

**EFFECTIVE TAX-SAVING TECHNIQUES FOR REAL CLIENTS
(DON'T SLIDE DOWN THE CUTTING EDGE)**

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- I INTRODUCTION.** Estate planners, like all other intellectually advantaged persons, have a relatively low threshold of boredom. They are continually searching for new and more effective ways to save taxes for their clients, without wildly distorting the client's basic dispositive scheme. In addition, like their less-sophisticated colleagues, they secretly believe in the existence of genuine loopholes – flaws or gaps in the tax law through which they can drive a vehicle carrying large tax benefits. Age and experience may sometimes break practitioners of this tendency, but the search for ever-more extreme techniques is deeply ingrained in many practitioners who came to their professions through tax law.
- II GROUND RULES.** The three techniques proposed in this discussion are based on the following premises.
- A Rule # 1. It is Easy to Avoid Risks If You Know Where They Are.** Ninety percent of the tax savings of most transactions are available with ten percent of the risk.
- 1 Rule 1-A.** Most of the risk in a transaction comes when trying to squeeze out the last ten percent of the tax benefits.
 - 2 Rule 1-B.** Just because you cannot find the flaw in a transaction does not mean that there isn't one. Never underestimate the gut reactions of an experienced estate planner.
- B Rule # 2. Never Use Techniques That Are Smarter than Your Client.** A client will badly mis-administer any transaction that the client does not fully understand. This means pretty much all complicated transactions.
- 1 Rule 2-A.** The need for a covered opinion under Circular 230 is a great big flashing warning light.
 - 2 Rule 2-B.** The doctrines of substance-over-form and economic substance do apply to estate planning.

- C Rule # 3. You Cannot Satisfy a Client Who Has Unrealistic Expectations.** Estate planners get in far more trouble for having let the client retain unrealistic expectations, than for actually making a mistake.
- 1 Rule 3-A.** Do not allow the client to do a transaction that the client cannot explain cogently (if not perfectly) at a cocktail party, after two drinks.
 - 2 Rule 3-B.** Before the client executes the transaction, ask him or her to explain to you what the client will do. The client does not need to understand why it works exactly, but the client does need to know what his or her responsibilities might be.
- D Rule # 4. Clients Love to Feel Smart – Give Them Techniques They Understand.** Clients will extol your virtues to others if the savings are created by a transaction so simple that the client understands it. If the client does not understand the transaction, they will keep things secret, out of fear that there is something shady.
- E Rule # 5. A Client Will Not Knowingly Enter Into a Transaction That Promises a Tax Battle.** Clients who agree to enter into transactions after you have explained that the IRS is likely contest a transaction strongly are not fully informed. Ultimately, they will claim not to have understood the risk, and the jury will believe them. Consent does not make an unsuitable transaction suitable. It just gives the practitioner a false sense of security.

III VALUATION DISCOUNT PLANNING WITH TENANCIES IN COMMON AND COMMUNITY PROPERTY. Surprisingly large valuation discounts may be available without the complications or fuss of a family limited partnership, by dividing tangible property into tenancy-in-common interests.

- A Courts Allow Generous Discounts.** Transfers of interests as a tenant in common have generally been valued with significant discounts for lack of control and lack of marketability. See, e.g., *Propstra v. U.S.*, 680 F.2d 1248 (9th Cir. 1982) (15 percent discount for lack of marketability of community property interest in land); *Lefrak v. Comm'r*, T.C. Memo. 1993-526 (30 percent discount for lack of marketability and control in partial interests in certain apartment buildings); *Estate of Cervin v. Comm'r*, T.C. Memo. 1994-550 (20 percent discount for undivided fractional interest in farm); *Estate of Stevens v. Comm'r*, T.C. Memo. 2000-53 (25 percent discount for undivided fractional interest in improved real estate); *Williams v. Comm'r*, T.C. Memo. 1998-59 (44 percent discount for undivided one-half interest in real estate); *Estate of Forbes v. Comm'r*, T.C. Memo. 2001-72 (30 percent discount).

- B** **Costs of Partitioning.** The IRS has, however, repeatedly claimed in private rulings that the discount for lack of marketability off a tenancy-in-common interest was limited to the cost of partitioning the property.
- C** **TAM 9336002.** In TAM 9336002, a wife gave her husband a life estate in her community one-half interest in their ranch. On the husband's death, the value of the undivided one-half interest was included in his estate tax return. The value was computed by taking one-half of the value of the entire ranch and then discounting the quotient by 30 percent. The IRS ruled in technical advice that in valuing an undivided interest in property, if a discount to reflect dual ownership is appropriate, the amount of the discount should be limited to the estimated cost to partition the property. The IRS reasoned that the definition of fair market value contemplates that a hypothetical buyer and seller will act in their own best economic interests.
- D** **TAM 199943003.** In TAM 199943003, the decedent died owning undivided interests as a tenant in common in certain parcels of undeveloped real property. The decedent's estate tax return valued the interests claiming various discounts for lack of marketability. The estate tax examiner believed that these discounts were excessive, and asked the IRS National Office how to compute the appropriate discounts. The IRS first cited the general principle that the fair market value of the decedent's interests in the property was the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. The appropriate fractional interest discount was, the National Office stated, a matter "of fact to be resolved on the basis of the entire record." The National Office then stated that:

One method for determining the fair market value of an undivided interest in property is to [sic] value of the fee, multiply the value of the fee by the undivided interest, and subtract out the share of the costs of partition allocable to the undivided interest.

- E** ***Williams* – A Shot Across the Bow.** The Tax Court's opinion in *Williams v. Comm'r*, T.C. Memo. 1998-59 should have served as a serious warning to the IRS about its continued reliance on the premise that the actual costs of partitioning are a ceiling on the discount for undivided partial interests in real estate.
- 1** **Facts.** In 1980 and 1983, Ellie gave undivided one-half interests in certain real estate to Robert (the husband of Ellie's niece, but someone who, witnesses testified, was loved by Ellie as if he were her son). Ellie later died owning the remaining half interest in the same real property.
- 2** **44 Percent Discount Allowed.** The Tax Court upheld a total discount of 44 percent for the minority interests (30 percent for lack of control, and a sequential 20 percent for lack of marketability).

- a **No Comps for Partial Interests.** The taxpayer's expert witnesses were a real estate appraiser, who valued the underlying real estate, a business appraiser who valued the partial interest, a real estate attorney who estimated partition costs and a banker who explained why banks would not make loans secured by partial interests. Neither the taxpayer's experts nor those for the IRS presented any comparables. The Tax Court held that the lack of comparables was proof of the lack of marketability of partial interests in real estate.
- b **Cost of Partitioning.** The Tax Court also rejected the notion that the discount should be limited to costs of partitioning the property, finding that this theory does not give adequate weight to other reasons for discounting a fractional interest in real property, such as lack of control and the historic difficulty of selling an undivided fractional interest in real property, discussed below.

F *Estate of Baird* **Is The Issue Now Decided?** In *Estate of Baird v. Commissioner*, 416 F.3d 442 (5th Cir., 2005), *rev'g and rem'g*, T.C. Memo. 2002-299, the Fifth Circuit awarded attorney's fees to the taxpayer on account of the lack of authority behind the IRS assertion that the cost of partitioning is the limitation on the discount.

- 1 **Facts.** The taxpayers owned a 14/65 fractional share of certain Louisiana timberland. The estate claimed a 60-percent discount for lack of marketability, based on independent professional appraisals.
 - a **Form 706.** Interestingly, the estate tax return claimed a 25 percent discount.
 - b **Amended Form 706.** An amended estate tax return increased the claimed discount to 50 percent.
 - c **Second Amended Form 706.** A second claim for refund increased the claimed discount to 60 percent.
 - d **Trial.** At trial, the estate raised its claimed discount to 90 percent, based on the testimony of one expert that he would not himself have bought the partial interest for more than ten percent of its proportionate value.
 - e **IRS.** The IRS appraiser had concluded that there were no reliable market comparable sales from which to determine value, and so limited the discount to the cost of partitioning the nearly-3,000 acre tract into 40 acre lots. The IRS discount was equivalent to just over three percent of the value of the property.

the relevant precedents. The court noted that the IRS had argued in its appellate brief that partitioning would be relatively easy and that the discount should be limited to the costs of partitioning.

- b IRS Knew Partitioning Could Not Happen.** The court also noted that the estates had provided the IRS with several letters from experts critiquing the analysis of the IRS expert, and that one of the letters stated that it was absurd to believe that "the hypothetical willing buyer would wade into such a fracas with the sellers' relatives only to be reimbursed his out-of-pocket costs."
- c Attorney's Fees Award.** The Fifth Circuit concluded that the Tax Court had abused its discretion by accepting the IRS's argument that its position was substantially justified because the estates failed to furnish detailed information about the risks and difficulties of partition, and that it had abused its discretion by relying on the in-court increases in discounts as proof of substantial justification.

G Planning Points.

- 1 Will IRS Surrender?** *Baird* is important because the IRS tends to give up arguments after they have been assessed attorneys' fees.
- 2 Creating Tenancies-in-Common or Community Property Interests to Reduce Values.** Assuming that the IRS does quit arguing that the costs of partitioning tangible property is the only measure of the discount for lack of marketability of a community property or tenancy-in-common interest, valuation discount planning may become far easier for a great many clients. Assets such as real estate, artwork and antiques can be owned by spouses or by spouses and children as tenants-in-common, producing noteworthy valuation discounts with relatively little effort.
- 3 Do Business Purpose and Economic Substance Doctrines Apply?** The IRS might assert the application of the business purpose doctrine or the economic substance doctrine, or both, to challenge the creation of a significant number of tenancies-in-common.
 - a Business Purpose Doctrine.** The business purpose doctrine states that a tax law that involves commercial or investment transactions is limited in its scope to transactions entered upon for commercial or investment purposes, and does not include transactions entered upon for no other motive but to escape taxation. ought not to be relevant, because the transaction is not a business or investment transaction. See *Gregory v. Helvering*, 293 U.S. 465 (1935); and *Comm=r v. Transport Trading & Terminal Corp.*, 176 F.2d 570,

572 (2nd Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). Also see *Estate of Strangi v. Comm'r*, 115 T.C. 478 (2000), *aff'd in part, rev'd in part*, *Gulig v. Comm'r*, 293 F.3d 279 (5th Cir. 2002), applying the doctrine to the creation of a family limited partnership.

(1) The business purpose doctrine is also often confused with the economic substance doctrine, both in language and application. In most cases, this confusion does not change the tax results, because the requirements of the two doctrines are similar. The economic substance doctrine, however, may apply in cases in which no business purpose is either expected or required, and thus the two doctrines must be examined separately.

(2) The business purpose doctrine should not be relevant in this situation, because the transaction is not a business or investment transaction. The conversion of property from ownership with a right of survivorship to tenants-in-common is appropriate to facilitate the disposition of each spouse's separate interest at death. Similarly, the gift of tenancy-in-common interests to other family members is appropriate because it gives each person an undivided interest in the asset, without giving away the entire asset.

b Economic Substance Doctrine. The economic substance doctrine disregards a transaction or entity that lacks economic substance and that is used solely to produce tax benefits.

(1) A transaction is not respected for tax purposes if it has no economic substance separate and distinct from the benefits achieved by tax reduction. *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978); *U.S. v. Court Holding Co.*, 324 U.S. 331 (1945); *Comm'r v. Tower*, 327 U.S. 280 (1946); *U.S. v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 456 (1950); also *ASA Investments v. Comm'r*, 201 F.3d 505 (D.C. Cir. 2000); *Ferguson v. Comm'r*, 29 F.3d 98 (2nd Cir. 1994); *Goldstein v. Comm'r*, 364 F.2d 734 (2nd Cir. 1966), *aff'g* 44 T.C. 284 (1965); *U.S. v. Wexler*, 31 F.3d 117, 122, 124 (3rd Cir. 1994); *ACM Partnership v. Comm'r*, 157 F.3d 231 (3rd Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999); *Hines v. Comm'r*, 912 F.2d 736 (4th Cir. 1990); *Merryman v. Comm'r*, 873 F.2d 879 (5th Cir. 1989); *Yosha v. Comm'r*, 861 F.2d 494, 498-99 (7th Cir. 1988), *aff'g* *Glass v. Comm'r*, 87 T.C. 1087 (1986); *Zmuda v. Comm'r*, 731 F.2d 1417 (9th Cir. 1984); *Casebeer v. Comm'r*, 909 F.2d

1360, 1363 (9th Cir. 1990); *True v. U.S.*, 190 F.3d 1165 (10th Cir. 1999); *Winn-Dixie Stores, Inc. v. Comm'r*, 254 F.3d 1313 (11th Cir., 2001), *aff'g* 113 T.C. 254 (1999); *United Parcel Service of America, Inc. v. Comm'r*, 254 F.3d 1014 (11th Cir. 2001); *Compaq Computer Corporation v. Comm'r*, 113 T.C. 214 (1999).

(2) On the other hand, as one commentator has noted,

[t]he doctrine permits taxpayers to retain even the most egregious tax benefits if they arise from transactions with meaningful economic consequences.

Harriton, A Sorting Out the Tangle of Economic Substance, @ 52 Tax Lawyer 235 (Winter 1999).

(3) The economic substance doctrine may apply in some estate planning situations, but it should not apply to the creation of tenancies-in-common, because the economic interests and powers of the parties are actually and substantially changed. Rights of survivorship are destroyed, and interests in the property change from one person to another. As long as the parties act consistently with the changed ownership, there should be no lack of economic substance.

