order(s) are issued dismissing all such petitions (whether filed by me or my spouse) and I accept the dismissal of such petitions filed by my spouse by a signed instrument, then all such persons shall no longer be deemed to have died intestate for all purposes of this Agreement and (i) any exercises of powers of appointment by such persons that were not effective prior to the filing of such petitions shall no longer be null and void, and (ii) all Plans created prior to the filing of such petitions by such persons in their individual, fiduciary and representative capacities shall no longer be null and void.

c. Sample Language.

In the event I file or my spouse files a petition for legal separation or dissolution of marriage:

a. my spouse shall no longer be a beneficiary of any trust hereunder and any exercises of powers of appointment by my spouse that have not become effective prior to the date of such filing shall be null and void;

b. my spouse may continue to serve as a trustee of any trust hereunder (if designated as such), and retain any powers my spouse may have to create plans of trustees and to remove trustees; and

c. my spouse's parents, all descendants of my spouse's parents who are not my descendants and all spouses of such persons who are not descendants of my parents ("my spouse's family") shall be deemed to have died intestate on the date of such filing for all purposes of this Agreement (other than for purposes of the Section titled "Rule Against Perpetuities" and "Ultimate Contingent Beneficiaries") and (i) any exercises of powers of appointment by my spouse's family that have not become effective prior to the date of such filing shall be

null and void and (ii) all plans created by my spouse's family in their individual, fiduciary and representative capacities shall be null and void;

provided, however, that if court order(s) are issued dismissing all such petitions (whether filed by me or my spouse) and I accept the dismissal of such petitions filed by my spouse by a signed instrument, then (i) my spouse shall continue to be a beneficiary of any trust hereunder that names my spouse as a beneficiary, (ii) no member of my spouse's family shall be deemed (pursuant to the foregoing provisions of this subsection to have died intestate for any purposes of this Agreement, and (iii) any exercise of power of appointment by my spouse or a member of my spouse's family that was not effective prior to the filing of such petitions shall no longer be null and void, and (iv) any plan created prior to the filing of such petitions by a member of my spouse's family in their individual, fiduciary and representative capacities shall no longer be null and void.

4. Survivorship Clause for GST Purposes: Additional GST tax planning may be available by including a 90 day survivorship provision. Section 2651(e) of the Code provides an exception to the generation-skipping tax for a direct skip, taxable distribution or taxable termination to a person who is a descendant of a parent of the transferor (or a descendant of a parent of the transferor's spouse or former spouse), if the parent of the recipient who is a descendant of a parent of the transferor (or the transferor's spouse or former spouse) was not living at the time of the original transfer by the transferor. For example, if a gift is made to a lineal grandchild, and at the time of the direct skip the parent of the grandchild who is a descendant of the transferor (i.e., the transferor's child) is not living, then the grandchild "moves up" one generation for GST purposes, and as a result, there is no direct skip. However, for this exception to apply to taxable distributions and taxable terminations, the skip person must have moved up a generation at the time of the original transfer to the trust; moving up a generation subsequent to that time is insufficient even if it occurs before the taxable distribution or taxable termination. Under Reg. Section 26.2651-1(a)(2)(iv), a person who dies within 90 days of the transfer is treated as having predeceased the transferor *for GST purposes* to the extent that the governing instrument or local law provides that such person is to be treated as having predeceased the transferor. Therefore, if a trust included in a parent's estate provides for a distribution to the parent's child if he survives the parent for 90 days, otherwise to the child's descendants on a per stirpital basis, then if the child in fact dies within 90 days of the parent, the child will be treated as if he predeceased the parent and the predeceased parent exception will apply to eliminate the direct skip.

a. Sample language.

Survivorship of Beneficiaries. Notwithstanding any provision of this Agreement, any distribution to be made upon my death from any portion of the property of the Gift Trust that is included in my gross estate to or for the benefit of any person other than Jane shall be contingent on the intended recipient surviving me for at least 90 days. If such intended recipient does not survive me for at least 90 days, then the distribution to be made to or for the benefit of such intended recipient shall instead be distributed as if such intended recipient predeceased me.

b. Sample language.

If a beneficiary who is one of my parents' descendants or who is otherwise described in section 2651 of the Code dies within 90 days after my death, such beneficiary will be deemed to have predeceased me.

5. Access to Digital Assets. Almost all states have enacted statutes granting the authority for trustees and other fiduciaries to access digital assets, and most states have adopted some version of the Revised Uniform Fiduciary Access to Digital Assets Act (2015) that is referenced in the sample below.

a. Sample Language.

