ESTATE PLANNING FOR THE MODERN 21ST CENTURY FAMILY (PART 2 WITH SAMPLE TRUST LANGUAGE)

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INTRODUCTION

Modern families take many forms, and estate planning professionals must advise them all. Part 1 of these materials described some of the distinct issues faced by a modern family. This Part 2 describes considerations in drafting for flexibility and includes some sample language.

DRAFTING WITH FLEXIBILITY FOR MODERN FAMILIES

General Approach

In our ever-changing world, where social norms, the composition and structure of families, medical and technological advances, and corresponding tax laws and trust rules are continually evolving, most estate planners acknowledge that drafting to preserve flexibility for future changes is increasingly important.

While historically, trustees in the United States primarily have sought merely to follow the terms of the governing instrument which presumably reflects the presumed intent of a trust's settlor, under the UTC and evolving modern trust law, there is a trend towards focusing on the best interests of the living beneficiaries of an irrevocable trust over the dead hand of a deceased testator or settlor.[1] There has been an increased relaxation of the traditional Claflin doctrine by refusing to view spendthrift language and other boiler plate as a "material purpose" of a trust, and a growing recognition that every clause of a trust need not be sacred as the manifestation of a settlor's original intent, particularly since a settlor's wishes often change over time.

In many cases, maximizing flexibility means allowing for change in the trust instrument to accommodate the beneficiaries' best interests in the future. The UTC sets out standards for modification to supplement any lack of flexibility in the trust instrument.[2] Many state statutes also now provide for multiple ways to modify existing irrevocable trusts. Accordingly, clients and their estate planning advisors have numerous options to consider in drafting for flexibility and for modifying irrevocable trusts. Some of the most common tools are described below.

Distribution Standards and Related Powers

Utilizing broad distribution standards maximizes flexibility. Eabling an independent trustee to make distributions for a beneficiary's best interests, or just stating that distributions can be made in the trustee's sole and

absolute discretion, will be most desirable when the goal is to maximize flexibility in making distributions.

Individual trustees who have discretionary powers to distribute trust property to themselves not subject to an ascertainable standard will be deemed to possess a general power of appointment.[3] Rather than risk estate inclusion for a trustee who is a beneficiary or a related or subordinate party with such broad powers, the trust should carve back the distribution standards for trustees who are beneficiaries or related and subordinate parties, and instead such discretionary distribution authority should be subject to ascertainable standards like health, education, maintenance and support. Sample language is included in the Addendum.

For flexibility, the trust should also include a "facility of payment" clause that permits distributions to be made directly to a beneficiary or to third parties for the beneficiary.

Additionally, the trust can permit loans to be made to the beneficiary with or without interest for situations in which loaning the funds may be more desirable than making a distribution —such as where a trust is GST-exempt and the funds are needed by a second generation beneficiary, or where the funds are being used to purchase an asset like a home that may also be used and perhaps partially owned by a beneficiary's spouse.

Finally, to increase flexibility for a primary beneficiary, the trust may include a so-called "5&5 withdrawal power," permitting the primary beneficiary each year to withdraw up to the greater of $5,000 or five percent of the trust value.

Trustee Succession Plan

Many clients would be comfortable permitting their children to inherit their share of assets outright, if not for the tax and asset protection benefits that trust planning offers. Accordingly, the most flexible trustee planning will name each generation of descendants to be trustee of their own trusts, as long as such descendant is not incapacitated. Many clients may feel, however, that an adult beneficiary who is merely eighteen or twenty-one years old may be too young to serve as sole trustee of a trust. Therefore, it is common to require that the beneficiary can begin to serve as co-trustee with another trustee at a particular age (e.g., 25) and then can act as sole trustee at an older age (e.g., 30). Depending on the amount of wealth and the clients' faith in their own children, the age of sole trusteeship may be even older. But for clients who seek to raise responsible and financially competent children, the goal can be to instill independence at whatever age they expect their children may be assuming other trappings of adulthood, such as marrying, buying a house and having children.