4 **Recourse Liability.** The tenancy-in-common produces a particularly good tax result if the property is subject to a recourse debt, because the interest is included with a marketability discount, but the entire amount of the debt is subtracted from the gross estate. Thus, the debt is not discounted, but the asset to which it primarily relates is discounted. See *Estate of Fung v. Comm'r*, 117 T.C. 21 (2001); and *Propstra v. United States*, 680 F.2d 1248, 1254- 1255 (9th Cir. 1982).

5 **Co-Ownership Agreement.** People who own property as tenants-in-common often have a written agreement detailing how such points of contention as maintenance expenses, capital improvements, and even simple use of the assets will be shared.

a **Benefits.** These agreements reduce conflicts and clarify the rights of each of the parties.

b **Rights to Partition.** A co-ownership agreement that allows the parties to partition the property or transfer their own interests more easily than under state law should reduce the discount for lack of marketability.

- c **Section 2703.** A co-ownership agreement that attempts to restrict the rights of the parties to sever the tenancy more strictly than applicable state law is likely to be ignored under Section 2703.
 - (1) Section 2703 states that the estate, gift and GST tax value of an asset is determined without regard to restrictions on the right to use, acquire, or transfer the property.
 - (2) Section 2703 does not apply if the agreement:
 - (a) Is a *bona fide* business arrangement;
 - (b) Is not a device to transfer such property to members of the decedent's family for less than full and adequate consideration in money or money's worth; and
 - (c) Consists of terms that are comparable to similar arrangements entered into by persons in an arms' length transaction.
 - (3) Even if Section 2703 is applicable, the worst that can happen is that the state law restrictions on disposition continue to apply to the interest and restrict its marketability.

IV MAXIMIZING ANNUAL EXCLUSION GIFTS

- A **Limit Raised to \$12,000.** Rev. Proc. 2005-70, § 3.28, 2005-2 C.B. 979 raised the gift tax annual exclusion to \$12,000 per donee per year, for transfers made in 2006. It remains \$12,000 for transfers made in 2007. Rev. Proc. 2006-53, 2006-48 I.R.B. 996 (Nov. 27, 2006).
- B **Annual Exclusion as Entry Level Giving Technique.** The annual exclusion is so easy to use, that clients who do not take full advantage of it should generally be regarded as poor candidates for other gift techniques. Viewed another way, clients will favor other techniques over the annual exclusion only if they do not really believe that they will have to transfer control of the asset in question. This tends to lead to misunderstanding of the real nature of the transaction, and often to misadministration of the transaction.
- C **The Unlimited Exclusion.**
 - 1 **Direct Payment of Qualifying Educational and Medical Expenses.** Section 2503(e) allows an unlimited gift tax annual exclusion for direct payments of qualifying educational expenses or qualifying medical ex-

penses (or both), paid on behalf of an individual, however related or unrelated to the donor. Treas. Regs. § 25.2503-6(a).

- 2 **Direct Payment.** This exclusion is available only for payments made directly to the service provider. Gifts in trust do not qualify, even if the trustee is required to use the funds for the payment of qualifying educational or medical expenses. Treas. Regs. § 25.2503-6(c), Ex. 2.
- 3 **Qualifying Educational Expenses.** The exclusion is allowed for direct payment of qualifying educational expenses, defined as tuition to attend a qualifying educational organization (one that normally maintains a regular faculty and curriculum and that normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.) Qualifying educational expenses does not include books, supplies, dormitory fees, board or other similar expenses. Treas. Regs. § 25.2503-6(b)(2).
- 4 **Medical Expenses.** Qualifying medical expenses means expenses that are deductible medical expenses for income tax purposes, including expenses incurred for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care. It also includes payments for medical insurance on behalf of any individual. Qualifying medical expenses does not include amounts paid for medical care that are reimbursed by the donee's insurance. Treas. Regs. § 25.2503-6(b)(3).
- 5 **Generation-Skipping Transfer Tax.** Gifts that qualify under Section 2503(e) are also fully excludible for GST tax purposes. IRC § 2611(b)(1).
- 6 **Prepaid Tuition.** The IRS has twice permitted in private rulings the use of the unlimited annual exclusion to prepay tuition expenses.
 - a **PLR 200602002.** In PLR 200602002, the IRS approved the gift and GST tax annual exclusion for a donor's prepayment of educational costs of the donor's six grandchildren for all years through graduation from 12th grade. See also Matz, "Practical Strategies for Funding a Child's College Education," 33 Est. Plan. 22 (June, 2006).
 - (1) The donor entered into an arrangement with the school to pay at one time an amount equal to the tuition for each of the six grandchildren, kindergarten through 12th grade.
 - (2) There were six separate agreements -- one for each grandchild.

- (3) The donor's payments were nonrefundable, and the donor or his children would separately have to pay any increases in tuition during the term of the agreement. Once paid, the tuition payments become the sole property of the school.
- (4) The prepayment did not afford each grandchild any additional rights or privileges over any other student, and did not guarantee enrollment. The school expressly reserved all rights under its standards policies and procedures.
- (5) The IRS, without detailed analysis, stated that Section 2503(e) applied. The IRS merely stated:

In this case, Grandchildren 1-6 are currently attending School. Donor will pay the amounts to School in payment of specified tuition costs with respect to designated grandchildren. The payments are not subject to refund and will be forfeited in the event the respective grandchild ceases to attend School. Thus, the payments are made directly to an educational organization to be used exclusively for the payment of specified tuition costs for designated individuals. Accordingly, the payments constitute an "amount paid on behalf of an individual as tuition to an educational organization ... for the education or training of such individual", for purposes of section 2503(e)(2). This is in contrast to the situation presented in section 25.2503-6(c), Example 2, where the payments were not made to an educational organization in payment of specific tuition costs for a designated individual.

b **TAM 199941013.** In TAM 199941013, the donor entered into a contractual arrangement with the school, very similar to the one approved in PLR 200602002.

- (1) The donor entered into several arrangements with a private school to pay at one time for the tuition for the donor's two grandchildren, from kindergarten through 12th grade.

- (2) Each of the written agreements covered one grandchild for several years other than the year in which the payment was made.
- (3) The two grandchildren were students at the school during the years the above payments were made by the donor.
- (4) The payments were not refundable. If a grandchild ceased to attend the school, then the school would retain the funds.
- (5) The donor's child (the father of the two grandchildren), agreed to cover any additional tuition amounts, if the tuition increased during the covered years.
- (6) The IRS, without detailed analysis, stated that Section 2503(e) applied.

c **Deathbed Gifts.** This could be an extraordinarily useful death-bed gift by a parent or grandparent. Such gifts could cover private school tuition, college tuition and even health insurance (for both the children and grandchildren.) This permits almost an unlimited reduction in the donor's gross estate.

V **USING GRANTOR TRUSTS TO MAKE GIFTS OF TAX-FREE INCOME.** Grantor trusts are often used together with installment sales to shift future growth in the value of assets to the trust's beneficiaries, without current income tax on the transferor. Such transactions may be too complex for a great many clients. Yet, grantor trusts may still be useful for clients who would like to make gifts to various family members, because the grantor trust rules heighten the benefit of other gifts by requiring the donor to pay the income tax on the income that those gifts produce. In this situation, grantor trust treatment enhances the tax benefits of gifts that the donor otherwise would make.

A **Drafting the Intentionally-Defective Grantor Trust.** There are several methods traditionally employed to create an intentionally defective grantor trust – a trust the principal and income of which will be excluded from the grantor's gross estate, but which will be a grantor trust for Federal and state income tax purposes. Some methods fit different situations better than others, and the planner should be familiar with all of them. See Balakrishna, "Defective Grantor Trusts: Greater Flexibility and Income Tax Leverage," 32 Est. Plan. 30 (Dec. 2005); Horn, "Avoiding and Attracting Grantor Trust Treatment," 24 ACTEC Notes 204 (Winter 1998); Irizarry-Diaz, "How Defective Is Your Trust? Suggestions on Structuring an Intentionally Defective Grantor Trust," 41 Tax Mgmt. Memo. 231 (June 19, 2000).

1 Power to Substitute Assets. Section 675(4)(C) states that the grantor owns any trust over which the grantor or a nonadverse person holds a non-fiduciary right to "reacquire the trust corpus by substituting other property of equivalent value." This power is highly favored because its exercise does not harm the trust beneficiaries, whose net trust assets cannot be reduced by the substitution of other assets of equivalent value.

a Possible Problems. This power, however, is far from perfect.

(1) First, the IRS takes the position that a power to substitute assets is not necessarily held in a nonfiduciary capacity (thus creating a grantor trust) merely because the trust instrument says so. The IRS has indicated in private letter rulings that the capacity in which a power is held is a factual determination that cannot be made in a ruling, and that must be made at audit. See, *e.g.*, PLRs 200532041, 200546052-200546055, 200548005. The IRS may be correct, but careful drafting should overcome it by stating clearly that the power to substitute assets is held without any fiduciary duty to any beneficiary with respect to its exercise or nonexercise.

(2) Second, there is really no clear precedent for the proposition that a retained power to substitute assets does not result in the trust assets being included in the transferor's gross estate. The IRS has cited the Tax Court's decision in *Estate of Jordahl v. Comm'r*, 65 T.C. 92 (1975), *acq.* 1977-1 C.B. 1 for the proposition that a retained right to substitute assets is not a power to alter the beneficial enjoyment of the trust under Section 2036 or Section 2038. See PLRs 200606006 and 200603040; also Rev. Rul. 82-5, 1982-1 C.B. 131 (extending *Jordahl* to taxation of life insurance policies under Section 2042).

(a) The proposition that a right to substitute assets is not a reserved power to alter beneficial enjoyment seems quite sound, but the grantor in *Jordahl* held the power in a fiduciary capacity, and the Tax Court noted this fact with some importance.

(b) There is no particular reason why the fiduciary capacity in which the power was held in *Jordahl* should affect the result under Sections 2036 or 2038, but the Tax Court did stress the fact that the power was held in a fiduciary capacity. Thus, while

the analysis in *Jordahl* is largely correct, the case is a questionable precedent.

- (3) A solution that is sometimes utilized is to grant the power to substitute assets to someone other than the grantor, thereby avoiding all questions relating to a reserved power to alter beneficial enjoyment.

 - (a) Section 675(4) does state that it applies to any power "exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity."
 - (b) This has been construed by some to mean that a grantor trust would be created if a power to substitute assets were held by any nonadverse party (or, perhaps, even an adverse party), as long as the power were not held in a fiduciary capacity. See, *e.g.*, PLR 200434012.
 - (c) One may find it difficult, however, to understand how a third-party can "reacquire" trust corpus that he or she did not contribute to the trust. Therefore, there is some doubt whether a third-person's power to substitute assets can be relied on to create a grantor trust.
- 2 **Power to Distribute to Grantor's Spouse.** Section 677(a) deems the grantor to own any portion of a trust, the income of which may be distributed to the grantor's spouse. Therefore, if the grantor is married, making the grantor's spouse a discretionary beneficiary of the trust will make it intentionally defective.

 - a **Predeceasing Spouse.** This grantor trust status will end if the spouse predeceases the grantor.
 - b **Divorcing Spouse.** Divorce, however, should not terminate grantor trust status. See IRC § 672(e).
- 3 **Lending on Favorable Terms.** Section 675(2) states that the grantor owns any portion of a trust as to which a nonadverse party can enable the grantor to borrow trust corpus or income without adequate interest or without adequate security, apart from a power to make loans to the public in general on such terms. Granting someone other than the grantor a right to lend money to the grantor without adequate interest or without adequate

security should not constitute a reserved power to control beneficial enjoyment, because it is not a power reserved by the grantor.

a Creditor's Rights. One question is whether this is equivalent to a right to distribute trust funds to the grantor, in which case the grantor's creditors could compel its exercise, and the trust funds would be included in the grantor's gross estate.

b Favorable Interest or Security – But Not Both. It is not entirely clear how one determines what constitutes a favorable interest rate, separate from the question of adequate security. The lower the adequacy of the security, the higher the interest rate should be. Thus, if actual loans are made, this can be a tricky calculation.

4 Power to Control Beneficial Enjoyment. Section 674(a) states that the grantor owns any portion of a trust as to which a nonadverse party holds a power to alter beneficial enjoyment, other than a power specifically permitted under Section 674(b).

a Power Limited by a Reasonably Definite Standard. The grantor is deemed to own any portion of a trust as to which a nonadverse, related or subordinate trustee holds a power to distribute income and principal among a class of beneficiaries, if the power is not subject to a reasonably definite standard set forth in the trust instrument, and if the distributions are not chargeable against the interest of each beneficiary under Section 674(b)(5).

b Power Not Limited by a Reasonably Definite Standard. The grantor will also own a trust if a nonadverse trustee (whether or not related or subordinate) has a power to allocate income and principal among the beneficiaries, if someone also has the power to increase the class of beneficiaries, other than by adding after-adopted or after-born children. Treas. Reg. § 1.674(d)-2(b); see also Randall & Megaard, "Defective Grantor Trusts Can Be Effective Education Funding Vehicles after RRA '93," 81 J. Tax'n 150 (Sept. 1994).

(1) The power to add beneficiaries negates most of the exceptions to grantor trust treatment under Sections 674(b)(5) through 674(b)(7), 674(c), and 674(d).

(2) There is no requirement that the additional beneficiaries be individuals; a power to add charitable beneficiaries will render Section 674(a) applicable, if the trustee has discretion to distribute income and principal among the multiple beneficiaries.

- (3) The power to add beneficiaries, arguably, should not be held by the trustee. The IRS could argue that any person whom the trustee could add is actually already a trust beneficiary, and that the initial class of beneficiaries is just larger than initially suggested by the instrument. This argument may be a bit strained, but there is no reason not to vest the power to a trust protector, and avoid the issue entirely. See K. Henkel, *Estate Planning and Wealth Preservation: Strategies and Solutions*, ¶ 6.06[3][c].