I give Trustee the power to access the content of any of my electronic communications, any catalogue of electronic communications sent or received by me, any of my electronically stored information, and any other digital asset

(i.e., a record that is electronic, including an underlying asset or liability but only if such asset or liability is itself a record that is electronic) in which I have a right or interest, as such terms are defined in the Revised Uniform Fiduciary Access to Digital Assets Act (2015), or any similar provisions of state law adopted by the state having jurisdiction over the administration of any trust created hereunder.

6. Ownership of Digital Devices and Digital Assets. In the distribution of tangible personal property section of a trust, consideration should be given to distinguishing between digital devices and the digital devices contained within them.

a. Sample Language

Digital Devices and Digital Assets.

(1) Separation of Digital Devices and Digital Assets. Digital devices and digital assets shall be treated as separate and distinct assets for purposes of carrying out the provisions of this Section. For example, a personal computer may be part of the trust estate of the Revocable Trust and the personal computer may have various files stored on its hard drive. For purposes of this Section, the personal computer and each of the other files are separate and distinct assets and may be distributable to different persons hereunder. The Trustee shall take such action as shall be necessary to transfer the digital assets from the digital devices, if any, on which said digital assets are stored and shall thereafter transfer said digital devices and digital assets as provided for pursuant to the provisions of this Section.

(2) Duplication of Certain Digital Assets. Notwithstanding the foregoing provisions of this Section to the contrary, if more than one of the Grantor's children (or any other person as agreed by a majority of the Grantor's children) desires particular digital assets of little, no or nominal value which are able to be readily duplicated (e.g., personal photos stored on the hard drive of a personal computer), then the Trustee shall duplicate said digital assets and provide copies to the Grantor's children (and any other person as agreed by a majority of the Grantor's children) who desire copies of said digital assets.

7. Private Settlement of Accounts. A grantor may prefer that disputes between beneficiaries and trustees over trust accountings be resolved privately rather than in a court, where that is possible.

a. Sample Language.

Trust Accounting and Settlement. This paragraph imposes a duty on the Trustee to account fully, fairly and regularly to the trust beneficiaries for all acts of trust administration. The informal settlement procedures described in this paragraph to permit full and final settlement of the Trustee's accounts without resort to court proceedings. A "future beneficiary" means a person to whom assets of a trust would be paid or payable, or who would be an income beneficiary of any trust created hereunder, upon the death of the primary beneficiary of such trust without exercise of powers of appointment. For purposes of this paragraph, if more than one generation of beneficiaries are "income beneficiaries" or "future beneficiaries" then "income beneficiaries" or "future beneficiaries," as the case may be, shall be the oldest generation of the then eligible beneficiaries.

(a) Duty to Account Annually. At least annually the Trustee of each trust shall send a written account of all trust receipts, disbursements and transactions and the property comprising the trust at the end of the accounting period to the primary beneficiary of the trust (or if none, the income beneficiaries) and, at the option of the Trustee, to the income and future beneficiaries of the trust.

(b) Accounting on Removal or Resignation of Trustee. Within ninety (90) days of the removal or resignation of a Trustee, the removed Trustee or the resigning Trustee shall provide the trust's income and future beneficiaries with a written account of all trust receipts, disbursements and transactions since the end

of the reporting period for which a written account was last provided to such beneficiary.

(c) Settlement of Accounts by Beneficiary Approval. A beneficiary may in writing approve any account and release the Trustee from liability for all matters covered by the account, which approval and release shall bind the beneficiary (and any persons represented by the beneficiary) at the time it is filed with the Trustee. The power to approve such accounts does not include the power to enlarge or shift the beneficial interest of any beneficiary.

(d) Settlement of Accounts by Lapse of Time. Unless written objections to an account are filed with the Trustee within one hundred twenty (120) days after the account is sent, the account shall bind and be deemed approved by all of the following beneficiaries who have not objected and the Trustee shall be deemed released by all such beneficiaries from liability for all matters covered by the account as though such accounts were approved by a court of competent jurisdiction: (1) each beneficiary to whom the account was sent or to whose representative the account was sent and (2) if the account was sent to all income and future beneficiaries of the trust (or their representatives), then all beneficiaries of the trust who have any past, present or future interest in the matters covered by the accounts; provided, that if court proceedings on the account are commenced within the one hundred twenty (120) day period; no beneficiary shall be bound by this subparagraph as to any matters at issue in the proceeding.

(e) Costs and Expenses. All costs and expenses of any such accounting (including attorneys' fees) shall be paid by the Trustee from principal or income, or both, of the trust as it in its sole and absolute discretion determines.

(f) Trustee's Right to Account Settlement Before Distribution. Before distribution of any trust principal the Trustee shall have the right to require settlement of any open accounts of the trust from which the distribution is being made, either by the written approval and release of all beneficiaries having an interest in the distribution or, if the releases cannot be obtained, by court settlement of the open accounts. All of the Trustee's fees and expenses (including attorneys' fees) attributable to court approval of the Trustee's accounts shall be paid by the trust involved, but the trust shall not be liable if and to the extent the accounts are not approved.