In addition to permitting descendants to serve as trustees, if the goal is to build in flexibility, the trust will also permit an adult primary beneficiary who has reached a certain age to alter the default trustee succession that is in the instrument. This would include the ability to appoint successor or co-trustees, to remove an acting trustee or co-trustee, and to designate a trustee succession plan, including imposing additional limitations (such as education or experience) on who may qualify for the position of successor trustee. To avoid the risk of estate inclusion, a beneficiary of the trust should not be empowered both to remove an acting trustee and to appoint a related or subordinate party as a successor trustee.[4]

Divided Trusteeships and Directed Trusts

Traditionally, all the functions of a trustee were handled by the same trustee or trustees. This meant that the same person or entity was responsible for trust administration, investments and distributions.

In recent years, however, there has been a growing recognition that a single trustee performing all functions may not always be ideal. A single trustee may not be able to accommodate all of the needs of the trust. In certain situations, such as where the assets or family dynamics are complex, a more modern "multi-participant trust" governance structure may be warranted. States have recognized the benefit of having several specialists perform distinct trustee functions, and in order to attract trust business to their state, have been enacting "directed trust" statutes to facilitate this trend. These statutes define the participants' roles and attempt to clearly delineate, with varying success, the duties and liabilities associated with each participant. Although the concept of a directed trust is not new, states have only recently begun enacting the statutory framework for the powers of directed trustees.

A directed trust is one in which the trust instrument provides that a co-trustee or third party will direct the trustee as to one or more of the trustee's responsibilities. The third party has the power to direct the trustee

with regards to the matter under the third party's control, and usually the trustee has no discretion over that particular area of administration. This arrangement is quite different from a delegated trust—i.e., one in which the trustee contracts with a third party to perform certain fiduciary acts on behalf of the trustee. In the latter arrangement, the third party acts as an agent of the trustee, subject to the terms of the contractual relationship. In the directed trust, however, the third party has specified control over the trustee.

States with a directed trust statute allow the trustee to avoid liability for the actions or inactions of a third party that is granted the power to direct the trustee in the trust instrument. Courts are reluctant to impose liability upon a trustee when the trust instrument and directed trust statute state that the trustee shall act as directed by the third party. Without the statute, trustees should be cautious in following the direction of a third party, even if the trust instrument grants that power, for fear of future claims brought by the beneficiaries.[5]

The following are common examples of when clients might want to consider naming a directed trustee: (a) the trust owns an interest in a family business; (b) the trust owns a concentrated position in a company; (c) the settlor wants to direct investments as Investment Advisor; (d) the settlor wants the trust to be able to invest in certain so-called "alternative investments," such as private equity or hedge funds; (e) the settlor decides that a group of individuals is better equipped than the named trustee at making investment decisions with respect to a family business, a concentrated position, or alternative investments as an "Investment Committee"; (f) the settlor would rather have someone who knows the beneficiary as well as the settlor and who can consider the personal circumstances when making distribution decisions and name that individual as "Distribution Advisor" or multiple individuals as a "Distribution Committee."

Some of the advantages of naming a directed trustee include that it: (a) allows for specialized expertise in an asset class; (b) ensures the family's views and goals are incorporated in the decision-making regarding the trust assets; (c) may reduce the total cost of trust services as an institutional trustee is likely to charge less for acting in a directed capacity; (d) increases flexibility with respect to the management of trust assets; and (e) can help manage trustee liability (depending on state law).

Some of the disadvantages of naming a directed trustee may include: (a) an additional layer of administrative complexity; (b) the difficulty of determining the appropriate flexibility; (c) possible additional expenses; (d) lack of clarity as to how much protection the directing party may obtain through exculpatory clauses; and (e) the lack of case law and direction provided by the courts. In addition, it may be challenging to bifurcate a trustee's fiduciary duty without affecting the remaining fiduciary duties of the trustee. If the trustee no longer has a duty to invest, this can create some uncertainty as to how this impacts the duty to account to beneficiaries and the protection the directed party receives under such an arrangement. There can also be a lack of clarity regarding who is functioning as managing trustee to coordinate between different fiduciaries with different focuses and priorities. For example, what happens if the administrative trustee needs cash to pay taxes or administrative fees, but the investment trustee is unwilling or unable to liquidate, and/or the distribution trustees plan to distribute?