5 Power to Pay Insurance Premiums. Section 677(a) also states that the grantor owns any portion of the trust, the income from which may be used to pay premiums on a policy of insurance on the grantor's life or that of the grantor's spouse. Authorizing the trustee to buy life insurance on the grantor's life or that of the grantor's spouse does not impair the beneficiaries' interests in the trust, but it is also unclear whether this rule actually results in grantor trust status if the trustee does not buy such policies.

a Actual Premium Payments. Clearly, the grantor is taxed on any trust income actually used to pay the premiums on policies owned by the trust on the life of the grantor or the grantor's spouse. Treas. Reg. § 1.677(a)-1(b)(2); also *Rand v. Helvering*, 116 F.2d 929 (8th Cir. 1941); *Connor v. Gagne*, 42 F. Supp. 231 (D.N.H. 1941).

b No Policies, No Premiums. The Tax Court has held that the mere possibility that the trust could buy insurance policies and pay the premiums is not enough to create a grantor trust, and the grantor does not own any trust income unless the trust actually owns insurance policies on the life of the grantor or the grantor's spouse during the taxable year. *Corning v. Comm'r*, 104 F.2d 329 (6th Cir. 1939) (trust owned no policies, so grantor not taxed on any income). The IRS, however, recently took a contrary position in Field Attorney Advice 20062701F, stating that a trust that apparently owned no life insurance policies was a wholly-owned grantor trust because the trustee was authorized to apply all of the income and principal to paying premiums on policies on the life of the grantor.

c Actual Premiums on Policies Held Outside Trust. In Rev. Rul. 66-313, 1966-2 C.B. 245, the IRS ruled that the grantor of one trust was taxable on its income to the extent that income was used to pay the premiums on life insurance policies on the grantor's life, even though the policies were owned by another trust created by the same grantor. This conclusion seems to be correct, because the

mere use of multiple trusts should not permit the grantor to avoid the application of this particular grantor trust rule.

d Income Available for Premiums, But Not Actually So Used. Beyond these basic principles, it becomes more difficult to determine how much trust income will be taxed to the grantor under this grantor trust provision.

- (1) Several early cases said that the grantor owns only the amount of trust income used to pay the premiums, rather than owning all trust income that could have been so used. *Weil v. Comm'r*, 3 T.C. 579 (1944), *acq.* 1944 C.B. 29 (grantor taxed only to extent of income used); *Iversen v. Comm'r*, 3 T.C. 756 (1944) (same); *Rand v. Comm'r*, 40 B.T.A. 233 (1939), *acq.* 1939-2 C.B. 30, *aff'd*, 116 F.2d 929 (8th Cir. 1940), *cert. denied*, 313 U.S. 594 (1941) (same).
- (2) Other early cases said that if the trust used principal, loan proceeds or other sources of funds to pay the premiums, trust income has not been used to pay premiums and the grantor has nothing on which to be taxed. Compare *Chandler v. Comm'r*, 41 B.T.A. 165 (1940), *aff'd without discussion on this point*, 119 F.2d 623 (3rd Cir. 1941) (grantor not taxable when trustee used nontaxable insurance dividends and principal contributions to pay premiums), with *Rieck v. Comm'r*, 118 F.2d 110 (3rd Cir. 1941) (grantor taxed when beneficiaries lent money to trust to pay premiums, and trustee then distributed trust income to beneficiaries).
- (3) These cases predate the 1954 and 1969 changes in Section 677 and the current "portion" regulations under Section 671, but they seem consistent with the current concept of ownership of a "portion" of a trust, and with the regulations under Section 677 regarding ownership only of the trust income under that section. See discussion of the different possible analyses in a letter from Theodore E. Calleton, Esq., in 1982-2 Tax Mgmt. Est., Gifts & Tr. J. 28 (1982); also Wark, "IRS Rulings Hint 'Super' Life Insurance Trust Okay for Gift, Income and Estate Tax Savings," 54 J. Tax'n 162, 166-167 (1981). See also PLRs 8126047, 8118051, 8112087, 8103074, 8007080.

6 Crummey Powers -- Sections 671 vs. Section 678. Section 678(b) states as follows:

Subsection (a) shall not apply with respect to a power over income if the grantor of the trust is otherwise treated as the owner under the provisions of this subpart other than this section.

If the grantor holds a trust power that causes the grantor to own the trust income under Sections 673 through 677, and the beneficiary holds a Section 678 power over the same trust income, the beneficiary's power is disregarded and the grantor is taxed as the owner of the trust income. Section 678(b).

a Powers over Principal. Section 678 does not address the problem of dual powers over trust principal that do not affect the payment of current income. There is no sound policy reason for this distinction and it must be viewed as a flaw in the drafting of Section 678.

(1) Logically, if the grantor holds a grantor trust power over the same principal to which a beneficiary's Section 678 power relates, the grantor and the beneficiary should share the ownership of the trust proportionately, each picking up an allocable share of the trust items of income, deduction, gain, and loss allocated correctly to the trust principal. If both of their powers relate to the entire trust, the grantor and the beneficiary should divide the trust equally. If their powers relate to specific amounts of the trust principal, they should divide the trust principal tax attributes in proportion to the size of the trust shares they control.

(2) Section 678(b) does not state whether the testing of a power under Section 678(a) is made once when it is first created, or annually as trust income accrues and becomes taxable. Logically, the ownership of the trust should be determined as each item of income or gain is realized by the trust. When the grantor's power exists and is, under Section 678(b), the dominant power, the grantor should own the trust. When the grantor later dies and the beneficiary's power under Section 678(a) would then prevail, the beneficiary should own the trust.

b Rulings Favor Grantor Total Ownership. The IRS has suggested, albeit without either a citation of authority or detailed reasoning, that the grantor's powers over principal prevail over the beneficiary's powers. PLRs 9448018, 200606006, 200603040.

7 **The Grantor Trust “Toggle Switch.”** Grantors may find the taxation on income they do not receive less desirable in a year in which the trust recognizes a very substantial gain, or in which the grantor has a cash flow shortage. In such years, it may be desirable to terminate the grantor trust status.

a **Authority.** The IRC and regulations are silent on this point, but there is no practical or legal reason why a trustee or third-person cannot be empowered to release the power that creates a grantor trust.

b **Timing.** Again, there is no direct authority, but such a release should be effective immediately, and thus cause the trust to cease to be a grantor trust from the time the power is exercised.

c **On Again?** In theory, the trust instrument could grant a third-person the right to reissue the grantor trust power.

(1) The problem, however, is that this starts to suggest the existence of a power in the grantor to control these events. An IRS agent is likely to start looking for evidence that the grantor influenced the acts of the agent.

(2) Of course, the mere existence of a trust protector’s power to withdraw and re-grant the grantor trust power should not pose a problem, as long as it is not exercised more than once. The existence of the grantor trust on-switch could then be exercised if the law is later clarified to permit such discretion.

8 **Gift and Estate Tax Consequences of Grantor’s Income Tax Payments.**

a **Facts.** A, a U.S. grantor, created an irrevocable grantor trust for the benefit of A=s descendants, and required that the trustee not be either related or subordinate to the grantor (as defined in Section 672(c)). A retained no interest in or power over the trust that would render the gifts to the trust incomplete for federal gift tax purposes, or that would cause the trust corpus to be included in A=s gross estate for federal estate tax purposes. A did, however, retain sufficient powers to cause the trust to be a grantor trust deemed owned by A for federal income tax purposes. The IRS posited three different situations.

(1) In Situation 1, A paid the federal income taxes imposed on the trust income. Neither applicable state law nor the gov-

erning instrument required or permitted the trustee to reimburse A for these taxes.

- (2) In Situation 2, the trustee, following a direction in the trust instrument, reimbursed A for any income taxes that A was required to pay on the trust income.
- (3) In Situation 3, the trustee, pursuant to a discretionary authority granted in the trust instrument, reimbursed A for any income taxes that A was required to pay on the trust income:

b Gift Tax Treatment. The IRS stated that the gift tax applies to indirect transfers of value from one person to another, as when one party forgives, fails to collect on a debt of another or gratuitously pays the tax liability of another. Treas. Regs. ' 25.2511-1(a); *Estate of Lang v. Comm=r*, 64 T.C. 404 (1975), *aff'd*, 613 F.2d 770 (9th Cir. 1980); *Doerr v. US*, 819 F.2d 162 (7th Cir. 1987); Rev. Rul. 81-264, 1981-2 C.B. 185. The IRS ruled that the payment of the income taxes attributable to the inclusion of the trust's income in the grantor's taxable income did not make a taxable gift of the tax payments to the trust beneficiaries.

- (1) The IRS stated that, because the grantor was the owner of the trust income under federal income tax laws, the grantor was legally liable for any income tax attributable to the trust's income. Thus, even though the grantor was not a beneficiary of the trust, the discharge of his or her own legal obligations could not be a gift to the other trust beneficiaries.
- (2) In all three situations, the IRS concluded, the grantor=s payment of the income tax liability does not constitute a taxable gift to the trust's beneficiaries.

c Estate Tax Treatment. A grantor=s right to discharge his or her legal obligations from the assets of a trust constitutes a reserved a right to the beneficial enjoyment of the trust property. Treas. Regs. ' 20.2036-1(b)(2); *Estate of Prudowsky v. Comm=r*, 55 T.C. 890 (1971), *aff'd*, 465 F.2d 62 (7th Cir. 1972); *Richards v. Comm=r*, T.C. Memo. 1965-263, *aff'd*, 375 F.2d 997 (10th Cir. 1967). Section 2036(a) does not apply when trust property may be used to satisfy the decedent's legal obligations only in the discretion of the trustee, whether or not the discretion is exercised by the trustee. *Comm=r v. Estate of Douglas*, 143 F.2d 961 (3rd Cir. 1944), *acq.*

1944 C.B. 7; *Estate of Mitchell v. Comm'r*, 55 T.C. 576 (1970),
acq. 1971-2 C.B. 3.

- (1) Therefore, the trust assets will be included in the grantor=s gross estate, however, if the trust instrument or applicable law requires that the grantor be reimbursed by the trust for the income tax paid by the grantor on trust income, but not if the trustee exercises a discretion granted by the governing instrument to reimburse the grantor for the income taxes that are imposed on the grantor with respect to trust income.
- (2) In Situation 1, however, none of the trust assets are includible in the grantor=s gross estate for federal estate tax purposes under Section 2036, because the grantor has not retained the right to have trust property expended in discharge of the grantor=s legal obligation.
- (3) In Situation 3, none of the trust assets are includible in the grantor=s gross estate for federal estate tax purposes under Section 2036, because the grantor has not retained the right to have trust property expended in discharge of the grantor=s legal obligation. The trustee=s payment of the grantor=s income taxes due on the trust income (or reimbursement to the grantor for such tax payments), pursuant to the discretionary authority granted under the trust instrument or state law, would not be gift by the trust beneficiaries to the grantor. Also, the trust assets are not included in the grantor=s gross estate because the trustee=s discretionary power does not constitute a retained right to the beneficial enjoyment of the trust, as long as there is no understanding, express or implied, between the grantor and the trustee regarding the trustee's exercise of this discretion in favor of the grantor.
- (4) In Situation 2, however, the trust assets would be included in the grantor=s gross estate under Section 2036(a), because the trust instrument requires that the trustee reimburse the grantor for the income taxes paid by the grantor on trust income. The trustee=s payment of the grantor=s income taxes due on the trust income (or reimbursement to the grantor for such tax payments), as directed by the trust instrument, would not be gift by the trust beneficiaries to the grantor.

d Effective Date. The IRS stated that it would not apply the estate tax holding regarding Situation 2 adversely to a grantor's estate with respect to any trust created before October 4, 2004.

e Evaluating Rev. Rul. 2004-64.

(1) State law can be important in evaluating a grantor trust under this ruling. Sec. 506 of the Uniform Principal and Income Act (1997) specifically neither authorizes nor directs a trustee to reimburse the grantor for these payments, leaving it to the drafter. The best approach will usually be to preclude the trustee from reimbursing the grantor for income taxes on trust income, thereby avoiding any argument that the trust funds should be included in the grantor's gross estate because the grantor's creditors could compel the trustee to exercise in the grantor's favor any discretion granted the trustee to benefit the grantor.

(2) The grantor may retain the incidence of state income taxes, as well as Federal income taxes.

(3) The effective date rules do not seem to preclude additions after October 3, 2004, to trusts that are protected from the new rules by their having created before October 4, 2004.

(4) See "Beaman, "Estate Tax Consequences of Revenue Ruling 2004-64: Silence in Grantor Trusts is Everything but Golden," 54 Drake L. Rev. 929 (2006).

9 Drafting Checklist. In summary, one should design an intentionally-defective grantor trust as follows:

√ Include one or more powers that will clearly cause the grantor to own the entire trust for income tax purposes, without causing the trust to be included in the grantor's gross estate.

NOTE: The safest power to use is a broad power in a nonadverse trustee to distribute income and principal among a broad class of beneficiaries, together with a trust protector's power to add charitable or noncharitable beneficiaries;

√ Add one or more of the following, but do not rely solely on them:

(a) A trustee's power to pay income and principal to the grantor's spouse;

- (b) A nonadverse third-person's power to reacquire trust assets in exchange for assets of equivalent value;
 - (c) A trustee's power to apply trust income and principal to the payment of life insurance premiums on policies insuring the lives of the grantor, the grantor's spouse or both;
- √ Do not give the grantor a nonfiduciary power to substitute assets, because there is inadequate authority supporting its estate tax consequences;
 - √ Give a trust protector an off-switch that enables him, her or it to take-away or limit the specific power that caused the trust to be a grantor trust;
 - √ Do not include *Crummey* withdrawal powers – have the grantor use unified credit to cover the gifts (or even, perish the thought, pay gift taxes);
 - √ Require the grantor to pay all income taxes legally imposed on the grantor with respect to trust income.