(g) Court Accounting Not Precluded. These informal account settlement procedures are not intended to preclude court action and the Trustee or any beneficiary shall have the right to utilize any court accounting procedures otherwise available to them under law to settle any open accounts; provided, that it shall not be considered a breach of fiduciary duty for the Trustee to rely on the informal account settlement procedures described in this paragraph in lieu of court accounting, any law or statute to the contrary notwithstanding.

(h) Persons to Represent Beneficiary. If a beneficiary is incapacitated at the time of reference, any of the following may represent the beneficiary to receive and review notices and accounts, approve or object to accounts, release the Trustee from liability and to execute any receipt:

(1) Any other beneficiary who is not incapacitated and who has an interest that is similar to the interest of the incapacitated beneficiary;

(2) The first of the following (in the order named) who is then living or acting and not incapacitated: the personal representative of the estate of such beneficiary; an agent acting for such beneficiary under a durable power of

attorney; such beneficiary's spouse; a parent of such beneficiary; a majority of the adult children of such beneficiary who are not incapacitated; or a guardian of the person of such a beneficiary for whom no representative has been appointed; and

(3) A person authorized to represent the beneficiary under the statutes of the state whose laws govern the administration of the trust.

Notwithstanding the foregoing, in no event may a donor or any person acting as Trustee, in any capacity, receive any notice or account or act for any beneficiary pursuant to this paragraph.

(i) Successor Trustee. No successor Trustee shall have any responsibility to inquire into or be liable for any act or omission of any predecessor.

8. Gender Change Included in Specific Gender References. Many documents include references that indicate that terms using the masculine gender include the feminine and vice versa, it is important to remember that under the laws of many states, it is possible to change gender markers from the gender assigned at birth. Other states recognize that certain individuals do not have either a masculine or a feminine gender identity. The following language addresses those concerns.

(a) Sample language

Headings and Context of Terms. Descriptive headings in this trust agreement are inserted for reference purposes only and are not to be considered as forming a part of this trust agreement in the interpretation of its provisions. All words used to refer to any specific gender shall extend to include all genders [and gender identities, including no gender] and any change of gender shall not exclude any beneficiary from receiving benefits conferred upon the beneficiary under this trust agreement. Any singular words shall include the plural expression, and vice versa, specifically including "child" and "children", when the context and facts so require, and any pronoun shall be taken to refer to the person or persons intended regardless of gender or number.

¹ Sample language is provided throughout this outline. These samples are excerpts from larger documents and some may reference defined terms that are not included in these materials. The language is subject to applicable state law and you may wish to tailor the language accordingly.

² Under Kentucky law a residuary clause that does not specifically exclude powers of appointment exercises a power of appointment unless a power expressly requires specific reference to exercise it. KRS 394.060 provides that "a devise or bequest extends to any real or personal estate over which the testator has any power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of such power, unless a contrary intention appears in the will."

³ IRC Section 2654(a)(1) and (2).

⁴ Credit for prior transfers (Section 1013): Estate tax credit allowed for a decedent's estate tax for "property" "transferred" by or from a person who died 10 years before or 2 years after the decedent. Starts at 100% if during first two years, and declines from there by 20% every 2 years.

⁵ 397 F.2d 82 (9th Cir. 1968).

⁶ T.C. Memo. 2011-209 (Aug. 30, 2011).

⁷ See, e.g., 760 ILCS 3/1207.

⁸ See Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1 (2011).

⁹ Illinois did not adopt the “benefit of the beneficiary” rule of Article 8 of the Uniform Trust Code when adopting the Illinois Trust Code, 760 ILCS 3/801 et. seq.

¹⁰ Many thanks to Katherine Barr, Sirote & Permutt, PC who provided this provision.

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OTHER IMPORTANT INFORMATION: Opinions expressed and information contained herein are current only as of the date appearing in this material and are subject to change without notice.

20/20 Vision: Drafting for the New Decade



October 27, 2020

Chicago Estate Planning Council

Adam Damerow and Jane Ditelberg



20/20 Vision: Drafting for the New Decade

October 27, 2020

Sponsored By:



Founded in 1999, BVG performs valuations of corporate stock and various financial assets for service, manufacturing and wholesale distribution businesses. BVG concentrates on gift and estate tax valuations including the quantification of discounts for lack of control and lack of marketability for minority interests in operating companies and for holding companies such as Limited Partnerships and Limited Liability Companies as well as partial interests in undivided parcels of real estate. In addition, BVG has experience resolving IRS disputes.