B The Grantor Nonmarital Trust. A grantor trust should be the preferred method of making gifts of income-producing assets (whether the income is ordinary income or capital gains). Many clients do not want to make substantial gifts of such assets. For these clients, the grantor nonmarital trust may be a good tax-saving technique.

- 1 Basic Features.** The grantor nonmarital trust is an *inter vivos* QTIP created by one spouse for the lifetime benefit of the other spouse, that at the donee spouse's death creates a nonmarital trust equal to the donee spouse's applicable exclusion amount.
 - a Gift Tax Treatment on Creation.** The gift qualifies for the gift tax marital deduction, if the donor spouse files a gift tax return and elects to deduct the transfer. IRC § 2523(f).
 - b Estate Taxation in First Spouse's Estate.** The trust is includible in the donee spouse's gross estate, and is the primary fund for creating the donee spouse's nonmarital trust.
 - c Estate Taxation in Surviving (Donor) Spouse's Estate.** The nonmarital trust created when the predeceasing (donee) spouse dies is excludible from the surviving (donor) spouse's gross estate. IRC § 2523(f)(5); Treas. Regs. § 25.2523(f)-1(d).

- d Grantor Trust Status.** For income tax purposes, however, the nonmarital trust is a grantor trust created by the surviving spouse. The fact that the trust assets are included in the donee spouse's gross estate under Section 2044 is immaterial for grantor trust purposes – the trust was created by the donor spouse and the grantor trust rules apply based on his or her status as the trust's grantor. See Treas. Regs. § 1.671-2(e).

2 Form of Grantor Trust.

- a Grantor is a Beneficiary.** It is tempting to rely on Section 677(a) to create a grantor trust, by making the grantor a discretionary beneficiary of income and principal after the donee spouse's death. Such a trust would otherwise constitute a valid nonmarital trust, for estate, gift and GST tax purposes.
- (1) Under the law of most states, however, the grantor's creditors would be able to compel the trustee to distribute to them the maximum amount that the trustee could distribute to the grantor.
 - (2) This, in turn, would cause the trust assets to be included in the grantor's gross estate for estate tax purposes. Rev. Rul. 76-103, 1976-1 C.B. 293; *Outwin v. Comm'r*, 76 TC 153 (1981), *acq.* 1982-1 C.B. 2 (construing Massachusetts law); *Paolozzi v. Comm'r*, 23 T.C. 182 (1954), *acq.* 1962-1 C.B. 4 (construing Massachusetts law). See also *Estate of Wells v. Comm'r*, T.C. Memo. 1981-574 (1981) (no estate taxation, even though deceased actually received all of the trust income during her lifetime).
 - (3) See however, cases that suggest that some state laws are not so clear. *Uhl v. U.S.*, 241 F.2d 867 (7th Cir. 1957) (Indiana law); *Estate of German v. Comm'r*, 7 Cl. Ct. 641 (1985) (Maryland law); *Herzog v. Comm'r*, 116 F.2d 591 (2nd Cir. 1941), *aff'g* 41 B.T.A. 509 (1940) (New York law); but *cf. Vanderbilt v. Chase Manhattan Bank, N.A.*, 473 NY Supp. 2nd 242 (1984) (New York law).
 - (4) Several states, including Alaska, Delaware, Nevada, and Rhode Island, and many foreign countries have laws that prevent a grantor's creditors from reaching a discretionary spendthrift trust. A nonmarital trust created in these jurisdictions should not pose an estate tax problem. See Alaska Stat. § 34.40.110; 12 Del. Code §§ 3570-3576; Nev. Rev.

Stat. §§ 166.010-166.170; R.I. Gen. Laws. §§ 18-9.2-1-18-9.2-7. See also discussions in Blattmachr, Rubin & Rothschild, "Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch," 32 Vand. J. Transnat'l L. 763 (May 1999); Boxx, "Gray's Ghost-A Conversation About the Onshore Trust," 85 Iowa L. Rev. 1195 (May 2000); Digby, "Strings and Rope Burns: Some Dos and Don'ts Under Code § 2036," 15 Prob. & Prop. 56 (Jan./Feb. 2001); Eason, "Home From the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Planning Considerations," 52 Fla. L. Rev. 41 (Jan. 2000); Hogan, "Once More Unto the Breach: Planning for a Conflict of Laws With Alaska and Delaware Self-Settled Spendthrift Trusts," 14 Prob. & Prop. 27 (Mar./Apr. 2000); Sterk, "Asset Protection Trusts: Trust Law's Race to the Bottom?" 85 Cornell L. Rev. 1035 (May 2000); Taylor, "Domestic Asset Protection Trusts: The 'Estate Planning Tool of the Decade' or Charlatan?" 13 BYU J. Pub. L. 163 (1998); Veit, "Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?" 16 Alaska L. Rev. 269 (Dec. 1999).

- (5) Estate tax problems can be avoided if the grantor is entitled only to income and principal under an ascertainable standard, because the trustee can only be required to distribute to the grantor the maximum amount that the trustee has discretion to distribute. Thus, even if the trustee's discretionary powers are imputed to the grantor through the grantor's creditors, the grantor would hold only a limited power of appointment over the trust fund. See, e.g., Gans, Zeydel & Blattmachr, "Supercharged Credit Shelter TrustSM" Steve Leimberg's Estate Planning Newsletter # 1078 (January 25, 2007) at <http://www.leimbergservices.com>.

- b Grantor Not a Beneficiary -- Rely on Usual Grantor Trust Powers.** If the trust is not created in a state with favorable law, such as Nevada, it is better to rely on the same type of trust powers that would be used with any other intentionally-defective grantor trust.

SELECTED ATTACHMENTS

PLEASE NOTE

THESE FORMS HAVE NOT BEEN SUBMITTED TO OR APPROVED BY THE IRS OR ANY OTHER AGENCY OR COURT, AND THEY MAY CONTAIN PROVISIONS WITH WHICH VARIOUS IRS AGENTS AND ATTORNEYS MAY NOT AGREE.

USE YOUR INDEPENDENT JUDGMENT -- NEITHER THE AUTHOR NOR THE CONFERENCE SPONSOR CAN TAKE ANY RESPONSIBILITY FOR INDIVIDUAL USE OF THESE SAMPLE DOCUMENTS.

FORM 1. Co-Tenancy Agreement for Parties Owning Property as Tenants in Common – Does Not Facilitate Transfer of Interests or Partition¹

CO-TENANCY AGREEMENT

On [date], we, *Donor*, of [locality, state], *Tenant1*, of [locality, state] and *Tenant2*, of [locality, state], enter into this agreement (the "agreement") relating to our co-ownership of a certain parcel of real estate described in Schedule A (the "property").

RECITALS

A. We own the property as tenants-in-common, in the shares reflected in the deed to the property; and

B. *Tenant1* and *Tenant* acquired their interests in the property at the same by a gratuitous transfer from *Grantor*, who retains an interest in the property; and

C. We wish to establish rules governing our shared ownership of and benefits in the property, to minimize disputes and provide an orderly and efficient operation of the property for our mutual benefit; and

D. We do not wish to alter the rights we enjoy under applicable state law to seek partition of the property.

NOW, THEREFORE, we agree as follows:

AGREEMENTS

Section 1. Co-Ownership Unaffected

This agreement shall not convert our interests in the property into anything other than tenancy-in-common interests in the property.

Section 2. Expenses

We shall each be responsible for paying a *pro rata* share (defined below) of the expenses of ownership and operation of the property. These expenses shall include: (a) exterior maintenance (including, but not limited to, painting, roof repair, and lawn and garden maintenance); (b) maintenance of the plumbing, electrical equipment (including fixtures and appliances), and heating and cooling equipment; (3) liability, theft, fire, and casualty insurance on the property;

1 KEY:

- *Donor* - Full name of the donor
- *Tenant1* - Full name of one of the co-tenants in common
- *Tenant2* - Full name of the other co-tenant in common

(4) property taxes, including all special assessments; (5) interior maintenance (including painting, papering, carpet cleaning and repair); (6) pest control services; and (7) weekly cleaning of the interior of the property by a professional cleaning service.

Section 3. Contribution for Expenses

Any co-tenant who receives a bill for any expense that is to be borne by all of us together, shall promptly contact the others and request contribution. Each of the other co-tenants shall remit to the requesting co-tenant payment in full within fifteen (15) days of the date of the request. The requesting co-tenant may pay the share of any co-tenant who fails to make such contribution in full within the said fifteen (15) days, and be reimbursed for such payment by each co-tenant who failed to supply such contribution. A co-tenant who makes such a payment for another co-tenant shall have a lien against the share of such other co-tenant for such payment, and may record such lien as may be permitted under applicable state law.

Section 4. Capital Expenditures

We must all agree to any capital expenditure, and no co-tenant shall make any capital expenditures to which we do not all agree, unless the expenditure is required to prevent or repair significant damage to the property. We are each responsible for paying a *pro rata* share of the cost of any capital expenditures to which we agree.

Section 5. Encumbrances

No co-tenant may encumber (defined below) the property without our mutual consent.

Section 6. Sale and Right of First Refusal

No co-tenant may transfer (defined below) any interest in the property, except after compliance with the terms of this section. Any attempted transfer of an interest in the property that does not comply with this section shall be void and shall not be respected for any purpose.

6.1. Receipt of a Bona Fide Offer. A co-tenant who receives and wishes to accept a *bona fide* offer (defined below), to effect a voluntary transfer (defined below), of such co-tenant's interest in the property must promptly send a notice to each of the other co-tenants and offer, or be deemed automatically to have offered, to sell all of such offering co-tenant's interest in the property to the other co-tenants at the same price and on the same terms as are contained in such *bona fide* offer. The other co-tenants shall each have thirty (30) days from the receipt of such notice in which to agree to buy, in the aggregate, all, but not less than all, of the offering co-tenant's interest in the property.

6.1.1. If the co-tenants to whom notice is required to be sent do not agree to buy, in the aggregate, all of the offering co-tenant's interest in the property, such proposed voluntary transfer may be completed.

6.1.2. The co-tenants to whom notice is required to be sent shall each have the right to buy a share of the offering tenant's interest in the property that is the same as their *pro rata* share of the property, determined as if the offering tenant's share did not exist. The co-tenants may, however, agree to buy the share of the offering co-tenant in such other proportions as they shall deem appropriate.

6.2. Involuntary Transfer. A co-tenant who possesses information that would lead a reasonable person to believe that an involuntary transfer (defined below) of such co-tenant's interest in the property may occur within the next ninety (90) days shall promptly send a notice to each of the other co-tenants and offer, or be deemed automatically to have offered, to sell his or her interest in the property to such other co-tenants for a *pro rata* share of the most recent fair market value of the property, as assessed for real property tax purposes by the municipality in which the property is situated. The other co-tenants shall each have thirty (30) days from the receipt of such notice in which to agree to buy, in the aggregate, all, but not less than all, of the offering co-tenant's interest in the property.

6.2.1. If the co-tenants to whom notice is required to be sent do not agree to buy, in the aggregate, all of the offering co-tenant's interest in the property, such proposed voluntary transfer may be completed.

6.2.2. The co-tenants to whom notice is required to be sent shall each have the right to buy a share of the offering tenant's interest in the property that is the same as their *pro rata* share of the property, determined as if the offering tenant's share did not exist. The co-tenants may, however, agree to buy the share of the offering co-tenant in such other proportions as they shall deem appropriate.

6.3. Closing. Any co-tenant's purchase of another co-tenant's interest in the property under this section shall take place at a closing, held at 1:00 P.M. on the one hundred twentieth (120th) day after the date on which the offer to sell is made (or deemed made), at any place to which the parties agree. At the closing, the buyers shall pay for the purchased interest in the property, and the seller shall deliver a deed representing marketable title to the seller's interest in the property, free and clear of all encumbrances, and with evidence of payment of all necessary transfer taxes and fees.

Section 7. Definitions and Miscellaneous

7.1. Definitions. For purposes of this agreement, the following terms shall have the following meanings:

7.1.1. A "bona fide offer" is an offer to buy a co-tenant's interest in the property, from a prospective buyer who is willing and able to complete such purchase.

7.1.2. "Days" shall mean all calendar days, whether or not such days are legal holidays under the laws of the United States or any State.

7.1.3. “Encumber” shall mean any pledging, mortgaging, or otherwise securing any type of debt or obligation with the property, whether incurred voluntarily or involuntarily, and in any manner whatsoever.

7.1.4. “Including” shall have the same meaning as “included, but not limited to,” unless otherwise expressly so stated.

7.1.5. A “pro rata share” of any expense or expenditure shall be the same share as each co-tenant owns in the property, as determined from the recorded deed to the property.

7.1.6. A "transfer" is any sale, pledge, encumbrance, gift, bequest or other transfer of any interest in the property, whether or not for value and whether or not made to another co-tenant to this agreement. "Involuntary transfer" is any transfer made on account of a court order or otherwise by operation of law, including any transfer incident to any divorce or marital property settlement or any transfer pursuant to applicable community property, quasi-community property or similar state law. "Voluntary transfer" is any transfer made during a co-tenant's lifetime which is not an involuntary transfer. Unless the context indicates otherwise, "transfer" includes both voluntary and involuntary transfers.

7.2. Nonassignment. Neither party may assign or otherwise transfer or encumber any interest in this agreement.

7.3. Entire Agreement. This instrument constitutes the parties' entire agreement with respect to this transaction, and supersedes any prior oral or written understandings or agreements. The Agreement may be amended only in writing.

7.4. Governing Law. This agreement will be governed by and construed according to the laws of the State of [state].

7.5. Successors. This agreement is binding on and enforceable by and against all of us, our successors, legal representatives, and assigns. No transfer of an interest in the property to any other person or entity may be validly completed unless the transferee agrees in writing to be bound by the terms and conditions of this agreement.

7.6. Enforceability. No part of this agreement will be affected if any other part of it is held invalid or unenforceable.

7.7. Notices. All notices required or permitted to be given under this agreement must be given in writing, and will be deemed given when personally delivered or when received after mailing by registered or certified United States mail, postage prepaid, with return receipt requested. Notice is valid if sent to the following addresses:

Donor, [address]

Tenant1, [address]

Tenant2, [address]

7.8. Specific Performance. We agree that the property is unique and that failure to perform the obligations under this agreement will result in irreparable damage to the other parties and that specific performance of these obligations may be obtained by a suit in equity.

7.9. Waiver. Failure to insist on compliance or enforcement of any provision of this agreement shall not affect its validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this agreement.

7.10. Copies. More than one (1) copy of this agreement may be executed and we agree and acknowledge that each executed copy shall be a duplicate original.

7.11. Number. Whenever the context of this agreement requires, singular number includes the plural and *vice versa*. Agreed to by each of the undersigned on the date first noted above.

AGREED:

[Signatures and notary clauses]

[Schedule omitted from this exemplar]

**FORM 2. Agreement to Prepay Education for Child through Grade Twelve – Based on
PLR 200602002²**

AGREEMENT

This agreement (the “agreement”) is entered into between *Full Name of Donor* (“*Shorthand for Donor*”), of [locality and state], and *Full Name of School* (“*Shorthand for School*”), located at [locality and state], on [date].

RECITALS:

A. *Shorthand for Donor* wishes to pay for the tuition (defined below) for *Full Name of Grandchild*, *his/her* grandchild (“*Shorthand for Grandchild*”), who is currently a full-time student at *Shorthand for School*; and

B. *Shorthand for School* wishes to provide educational services to *Shorthand for Grandchild* for the next school year and all school years thereafter, if *Shorthand for Grandchild* becomes and remains a student in good standing at *Shorthand for School*; and

C. *Shorthand for School* is an educational organization described in Section 170(b)(1)(A)(ii) of the U.S. Internal Revenue Code (the “Code”); and

D. *Shorthand for School* wishes to accept prepayment for those services, in whole or in part;

NOW, THEREFORE, *Shorthand for Donor* and *Shorthand for School* agree as follows:

² **KEY:**

Full Name of Donor	--	Full legal name of the donor
Shorthand for Donor	--	A shorter way to refer to the donor in this instrument, such as “Donor,” “Frank,” or “the Party of the First Part.”
Full Name of School	--	Full legal name of the school to which payments are being made
Shorthand for School	--	A shorter way to refer to the school in this instrument, such as “Woodbury Forest Academy,” “the School,” or “the Party of the Second Party.”
Full Name of Grandchild--		Full legal name of the individual grandchild for whom the donor is prepaying tuition
his/her	--	“his” or “her” referring to the donor
Shorthand for Grandchild--		A shorter way to refer to the grandchild in this instrument, such as “Frank,” “Stinky,” or “the Grandchild.”
him/her	--	“him” or “her” referring to the donor

Section 1. Prepayment

Shorthand for Donor agrees to pay to *Shorthand for School* the sum of [amount], in good personal check, on the date of this contract. This amount represents the projected total annual tuition for *Shorthand for Grandchild* for each grade level through graduation (grade 12), based on the current tuition rates charged by *Shorthand for School*. This prepayment is non-refundable, and once paid becomes the sole property of *Shorthand for School*. If *Shorthand for Grandchild* ceases to be a student at *Shorthand for School*, this prepayment shall be forfeited and shall remain the sole property of *Shorthand for School*.

Section 2. Educational Services

Shorthand for School agrees that it will apply these amounts to pay the tuition for *Shorthand for Grandchild* while *Shorthand for Grandchild* is a student at *Shorthand for School*.

A. Tuition Increases. The parties both acknowledge that tuition may increase in subsequent years and the balance due after the application of the prepayment for that year will be paid by *him/her*, or the parents of *Shorthand for Grandchild*, who will sign the consent and joinder attached hereto.

B. No Additional Rights or Benefits. The prepayment under this agreement does not afford *Shorthand for Grandchild* any additional rights or privileges over any other student attending or applying for attendance at *Shorthand for School*, does not guarantee enrollment, and the *Shorthand for School* expressly reserves all rights under its standards policies and procedures.

C. "Tuition" Defined. "Tuition," for purposes of this agreement, has the same meaning as it has in Section 2503(c) of the Code. It shall not include amounts paid for books, supplies, dormitory fees, board, or other similar expenses which do not constitute direct tuition costs.

Section 3. Overriding Purpose

Shorthand for Donor intends that these gifts qualify as a direct payment of educational expenses, under Section 2503(e) of the Code. All provisions of this agreement shall be construed so as to effect this intent.

Section 4. Miscellaneous

4.1. Nonassignment. Neither party may assign or otherwise transfer or encumber any interest in this agreement.

4.2. Entire Agreement. This instrument constitutes the parties' entire agreement with respect to this transaction, and supersedes any prior oral or written understandings or agreements. The Agreement may be amended only in writing.

4.3. Governing Law. This agreement will be governed by and construed according to the laws of the State of [state].

4.4. Successors. This agreement is binding on and enforceable by and against all of us, our successors, legal representatives, and assigns. No transfer of an interest in the property to any other person or entity may be validly completed unless the transferee agrees in writing to be bound by the terms and conditions of this agreement.

4.5. Enforceability. No part of this agreement will be affected if any other part of it is held invalid or unenforceable.

4.6. Waiver. Failure to insist on compliance or enforcement of any provision of this agreement shall not affect its validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this agreement.

4.7. Copies. More than one (1) copy of this agreement may be executed and we agree and acknowledge that each executed copy shall be a duplicate original.

4.8. Number. Whenever the context of this agreement requires, singular number includes the plural and *vice versa*. Agreed to by each of the undersigned on the date first noted above.

4.9. Construction. No presumption shall apply because of the preparation of the Agreement by counsel for one party.

4.10. Tax-Related Terms. All tax-related terms shall have the same meaning that they have in the Code.

[Signatures and notary clauses]

CONSENT AND JOINDER

Agreed and acknowledged by the following persons who are not themselves parties to the Agreement, but who are the parents of *Full Name of Grandchild*, and who themselves have read the Agreement and who agree that they shall be bound by all of its provisions, including (but not limited to) the provisions requiring them to pay for the education of *Shorthand for Grandchild* in the situations described in the Agreement.

[Signatures and notary clauses]

FORM 3. *Inter Vivos* Intentionally Defective Grantor Trust -- Common Trust for Children and Descendants -- No Annual Exclusion Withdrawal Powers -- Grantor Trust Status Based on Section 674(b) (Power to Alter Beneficial Enjoyment Plus Power to Add Beneficiaries) and Section 677(a) (Powers to Distribute to Grantor's Spouse and to Pay Life Insurance Premiums on Grantor's Life) -- GST Exemption Must Be Allocated to Avoid GST Tax—Grantor Required to Pay Income Taxes — Grantor Trust Power May be Released³

Irrevocable Grantor Trust

On [date], I *Grantor*, of [locality, state] (sometimes referred to in the first person and sometimes as the ?grantor@), and *FirstTrustee*, of [locality, state] (referred to as the ?trustee@), made this trust.

Article 1. My Family

I am married to *Spouse* and I have [number] children, *Children*.

Article 2. Transfers to the Trust

I transfer to the trustee the property listed in the schedule to this trust, and may transfer one or more life insurance policies and additional assets, to be held on the terms and conditions set forth in this instrument. I retain no right or interest in any trust property.

Article 3. Irrevocability

This trust is irrevocable, and I cannot alter, amend, revoke, or terminate the trust in any way.

³

KEY:

Grantor	--	Full name of the grantor
FirstTrustee	--	Full name of the initial trustee
Spouse	--	Full name of the grantor's spouse
Children	--	Full names of grantor's children
husband/wife	--	?husband@ or ?wife,@ as the case may be
SecondTrustee	--	Full name of the alternate trustee
he/she	--	?he@ or ?she,@ referring to the grantor's spouse
FirstProtector	--	Full name of the initial trust protector
SecondProtector	--	Full name of the alternate trust protector

**Article 4. Common Trust for My *Husband/Wife*,
My Children and My Descendants; Right to Add Beneficiaries**

The trustee shall hold the trust assets in trust for the benefit of my *husband/wife,* my children and my more remote descendants, as provided in this article.

A. Before Termination Date. Until the termination date (defined below), the trustee shall distribute as much of the trust's net income and principal to and among my *husband/wife*, my children, and my then-living more remote descendants, in such proportions as the trustee shall deem appropriate for any purpose, annually adding to principal any undistributed income.

1. Unequal Distributions. The trustee may distribute income and principal unequally and may make distributions to some beneficiaries and not to others.

2. Other Resources. The trustee may consider other income and assets readily available to each beneficiary in making distributions.

B. Upon the Termination Date. Upon the termination date, the trustee shall distribute the remaining trust assets in equal shares, with one (1) equal share distributed to each of my then-living children, and one (1) equal share to the then-living descendants of each of my children who is not then-living but who is survived by then-living descendants, subject to the provisions of the article entitled "Contingent Trust for Certain Beneficiaries." The then-living descendants of a deceased child of mine shall take, per stirpes, the share of that their ancestor, such deceased child of mine, would have taken if living.

C. "Termination Date" Defined. The termination date shall be the date twenty-one (21) years after the death of the last to die of me, my *husband/wife*, my children, and those of my more remote descendants alive on the date of the trust.

D. Right to Add Beneficiaries.

1. Additional Beneficiaries. The trust protector (defined below) may add to the class of beneficiaries described in paragraph A, paragraph B, or both, of this article, any charitable organization the contributions to which are deductible under Sections 170(c), 642(c), and 2522(a) of the Internal Revenue Code of 1986, as amended (the "Code").

a. Before the Termination Date. Any beneficiary added under paragraph A of this article shall be eligible to receive distributions of the trust's net income and principal in the discretion of the trustee, in the same manner as is any child or more remote descendant of mine.

b. Upon the Termination Date. The trust protector shall designate how any beneficiary added under paragraph B of this article, shall share in the trust distributions upon the termination date. The trust protector may designate that such additional beneficiary or beneficiaries shall receive all or any portion of the trust distributions upon the termination date.

2. How Exercised. The trust protector shall add to the class of beneficiaries by a dated writing delivered to the trustee, stating the date on which it is to be effective and, if the trustee so states, the term for which it is to be effective. The trustee shall retain the original or a copy of this instrument with the records of the trust.

3. Rescission. The trust protector may rescind any prior addition of a beneficiary made pursuant to this paragraph D of this article, by a dated writing delivered to the trustee, stating the date on which this rescission is to be effective and, if the trustee so states, the term for which it is to be effective. The trustee shall retain the original or a copy of this instrument with the records of the trust.

Article 5. Contingent Trust for Certain Beneficiaries

The trustee shall retain as a separate trust as described in this article, any principal or income that would otherwise be distributed to a beneficiary (other than a child of mine), before that beneficiary has reached the age of thirty-five (35) years.

A. Until the Vesting Date. Until the vesting date (defined below), the trustee may distribute to or for the benefit of the beneficiary as much of the net income and principal as the trustee may consider appropriate for the beneficiary's health, education, support, or maintenance, annually adding to principal any undistributed income.

B. Upon the Vesting Date. Upon the vesting date, the trustee shall distribute the remaining assets to the beneficiary if the beneficiary is then living and otherwise to the beneficiary's estate to be distributed as part of that estate.

C. "Vesting Date" Defined. The "vesting date" is the earlier of (1) the date on which the beneficiary dies and (2) the date on which the beneficiary reaches the age of thirty-five (35) years.

Article 6. The Trustees

A. Initial Trustee. *FirstTrustee* is the initial trustee of this trust.

B. Successor Trustees. *SecondTrustee*, of [*locality, state*], shall be the successor trustee, to serve if *FirstTrustee* is unable or unwilling to serve or to continue serving.

C. Nonadverse Trustee. There shall, during my lifetime, always be at least one (1) nonadverse trustee (defined below.)

1. "Nonadverse Trustee" Defined. A "nonadverse trustee" is a trustee who is not an "adverse party," as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under the articles entitled "Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries" and "Contingent Trust for Certain Beneficiaries," and the exercise or nonexercise of any other powers

granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal.

2. Certain Powers Exercisable Only by a Nonadverse Trustee. Only a nonadverse trustee may exercise the powers granted the trustee under the articles entitled “Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries” and “Contingent Trust for Certain Beneficiaries,” and any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal.

3. No Consent Required. The consent of any adverse party, as defined in Code Section 672(a), shall not be required by a nonadverse trustee to exercise the powers granted the trustee under the articles entitled “Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries” and “Contingent Trust for Certain Beneficiaries,” and any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal.

4. Overriding Rule. This paragraph C shall apply notwithstanding any contrary provisions in this instrument.

D. Bond. No trustee named by me or by another trustee shall be required to provide surety or other security on a bond.

E. Additional Trustee. The trustee may appoint any person as an additional trustee, to serve at the pleasure of the appointing trustee.