Welcome and Announcements



Kim Kamin
CEPC President

New Members Announcement



Mary Fuller, CPA
Shepard Schwartz & Harris



Kristin Pinter, JD
Dolgin Law Group



Gina Shkoukani, JD
Neal Gerber & Eisenberg



Natalie Waechter, Appraiser
Bonhams Auctioneers

Public Outreach Committee



Gretchen Spreitzer, ATTY
The Northern Trust Company
Co-Chair

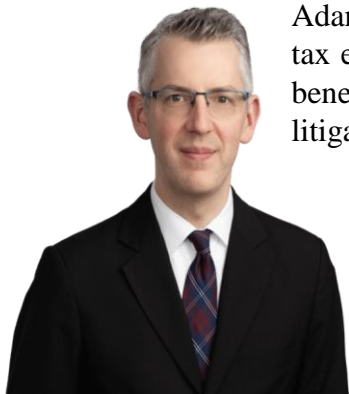


Rick Cohn, ATTY
Co-Chair

Speaker Introduction



Julie Pleshivoy
Vice President & Program Committee Chair,
CEPC



Adam Damerow is a partner at Katten Muchin Rosenman LLP and assists ultra high-net-worth individuals in creating tax efficient estate plans to preserve, protect and transfer wealth to future generations. He also guides fiduciaries and beneficiaries through disputes over estates and trusts, often helping them avoid the time, expense and burden of litigation.

Advising clients with both pragmatism and strategy

Adam focuses solely on private client matters. He knows that wealth creators don't just want to transfer their wealth in tax-efficient ways; they want to give their beneficiaries the flexibility to use and maintain that wealth for future generations. He works to understand his clients' values and goals with their tax planning, and then achieve those goals as efficiently and creatively as possible. Toward that end, Adam undertakes varied strategies for his clients — from the formation and funding of family investment holding companies and family offices to the creation of dynasty trusts. The thoughtfulness of his planning stands the test of time; years after working with a first-generation wealth creator, for instance, the second generation of family members asked Adam to reinforce the planning that had positioned them so well.

Helping fiduciaries and beneficiaries resolve disputes

Adam also advises individual and corporate fiduciaries on the often challenging task of administering trusts and estates. When he is not advising the fiduciary, Adam will represent estate and trust beneficiaries and zealously advocate for their rights under the governing documents of the estate plan. While he represents clients in contested court proceedings, he more often helps fiduciary clients find creative ways to resolve disputes before they evolve into litigation. In one matter involving a multibillion-dollar estate and litigious beneficiaries, he facilitated two different settlements among the beneficiaries and the tax authorities, avoiding further litigation.

Jane G. Ditelberg



Jane G. Ditelberg is Assistant General Counsel and Senior Vice President at The Northern Trust Company in Chicago. As a member of Northern Trust's Legal Department, Jane provides legal counsel to the bank in its role as executor, trustee, and guardian. She is licensed to practice law in Illinois and admitted to practice before the United States District Court for the Northern District of Illinois. Prior to joining Northern Trust in February, 2008, Jane spent 17 years as an estate planning attorney in private practice in Chicago. She is a Fellow of the American College of Trust and Estate Counsel (Committees on Amicus Briefs (Vice Chair), State Laws, Employee Benefits, and Diversity and Inclusivity). She is a member of the Chicago Bar Association where she served on the Task Force for the Illinois Trust Code and as Chair of the Estate and Gift Tax Subcommittee. She is a frequent author and lecturer on a wide range of estate and tax planning topics for groups including ACTEC, the Illinois Institution of Continuing Legal Education, the Heckerling Estate Planning Institute, and the University of Notre Dame Estate Planning Conference.

20/20 VISION: DRAFTING FOR THE NEW DECADE

ADAM DAMEROW, KATTEN
JANE DITELBERG, NORTHERN TRUST

Chicago Estate Planning Council
October 27, 2020

TRUSTEE APPOINTMENT AND REMOVAL

MULTIPLE FIDUCIARIES

POT TRUSTS

(NOT CANNABIS, LOL)

ADVANCEMENT CLAUSES

BEHAVIORAL AND INCENTIVE CLAUSES

CHILDREN AND DESCENDANTS



SPOUSES AND IN-LAWS

SILENT TRUSTS

AMENDMENT AND DECANTING POWERS

GRANTS AND EXERCISES OF POWERS OF APPOINTMENT

CHANGING SITUS OR GOVERNING LAW

CRUMMEY POWERS

GRANTOR TRUSTS

FUNDING DISTRIBUTIONS AT SECOND DEATH

EXPANDED INVESTMENT POWERS

STATEMENTS OF INTENT

ILLINOIS TRUST CODE PROVISIONS

ISSUES IN 2020

BOILERPLATE PROVISIONS

QUESTIONS?

Question & Answer