F. Delegation. The trustee may delegate to another trustee any power or authority granted by this instrument or applicable state law to the trustee, to continue at the pleasure of the delegating trustee and only for so long as the delegating trustee continues to serve, unless otherwise agreed. Any person dealing in good faith with a trustee may rely on that trustee's representation that a delegation has been made and remains in effect under this paragraph. A trustee may not delegate to an adverse party any powers which may be exercised only by a nonadverse trustee, under the paragraph of this article entitled “Nonadverse Trustee.”

G. Resignation. A trustee may resign by giving written notice specifying the effective date of the resignation to the designated successor.

1. No Designated Successor. If no successor is designated, the resigning trustee shall give notice to the then-serving trust protector.

2. No Then-Serving Trust Protector. If no successor is designated and no trust protector is then-serving, the resigning trustee shall give notice to the then-living adult beneficiaries to whom income may then be distributed.

H. Vacancies. A corporation no substantial portion of the stock of which is owned by me or by the beneficiaries of this trust, and that is not related or subordinate to me, as defined in Code Section 672(e), shall be named as successor trustee to fill any vacancy.

1. Trust Protector Fills Vacancy. Such corporate trustee shall be named by the then-serving trust protector.

2. Beneficiaries Fill Vacancy. Such corporate trustee shall, if there is no then-serving trust protector, be named by majority vote of the adult beneficiaries to whom trust income may then be distributed.

I. Responsibility of Successors. No trustee shall be responsible for or need inquire into any acts or omissions of a prior trustee.

J. Compensation. In addition to reimbursement for expenses, each individual trustee is entitled to reasonable compensation for services. Each corporate trustee is entitled to compensation based on its written fee schedule in effect at the time its services are rendered or as otherwise agreed, and its compensation may vary from time to time based on that schedule.

K. Management Powers. The trustee may exercise the powers described below, in a fiduciary capacity.

1. Investments. The trustee may invest and reinvest the trust (or leave it temporarily uninvested) in any type of property and every kind of investment, in the same manner as a prudent investor would invest his or her own assets. The trustee may apply trust income and principal to pay premiums on policies of insurance on my life, on the life of my *husband/wife*, or on both of our lives.

2. Sales and Exchanges. The trustee may sell or exchange any real or personal property contained in the trust, for cash or credit, at public or private sale, and with such warranties or indemnifications as the trustee may deem advisable.

3. Borrowing. The trustee may borrow money (even from a trustee or from any beneficiary of the trust), for the benefit of the trust and secure these debts with assets of the trust.

4. Security Interests. The trustee may grant security interests and execute all instruments creating such interests upon such terms as the trustee may deem appropriate.

5. Compromises. The trustee may compromise and adjust claims against or on behalf of the trust on such terms as the trustee may deem appropriate.

6. Custodian for Securities. The trustee may take title to any securities in the name of any custodian or nominee, without disclosing this relationship.

7. Receipts and Disbursements. The trustee may determine whether receipts are income or principal and whether disbursements are to be charged against income or principal, to

the extent not established clearly by state law. Determinations made by the trustee in good faith shall not require equitable adjustments.

8. Tax Elections. The trustee may make all tax elections and allocations the trustee may consider appropriate; however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. No tax elections or allocations made by the trustee in good faith shall require equitable adjustments.

9. Lawyers, Accountants, Etc. The trustee may employ such lawyers, accountants, and other advisers as the trustee may deem useful and appropriate for the administration of the trust. The trustee may employ a professional investment adviser in managing the investments of the trust (including any investment in mutual funds, investment trusts or managed accounts), delegate to this adviser any discretionary investment authorities and rely on the adviser's investment recommendations without liability to any beneficiary.

10. Distributions in Kind. The trustee may divide and distribute the trust in kind, in money, or partly in each, without regard to the income tax basis of any asset and without the consent of any beneficiary. The decision of the trustee in dividing any portion of the trust between or among two (2) or more beneficiaries shall be binding on all persons.

11. Minor Distributees. The trustee shall distribute any of the trust to a minor by distributing it to any appropriate person (who may be a trustee) chosen by the trustee, as custodian under any appropriate Uniform Transfers to Minors Act, to be held for the maximum period of time allowed by law. The trustee may also sell any asset that cannot legally be held under this custodianship and invest the sales proceeds in assets that can be held under this custodianship.

L. Special Limits on Powers of Interested Trustee. The following limitations shall apply, notwithstanding other provisions of this instrument.

1. Limiting Actions by Interested Trustees. No interested trustee (defined below) may participate in the exercise of any discretion to distribute principal to himself or herself, except as is appropriate for his or her health, education, support, and maintenance, or any of them. No interested trustee may participate in the exercise of any discretion to distribute or expend principal or income in a manner that would discharge that trustee's personal obligation to support the beneficiary.

2. Disinterested Trustees Exercising Certain Powers. A disinterested trustee (defined below) who is serving as a co-trustee with an interested trustee, may exercise those discretions granted under this instrument the exercise of which by an interested trustee are precluded.

3. If Multiple Trustees Include an Interested Trustee Who Cannot Act. The number of trustees who must consent to the exercise of a power granted under this instrument, as determined under the article entitled "The Trustees" shall be determined by treating the inter-

ested trustees who are not entitled, under this article, to participate in the exercise of the power or discretion, as if they were not then serving.

4. If All Trustees Are Precluded From Acting. If this article precludes every then-serving trustee from exercising a power otherwise granted to the trustee under this instrument, the then-serving trustee shall appoint a disinterested trustee who may exercise such power (or decline to exercise it) as if that disinterested trustee were the sole then-serving trustee.

Article 7. Trust Protector

A. Initial Trust Protector. *FirstProtector*, of [*locality, state*] is the initial trust protector of this trust.

B. Successor Trust Protector. *SecondProtector*, of [*locality, state*], shall be the successor trust protector, to serve if *FirstProtector* is ever unable or unwilling to serve or to continue serving.

C. Trust Protector Must Be a Nonadverse Party. Every trust protector must be a “nonadverse party,” as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under the article entitled “Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries” and the exercise or nonexercise of any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal.

1. No Consent Required. The consent of any adverse party, as defined in Code Section 672(a), shall not be required by a trust protector to exercise the powers granted the trust protector under paragraph D of the article entitled “Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries.”

2. Overriding Rule. This paragraph C shall apply notwithstanding any contrary provisions in this instrument.

D. Bond. No trust protector named by me or otherwise shall be required to provide surety or other security on a bond.

E. Additional Trust Protector. The trust protector may not appoint additional trust protectors to serve at the same time as the appointing trust protector, nor may the trust protector delegate to another person any power or authority granted by me to the trust protector.

F. Resignation. A trust protector may resign by giving written notice specifying the effective date of the resignation to the designated successor.

1. No Designated Successor. If no successor is designated, the resigning trust protector shall give notice to the then-serving trustee.

2. No Then-Serving Trustee. If no successor is designated and no trustee is then-serving, the resigning trust protector shall give notice to the then-living adult beneficiaries to whom income may then be distributed.

G. Vacancies. An individual who is a “nonadverse party,” as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under the article entitled “Common Trust for My *Husband/Wife*, My Children and My Descendants; Right to Add Beneficiaries” and the exercise or nonexercise of any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal, shall be named to fill any vacancy in the post of trust protector.

1. Trust Protector Fills Vacancy. Such successor trust protector shall be named by the then-serving trust protector, as a condition of any resignation.

2. Beneficiaries Fill Vacancy. Such successor trust protector shall, if none is named by a then-serving trust protector, be named by majority vote of the adult beneficiaries to whom trust income may then be distributed.

H. Responsibility of Successors. No trust protector shall be responsible for or need inquire into any acts or omissions of a prior trust protector.

I. Compensation. In addition to reimbursement for expenses, each trust protector is entitled to reasonable compensation for services.

J. Lawyers, Accountants, Etc. The trust protector may employ such lawyers, accountants, and other advisers as the trust protector may deem useful and appropriate for the exercises of the powers granted the trust protector under this instrument.

Article 8. Overriding Purposes

This article states some of my purposes in creating the trust, and all provisions of the trust shall be construed so as best to effect these purposes. No trustee shall exercise any discretion in a manner that could reasonably be expected to frustrate the effectuation of these purposes.

A. Income Tax. The trust shall be a grantor trust deemed owned by me for federal income tax purposes.

B. Gift Tax. All transfers to the trust shall be completed gifts for federal gift tax purposes.

C. Estate Tax. The assets of the trust shall be excluded from my gross estate for federal estate tax purposes.

D. Limited Power to Amend. The trust protector may, by an instrument in writing delivered to the trustee, amend this agreement in any manner required to meet the tax objectives set forth in this article.

Article 9. Trust Administration

A. Spendthrift Limits. No interest in the trust shall be subject to the beneficiary's liabilities or creditor claims, assignment or anticipation.

B. Protection from Creditors. If the trustee shall determine that a beneficiary would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to his or her creditors, the trustee shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the trustee to give each beneficiary the fullest possible benefit and enjoyment of all of the trust income and principal to which he or she is entitled.

C. Merger and Consolidation. The trustee may merge or consolidate any trust into any other trust that has the same trustee and substantially the same dispositive provisions.

D. Division of Trusts. The trustee may divide any trust into multiple separate trusts.

E. Accountings. The trustee shall not be required to file annual accounts with any court or court official in any jurisdiction.

F. Change of Situs. The trustee may change the situs of the trust, and to the extent necessary or appropriate, move the trust assets to a state or country other than the one in which the trust is then administered if the trustee shall determine it to be in the best interests of the trust or the beneficiaries. The trustee may elect that the law of such other jurisdiction shall govern the trust to the extent necessary or appropriate under the circumstances.

G. Disabled Beneficiary. The trustee may distribute income, principal or both for a disabled beneficiary to his or her guardian or other legal personal representative, to his or her parent, guardian, personal representative or the person with whom the beneficiary resides, without looking to the proper application of those payments.

H. Additional Transfers. Any person may transfer property to the trustee at any time. The trustee may refuse to accept a transfer if the trustee deems that acceptance is not in the trust's best interests. The trustee may accept a gift subject to one or more conditions imposed by the donor or the trustee if it is in the best interests of the trust and the beneficiaries and if the condition does not change the rights of a beneficiary with respect to any prior gift.

I. Income Taxes. I shall be required to pay all income taxes imposed upon me with respect to income or gains of the trust, even though such income and gains are not distributed to me. This rule shall apply notwithstanding any contrary rule of state law.

Article 10. Definitions and Miscellaneous

A. “Children” and “Descendants” Defined. “Children” and “descendants” include those now or hereafter born, and in addition to natural born, any child or descendant now or hereafter legally adopted.

B. “Disabled” Defined. An individual is “disabled” or “under a disability” if the trustee (or, if the person whose disability is in question is a trustee, the next successor trustee) receives written certification from two physicians, both of whom have personally examined the individual, and at least one of whom is board certified in the specialty most closely associated with the alleged disability.

1. Statement in Certification. The certification must state that the individual is physically or mentally incapable of managing his or her own finances, regardless of cause and regardless of whether there is an adjudication of incompetence, mental illness, or need for a committee, conservator, guardian or other personal representative.

2. Rescission. A certification of disability shall be rescinded when the then-serving trustee shall receive a new certification from two physicians, both of whom have personally examined the individual and at least one of whom is board certified in the specialty most closely associated with the alleged disability. This new certification must state that the individual is capable of managing his or her own finances.

3. Liability. No person is liable to anyone for actions taken in reliance on these certifications or for dealing with a trustee other than the one removed for disability based on these certifications.

C. “My *Husband/Wife*” Defined. I am married to “Spouse” on the date of this instrument, but any reference to my “*husband/wife*”, whether or not it includes a reference to “Spouse” individually, shall refer to the person to whom I am married at the time of any distribution or event for which the identity of my “*husband/wife*” is relevant. If such reference relates to an event that would occur after the date of my death, it shall refer to the person to whom I am married on the date of my death, whether or not that person later remarries.

D. Survivorship. No person shall be deemed to have survived me for purposes of this trust unless he or she is living on the date ninety (90) days after the date of my death.

E. Tax-Related Terms. All tax-related terms shall have the same meaning in the will that they have in the Code.

F. “Trust” Defined. “Trust,” without further qualification or specification, shall refer to all trusts under this instrument.

G. “Trustee” or “Trust Protector” Defined. “Trustee” shall include each trustee individually, multiple trustees, and any successor, and “trust protector” shall include each trust protector and any successor.

H. Absence of Beneficiaries. If all of the beneficiaries of this trust should die before the trust assets have vested, and if there are no charitable beneficiaries of this trust then existing, the trustee shall distribute all of the remaining assets of that to the persons who would have been the heirs and distributees of my personal estate, and in such shares as they would have inherited it, had I died unmarried and without a valid will, determined on the later of the date of my death or the date of the death of the last of the beneficiaries to die.

I. Copies. There is only one signed original of this trust. Anyone may rely on a copy of this trust certified by a notary public or similar official to be a true copy of the signed original (and of any amendments) as if that copy were the signed original. Anyone may rely upon any statement of fact certified by the person who appears from the original document or a certified copy to be a trustee.

J. Number. Whenever the context of the will requires, the singular number includes the plural and the plural the singular.

K. Applicable Law. This trust shall be governed by and construed according to the laws of the state of [state].

DECLARED AND AGREED on the date indicated above.

Dated:, 20.....

[Signatures, notary clauses and schedule]

WAIVER OF CERTAIN RIGHTS

I, the undersigned *husband/wife* of *Grantor*, waive all of my rights, title, and interest in any property transferred to the attached trust, dated [date] (the ?trust@), by *Grantor.* This waiver shall apply both to current and inchoate interests that I may have, including, but not limited to, rights to an intestate share, statutory share, omitted spouse's share, or share in the nature of dower or curtesy, in the estate of *Grantor*. This waiver shall constitute a third-party beneficiary contract for the benefit of all the beneficiaries of the trust, and these beneficiaries or the trustee of the trust may enforce this waiver by appropriate legal action.

Dated:, 20.....

[Signatures and notary clauses]

FORM 4. *Inter Vivos* QTIP Marital Trust Creating Grantor Nonmarital Trust—Creates Estate Tax Exemption Equivalent Nonmarital Trust at Donee Spouse’s Death For Benefit of Grantor’s Children and Descendants – Grantor Trust Under Section 674(b) – Trust Protector Can Add Charitable Beneficiaries -- Grantor Required to Pay All Income Taxes After Donee Spouse’s Death⁴

Qualified Terminable Interest Property Marital Trust

On [date], I, *Grantor*, of [locality, state] (sometimes referred to in the first person and sometimes as the “grantor”), and *FirstTrustee*, of [locality, state] (referred to as the “trustee”), make this trust.

Article 1. My Family

I am married to *Spouse*, and any references to my *husband/wife* shall be to *him/her*. I have [number] children, *Children*.

Article 2. Transfers to the Trust

I transfer to the trustee the property listed in the schedule to this trust, and may transfer additional assets to be held on the terms and conditions set forth in this instrument. I retain no right or interest in any trust property, except as may be expressly provided elsewhere in this instrument.

Article 3. Irrevocability

This trust is irrevocable, and I cannot alter, amend, revoke or terminate the trust in any way.

⁴ **KEY:**

Grantor	--	Full name of the grantor
FirstTrustee	--	Full name of the initial trustee
Spouse	--	Full name of the grantor's spouse
Children	--	Full names of grantor's children
husband/wife	--	?husband@ or ?wife,@ as the case may be
SecondTrustee	--	Full name of the alternate trustee
he/she	--	?he@ or ?she,@ referring to the grantor's spouse
his/her	--	“his” or “her,” referring to the grantor’s spouse
FirstProtector	--	Full name of the initial trust protector
SecondProtector	--	Full name of the alternate trust protector

Article 4. Trust during Lifetime of My *Husband/Wife*

The trustee shall distribute all of the trust's net income annually or more frequently to my *husband/wife*, *Spouse*, during *his/her* life. The trustee shall also distribute to my *husband/wife* as much of the principal as is appropriate for any purpose.

Article 5. Trust At My *Husband/Wife*'s Death

A. Accrued and Undistributed Income. At my *husband/wife*'s death, the trustee shall distribute to her estate any accrued or undistributed income of the trust.

B. Division If I Survive. If I survive my *husband/wife*, the trustee shall divide the trust principal, to the extent it is not used to pay transfer taxes (defined below), into two shares, one share of which shall be known as the "family trust share" and the other share of which shall be known as the "revocable trust share."

1. Formula. The formula by which these shares are determined is set forth later in this instrument.

2. Family Trust Share. The family trust share shall be held under the article entitled "The Family Trust."

3. Revocable Trust Share. The revocable trust share shall be distributed to the trustee of the *Spouse* Revocable Trust, dated [date], as then most recently amended or restated, to be held and administered as part of that trust fund.

C. Disposition if I Do Not Survive. If I do not survive my *husband/wife*, the trustee shall distribute the entire trust principal to the trustee of the *Spouse* Revocable Trust, dated [date], as then most recently amended or restated (the "*Spouse* Revocable Trust"), to be held and administered as part of that trust fund.

D. Alternate Disposition. Any dispositions under this instrument to the trustee of the *Spouse* Revocable Trust shall, if the *Spouse* Revocable Trust does not then exist, be distributed instead to the personal representative of the estate of my *husband/wife*, to be held and administered as part of that estate.

Article 6. The Family Trust

The trustee shall hold the family share as the Family Trust, under this article.

A. Before Termination Date. Until the termination date (defined below), the trustee shall distribute as much of the family trust's net income and principal to and among my then-living children and my then-living more remote descendants, in such proportions as the trustee shall deem appropriate for any purpose, annually adding to principal any undistributed income.

1. Unequal Distributions. The trustee may distribute income and principal unequally and may make distributions to some beneficiaries and not to others.

2. Other Resources. The trustee may consider other income and assets readily available to each beneficiary in making distributions.

B. Upon the Termination Date. Upon the termination date, the trustee shall distribute the remaining trust assets in equal shares, with one (1) equal share distributed to each of my then-living children, and one (1) equal share to the then-living descendants of each of my children who is not then-living but who is survived by then-living descendants, subject to the provisions of the article entitled "Contingent Trust for Certain Beneficiaries." The then-living descendants of a deceased child of mine shall take, *per stirpes*, the share of that their ancestor, such deceased child of mine, would have taken if living.

C. "Termination Date" Defined. The termination date shall be the date twenty-one (21) years after the death of the last to die of me, my *husband/wife*, my children, and those of my more-remote descendants alive on the date of this instrument.

E. Right to Add Beneficiaries.

1. Additional Beneficiaries. The trust protector (defined below) may add to the class of beneficiaries described in paragraph A, paragraph B, or both, of this article, any charitable organization the contributions to which are deductible under Sections 170(c), 642(c), and 2522(a) of the Internal Revenue Code of 1986, as amended (the "Code").

a. Before the Termination Date. Any beneficiary added under paragraph A of this article shall be eligible to receive distributions of the trust's net income and principal in the discretion of the trustee, in the same manner as is any child or more remote descendant of mine.

b. Upon the Termination Date. The trust protector shall designate how any beneficiary added under paragraph B of this article, shall share in the trust distributions upon the termination date. The trust protector may designate that such additional beneficiary or beneficiaries shall receive all or any portion of the trust distributions upon the termination date.

2. How Exercised. The trust protector shall add to the class of beneficiaries by a dated writing delivered to the trustee, stating the date on which it is to be effective and, if the trustee so states, the term for which it is to be effective. The trustee shall retain the original or a copy of this instrument with the records of the trust.

3. Rescission. The trust protector may rescind any prior addition of a beneficiary made pursuant to this paragraph D of this article, by a dated writing delivered to the trustee, stating the date on which this rescission is to be effective and, if the trustee so states, the term for which it is to be effective. The trustee shall retain the original or a copy of this instrument with the records of the trust.

Article 7. Contingent Trust for Certain Beneficiaries

If a beneficiary is entitled to receive any portion of any trust fund held under this instrument while the beneficiary is under the age of thirty-five (35) years, the trustee may retain such assets in a separate trust for that beneficiary.

A. Before the Vesting Date. Until the vesting date (defined below), the trustee shall distribute to or for the benefit of the beneficiary as much of the net income and principal as the trustee may consider appropriate for the beneficiary=s health, education, support, or maintenance, annually adding to principal any undistributed income.

B. At the Vesting Date. Upon the vesting date, the trustee shall distribute the remaining assets to the beneficiary if the beneficiary is then living or otherwise to the beneficiary=s estate to be distributed as part of that estate.

C. Vesting Date Defined. The Vesting date shall be the earlier of (1) the date on which the beneficiary dies or (2) the date on which the beneficiary reaches the age of thirty-five (35) years.

Article 8. Transfer Taxes

The trustee shall pay from the trust fund all transfer taxes (defined below), other than generation-skipping transfer taxes, payable by reason of the death of my *husband/wife* on assets passing under this trust.

A. Apportioning Transfer Taxes. The trustee shall pay transfer taxes imposed on any trust assets includible in my *husband/wife*'s gross estate for Federal estate tax purposes, from those assets, as provided by the laws of the state in which *he/she* resides at *his/her* death, except as expressly provided elsewhere in this instrument.

B. Apportioning Generation-Skipping Transfer Taxes. The trustee shall pay all generation-skipping transfer taxes imposed on transfers under this trust from those transfers.

C. Apportioning Transfer Taxes Away From Deductible Assets. Assets of the trust that pass in a manner that qualifies for the marital or charitable deduction for Federal or state estate or inheritance tax purposes, shall have the maximum benefit of the marital or charitable deduction allowed with respect to any transfer taxes, and shall not bear such transfer taxes.

Article 9. The Trustees

A. Initial Trustee. *FirstTrustee* is the initial trustee of this trust.

B. Successor Trustees. *SecondTrustee*, of [*locality, state*], shall be the successor trustee, to serve if *FirstTrustee* is unable or unwilling to serve or to continue serving.

C. Nonadverse Trustee. There shall, during my lifetime, always be at least one (1) nonadverse trustee (defined below.)

1. “Nonadverse Trustee” Defined. A “nonadverse trustee” is a trustee who is not an “adverse party,” as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under this instrument at the time that the trust is then serving.

2. Certain Powers Exercisable Only by a Nonadverse Trustee. Only a nonadverse trustee may exercise the powers granted the trustee during my lifetime under the articles entitled “Trust During Lifetime of My *Husband/Wife*” and “The Family Trust.”

3. No Consent Required. The consent of any adverse party, as defined in Code Section 672(a), shall not be required by a nonadverse trustee to exercise the powers granted the trustee during my lifetime under the articles entitled “Trust During Lifetime of My *Husband/Wife*” and “The Family Trust.”

4. Overriding Rule. This paragraph C shall apply notwithstanding any contrary provisions in this instrument.

D. Bond. No trustee named by me or by another trustee shall be required to provide surety or other security on a bond.

E. Additional Trustee. The trustee may appoint any person as an additional trustee, to serve at the pleasure of the appointing trustee.

F. Delegation. The trustee may delegate to another trustee any power or authority granted by this instrument or applicable state law to the trustee, to continue at the pleasure of the delegating trustee and only for so long as the delegating trustee continues to serve, unless otherwise agreed. Any person dealing in good faith with a trustee may rely on that trustee's representation that a delegation has been made and remains in effect under this paragraph. A trustee may not delegate to an adverse party any powers which may be exercised only by a nonadverse trustee, under the paragraph of this article entitled “Nonadverse Trustee.”

G. Resignation. A trustee may resign by giving written notice specifying the effective date of the resignation to the designated successor.

1. No Designated Successor. If no successor is designated, the resigning trustee shall give notice to the then-serving trust protector.

2. No Then-Serving Trust Protector. If no successor is designated and no trust protector is then-serving, the resigning trustee shall give notice to the then-living adult beneficiaries to whom income may then be distributed.

H. Vacancies. A corporation no substantial portion of the stock of which is owned by me or by the beneficiaries of this trust, and that is not related or subordinate to me, as defined in Code Section 672(e), shall be named as successor trustee to fill any vacancy.

1. Trust Protector Fills Vacancy. Such corporate trustee shall be named by the then-serving trust protector.

2. Beneficiaries Fill Vacancy. Such corporate trustee shall, if there is no then-serving trust protector, be named by majority vote of the adult beneficiaries to whom trust income may then be distributed.

I. Responsibility of Successors. No trustee shall be responsible for or need inquire into any acts or omissions of a prior trustee.

J. Compensation. In addition to reimbursement for expenses, each individual trustee is entitled to reasonable compensation for services. Each corporate trustee is entitled to compensation based on its written fee schedule in effect at the time its services are rendered or as otherwise agreed, and its compensation may vary from time to time based on that schedule.

K. Management Powers. The trustee may exercise the powers described below, in a fiduciary capacity.

1. Investments. The trustee may invest and reinvest the trust (or leave it temporarily uninvested) in any type of property and every kind of investment, in the same manner as a prudent investor would invest his or her own assets. The trustee may apply trust income and principal to pay premiums on policies of insurance on my life, on the life of my *husband/wife*, or on both of our lives.

2. Sales and Exchanges. The trustee may sell or exchange any real or personal property contained in the trust, for cash or credit, at public or private sale, and with such warranties or indemnifications as the trustee may deem advisable.

3. Borrowing. The trustee may borrow money (even from a trustee or from any beneficiary of the trust), for the benefit of the trust and secure these debts with assets of the trust.

4. Security Interests. The trustee may grant security interests and execute all instruments creating such interests upon such terms as the trustee may deem appropriate.

5. Compromises. The trustee may compromise and adjust claims against or on behalf of the trust on such terms as the trustee may deem appropriate.

6. Custodian for Securities. The trustee may take title to any securities in the name of any custodian or nominee, without disclosing this relationship.

7. Receipts and Disbursements. The trustee may determine whether receipts are income or principal and whether disbursements are to be charged against income or principal, to

the extent not established clearly by state law. Determinations made by the trustee in good faith shall not require equitable adjustments.

8. Tax Elections. The trustee may make all tax elections and allocations the trustee may consider appropriate; however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. No tax elections or allocations made by the trustee in good faith shall require equitable adjustments.

9. Lawyers, Accountants, Etc. The trustee may employ such lawyers, accountants, and other advisers as the trustee may deem useful and appropriate for the administration of the trust. The trustee may employ a professional investment adviser in managing the investments of the trust (including any investment in mutual funds, investment trusts or managed accounts), delegate to this adviser any discretionary investment authorities, and rely on the adviser's investment recommendations without liability to any beneficiary.

10. Distributions in Kind. The trustee may divide and distribute the trust in kind, in money, or partly in each, without regard to the income tax basis of any asset and without the consent of any beneficiary. The decision of the trustee in dividing any portion of the trust between or among two (2) or more beneficiaries shall be binding on all persons.

11. Minor Distributees. The trustee shall distribute any of the trust to a minor by distributing it to any appropriate person (who may be a trustee) chosen by the trustee, as custodian under any appropriate Uniform Transfers to Minors Act, to be held for the maximum period of time allowed by law. The trustee may also sell any asset that cannot legally be held under this custodianship and invest the sales proceeds in assets that can be held under this custodianship.

L. Special Limits on Powers of Interested Trustee. The following limitations shall apply, notwithstanding other provisions of this instrument.

1. Limiting Actions by Interested Trustees. No interested trustee (defined below) may participate in the exercise of any discretion to distribute principal to himself or herself, except as is appropriate for his or her health, education, support, and maintenance, or any of them. No interested trustee may participate in the exercise of any discretion to distribute or expend principal or income in a manner that would discharge that trustee's personal obligation to support the beneficiary.

2. Disinterested Trustees Exercising Certain Powers. A disinterested trustee (defined below) who is serving as a co-trustee with an interested trustee, may exercise those discretions granted under this instrument the exercise of which by an interested trustee are precluded.

3. If Multiple Trustees Include an Interested Trustee Who Cannot Act. The number of trustees who must consent to the exercise of a power granted under this instrument, as determined under the article entitled "The Trustees" shall be determined by treating the inter-

ested trustees who are not entitled, under this article, to participate in the exercise of the power or discretion, as if they were not then serving.

4. If All Trustees Are Precluded From Acting. If this article precludes every then-serving trustee from exercising a power otherwise granted to the trustee under this instrument, the then-serving trustee shall appoint a disinterested trustee who may exercise such power (or decline to exercise it) as if that disinterested trustee were the sole then-serving trustee.

Article 10. Trust Protector

A. Initial Trust Protector. *FirstProtector*, of [locality, state] is the initial trust protector of this trust.

B. Successor Trust Protector. *SecondProtector*, of [locality, state], shall be the successor trust protector, to serve if *FirstProtector* is ever unable or unwilling to serve or to continue serving.

C. Nonadverse Trust Protector. Every trust protector must be a “nonadverse party,” as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under the article entitled “The Family Trust” and the exercise or nonexercise of any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal.

1. No Consent Required. The consent of any adverse party, as defined in Code Section 672(a), shall not be required by a trust protector to exercise the powers granted the trust protector under paragraph D of the article entitled “The Family Trust.”

2. Overriding Rule. This paragraph C shall apply notwithstanding any contrary provisions in this instrument.

D. Bond. No trust protector named by me or otherwise shall be required to provide surety or other security on a bond.

E. Additional Trust Protector. The trust protector may not appoint additional trust protectors to serve at the same time as the appointing trust protector, nor may the trust protector delegate to another person any power or authority granted by me to the trust protector.

F. Resignation. A trust protector may resign by giving written notice specifying the effective date of the resignation to the designated successor.

1. No Designated Successor. If no successor is designated, the resigning trust protector shall give notice to the then-serving trustee.

2. No Then-Serving Trustee. If no successor is designated and no trustee is then-serving, the resigning trust protector shall give notice to the then-living adult beneficiaries to whom income may then be distributed.

G. Vacancies. An individual who is a “nonadverse party,” as defined in Code Section 672(a), with respect to the exercise or nonexercise of the powers granted the trustee under the article entitled “The Family Trust,” and the exercise or nonexercise of any other powers granted to the trustee under this instrument, which would enable the trustee to alter or control the beneficial enjoyment of all or any portion of the trust income or principal, shall be named to fill any vacancy in the post of trust protector.

1. Trust Protector Fills Vacancy. Such successor trust protector shall be named by the then-serving trust protector, as a condition of any resignation.

2. Beneficiaries Fill Vacancy. Such successor trust protector shall, if none is named by a then-serving trust protector, be named by majority vote of the adult beneficiaries to whom trust income may then be distributed.

H. Responsibility of Successors. No trust protector shall be responsible for or need inquire into any acts or omissions of a prior trust protector.

I. Compensation. In addition to reimbursement for expenses, each trust protector is entitled to reasonable compensation for services.

J. Lawyers, Accountants, Etc. The trust protector may employ such lawyers, accountants, and other advisers as the trust protector may deem useful and appropriate for the exercises of the powers granted the trust protector under this instrument.

Article 11. Overriding Purposes

This article states some of my purposes in creating the trust, and all provisions of the trust shall be construed so as best to effect these purposes. No trustee shall exercise any discretion in a manner that could reasonably be expected to frustrate the effectuation of these purposes.

A. Income Tax. The trust and the family trust created under it shall be grantor trusts deemed owned by me for federal income tax purposes.

B. Gift Tax. All transfers to the trust shall be completed gifts that qualify for the Federal gift tax marital deduction for Federal gift tax purposes.

C. Estate Tax. The assets of the trust shall be included in the gross estate of my *husband/wife* for Federal estate tax purposes. The assets of the family trust shall not be included in my gross estate for Federal estate tax purposes.

D. Limited Power to Amend. The trust protector may, by an instrument in writing, amend this agreement in any manner required to meet the tax objectives set forth in this article.

Article 12. Trust Administration

A. Spendthrift Limits. No interest in the trust shall be subject to the beneficiary's liabilities or creditor claims, assignment or anticipation.

B. Protection from Creditors. If the trustee shall determine that a beneficiary would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to his or her creditors, the trustee shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the trustee to give each beneficiary the fullest possible benefit and enjoyment of all of the trust income and principal to which he or she is entitled.

C. Merger and Consolidation. The trustee may merge or consolidate any trust into any other trust that has the same trustee and substantially the same dispositive provisions.

D. Division of Trusts. The trustee may divide any trust into multiple separate trusts.

E. Accountings. The trustee shall not be required to file annual accounts with any court or court official in any jurisdiction.

F. Change of Situs. The trustee may change the situs of the trust, and to the extent necessary or appropriate, move the trust assets to a state or country other than the one in which the trust is then administered if the trustee shall determine it to be in the best interests of the trust or the beneficiaries. The trustee may elect that the law of such other jurisdiction shall govern the trust to the extent necessary or appropriate under the circumstances.

G. Disabled Beneficiary. The trustee may distribute income, principal or both for a disabled beneficiary to his or her guardian or other legal personal representative, to his or her parent, guardian, personal representative or the person with whom the beneficiary resides, without looking to the proper application of those payments.

H. Additional Transfers. Any person may transfer property to the trustee at any time. The trustee may refuse to accept a transfer if the trustee deems that acceptance is not in the trust's best interests. The trustee may accept a gift subject to one or more conditions imposed by the donor or the trustee if it is in the best interests of the trust and the beneficiaries and if the condition does not change the rights of a beneficiary with respect to any prior gift.

I. Income Taxes. I shall be required to pay all income taxes imposed upon me with respect to income or gains of the trust, even though such income and gains are not distributed to me. This rule shall apply notwithstanding any contrary rule of state law.

Article 13. The Family Trust Share

A. Purposes. The division of the trust fund into a family trust share and a revocable trust share shall minimize the Federal estate taxes at my death, to the extent that it can be done while deferring all Federal estate taxes until both my *husband/wife* and I have died.

B. AFamily Trust Share” Defined. If I survive my *husband/wife*, the Afamily trust share” shall be a fractional share of the trust fund then available for division between the family trust share and the revocable trust share (the “residuary trust fund.”)

1. The Numerator. The numerator of the fraction shall be equal to the largest value of the residuary trust fund that can pass free of Federal estate tax by reason of the unified credit allowable with respect to my *husband/wife*’s estate. This value shall be determined after being reduced by reason of my adjusted taxable gifts, all other dispositions of property included in my *husband/wife*’s gross estate for which no deduction is allowed in computing my Federal estate tax, and administration expenses and other charges to principal that are not claimed and allowed as Federal estate tax deductions.

2. The Denominator. The denominator of the fraction shall equal the value of the residuary trust fund.

C. ARevocable Trust Share@ Defined. If I survive my *husband/wife*, the Arevocable trust share@ shall be the remaining fractional share of the residuary trust fund after subtracting the family trust share.

D. Computational Assumptions. The family trust share shall be computed as the maximum possible election is made to qualify all property passing as the revocable trust share for the Federal estate tax marital deduction.

E. Effect of Disclaimers.

1. Disclaiming the Revocable Trust Share. The trustee shall add to the family trust share any portion of the revocable trust share as to which a qualified disclaimer by or for me is made. The family trust share shall be calculated before any qualified disclaimer by or for me of any of the revocable trust share.

2. Apportioning Transfer Taxes to Disclaimed Funds. Transfer taxes imposed on assets as to which I have made a qualified disclaimer shall be apportioned to those disclaimed funds.

F. Allocating Assets Between or Among Shares.

1. Qualifying Assets. If I survive my *husband/wife*, the trustee shall allocate to the revocable trust share assets that can qualify for the Federal estate tax marital deduction.

2. Foreign Death Taxes. The trustee shall not, to the extent possible, allocate to the revocable trust share assets upon which a foreign death tax is payable.

3. Includible Assets. The trustee shall allocate to the revocable trust share solely assets includable in my *husband/wife*'s gross estate for Federal estate tax purposes.

4. Other Rules. The trustee shall, in other respects, allocate assets as the trustee shall consider to be in the best interests of the beneficiaries, valuing each asset on the date or dates of allocation.

G. Income. The trustee shall allocate to each share a ratable portion of all of the income earned by the trust after my *husband/wife*'s death, and income earned on assets used to pay charges according to the same fractional shares.

Article 14. Definitions and Miscellaneous

A. Definitions. The following terms shall have the meaning set forth below for all purposes of this trust:

1. AChildren@ and ADescendants@ Defined. AChildren@ and Adescendants@ include those now or hereafter born and, in addition to natural born, any child or descendant now or hereafter legally adopted.

2. ADisinterested Trustee@ Defined. A Disinterested trustee@ means a trustee who is not an interested trustee.

3. AInterested Trustee@ Defined. An Ainterested trustee@ means a trustee who is also (a) a beneficiary of the trust of which he or she is a trustee; (b) married to and living together with a beneficiary of the trust of which he or she is a trustee; (c) the father, mother, issue, brother or sister, of a beneficiary of the trust of which he or she is a trustee; (d) an employee of a beneficiary of the trust of which he or she is a trustee; (e) a corporation or any employee of a corporation in which the stock holdings of the trustee and the trust are significant from the viewpoint of voting control; or (f) a subordinate employee of a corporation in which the trustee is an executive.

4. APersonal Representative@ Defined. A Apersonal representative@ means the legal representative of a decedent=s estate. The Apersonal representative@ shall include any executor, ancillary executor, administrator, or ancillary administrator, whether local or foreign and whether of all or part of my estate, multiple personal representatives, and their successors.

5. ATransfer Taxes@ Defined. ATransfer taxes@ means all estate, inheritance, legacy, succession, and other transfer taxes, including any tax on excess retirement accumulations, imposed with respect to my death by any state, the United States, or by any foreign country. ATransfer taxes@ also includes all taxes that are reimbursable under Sections 2207 through 2207B of the Internal Revenue Code of 1986, as amended, which right of reimbursement I hereby waive. ATransfer taxes@ also includes all interest and penalties on such taxes.

6. “Trustee” or “Trust Protector” Defined. “Trustee” shall include each trustee individually, multiple trustees, and any successor, and “trust protector” shall include each trust protector and any successor.

B. Absence of Trust Beneficiaries. If all of the beneficiaries of any trust under this instrument should die before the trust assets have vested in them, the trustee shall distribute all of the remaining assets of that trust as follows:

1. One-Half to My Heirs and Distributees. One half (2) (or all, if there are no persons to take under subparagraph B.2. of this article) to the heirs and distributees who would have inherited my personal estate, and in such shares as they would have inherited it, had I died unmarried and without a valid will, determined on the later of the date of my death or the date of the death of the last of the trust beneficiaries to die; and

2. One-Half to My *Husband/Wife*s Distributees. One half (2) (or all, if there are no persons to take under subparagraph B.1. of this article) to the heirs and distributees who would have inherited my *husband/wife*s personal estate, and in such shares as they would have inherited it, had he died unmarried and without a valid will, determined on the later of the date of my death or the date of the death of the last of the trust beneficiaries to die.

C. Applicable Law. This instrument shall be governed by and construed according to the laws of the *State*.

D. Number. Whenever the context requires, the singular includes the plural and the plural the singular.

E. Survivorship. No person shall be deemed to have survived me for purposes of this instrument, unless he or she is living on the date ninety (90) days after the date of my death. No person shall be deemed to have survived my *husband/wife* for purposes of this instrument, unless he or she is living on the date ninety (90) days after the date of my *husband/wife*s death.

F. Tax-Related Terms All tax-related terms shall have the same meaning they have in the Internal Revenue Code of 1986, as amended.

G. Copies. There is only one signed original of this trust. Anyone may rely on a copy of this trust certified by a notary public or similar official to be a true copy of the signed original (and of any amendments) as if that copy were the signed original. Anyone may rely upon any statement of fact certified by the person who appears from the original document or a certified copy to be a trustee.

H. Applicable Law. This trust shall be governed by and construed according to the laws of the state of [state].

DECLARED AND AGREED on the date indicated above.

Dated:, 20.....

[Signatures, notary clause and schedule]

WAIVER OF CERTAIN RIGHTS

I, the undersigned *husband/wife* of *Grantor*, waive all of my rights, title, and interest in any property transferred to the attached trust, dated [date] (the ?trust@), by *Grantor.* This waiver shall apply both to current and inchoate interests that I may have, including, but not limited to, rights to an intestate share, statutory share, omitted spouse's share, or share in the nature of dower or curtesy, in the estate of *Grantor*. This waiver shall constitute a third-party beneficiary contract for the benefit of all the beneficiaries of the trust, and these beneficiaries or the trustee of the trust may enforce this waiver by appropriate legal action.

Dated:, 20.....

[Signatures and notary clause]