When drafting for a directed trust with divided trusteeship, there are a number of things to keep in mind, and flexibility is crucial. The instrument doesn't need to set forth a divided trusteeship initially, but can merely permit that different roles can be appointed later. The instrument can permit Special Trustees to be named who assume authority for particular speciality assets, and the instrument can also permit an "Investment Director" or "Investment Direction Advisor" who directs any other trustees with regard to investments more broadly. Similarly, a "Distribution Trustee" or "Distribution Advisor" can be named initially or just contemplated in the instrumnent.

Even if there is an initial directed trustee and directing party, drafters should include provisions for later combining all trustee functions into one (non-directed) trustee in case that is desirable in the future. Drafters shoould also always provide for the appointment, removal, and succession of directing parties. Furthermore, drafters should make it explicit that the directed trustee has no ability to remove or appoint the directing party. For example, in Illinois, if the directed trustee appoints a directing party or successor to a directing party, then the directed trustee will assume the same fiduciary and other duties and standards that applied to such directing party.[6]

Drafters should address how the directed trustee will share information with the directing party and vice versa. In addition, drafters should include provisions for sharing information with other participants, including anything that could or should be communicated to a beneficiary.

Flexibility is particularly essential when drafting state governing law clauses in trusts. It is best to provide maximum flexibility for changing applicable state law for the trust in the future. The governing law clause in a trust should designate the initial state governing law for trust administration, construction and validity issues. It should also include language that allows substitution of another state's laws during the trust term. Typically, the trustee or beneficiary can be given the power to change state governing law. The trust agreement can designate a different state's law to apply to different trust issues.[7]

Powers of Appointment

Powers of appointment are among the most useful tools to build in flexibility and allow the settlor to grant a powerholder the option of distributing trust assets among desired appointees in the future. This enables changing beneficial interests in a non-fiduciary capacity, unlike a trustee or Trust Protector who may be deemed a fiduciary. The most flexibility will include broad lifetime and testamentary special (or "limited") powers of appointment (meaning the powerholder can appoint the trust property among any persons, including individuals or trusts, or organizations other than the party's self, estate, or creditors, during life or at death). [8]

To maximize flexibility, the trust instrument can permit the primary beneficiary (or even an independent powerholder) to have broad special lifetime and testamentary powers of appointment. Such powers can even permit the powerholder to appoint property to a new trust in which the powerholder has rights or powers, as long as those rights or powers are no broader than in the original instrument. Sample language is included in the Addendum.

For most trusts, but particularly for large trusts that are expected to remain in effect for many years, it is best to permit powerholders to have flexibility beyond the ability to appoint trust assets to the settlor's descendants. Often it will be desirable for the powerholder to be able to appoint for the benefit of a spouse or other lifetime partner (at least in a continuing trust), and for income tax reasons to have the ability to appoint to charitable organizations (including any Foundation or Donor Advised Fund) the family may have in place. The most flexible option is for the trust instrument to provide both lifetime and testamentary broad special powers of appointment.

To maximize privacy and flexibility, drafters should be wary of creating testamentary powers of appointment that can be exercised only by a will. Instead, it is prudent to allow the power to be exercised by any instrument that specifically references the power and is delivered to the trustee of the irrevocable trust over which the powers are being exercised. The instrument exercising the power of appointment can require all the same formalities that would be required of a trust amendment (such as signed instrument delivered to the trustee to be kept with the trust records that makes specific reference to the power of appointment being exercised). Sample language is included in the Addendum.

General powers of appointment can also be used for flexibility in tax planning. One method to trigger inclusion in the gross estate—and therefore obtain a step-up in basis and also utilize the powerholder's own generation-skipping transfer tax exemptions—is to provide a powerholder with a general power of appointment either by formula or by permitting an independent trustee or trust protector to add such power. By building in the trigger of a general power of appointment under certain circumstances, or for one to be added, the assets over which the beneficiary has such power will be includable in his or her estate.[9] The property subject to the power is includable in the powerholder's estate whether or not the power is exercised and will result in a step-up in basis. A general power of appointment is defined as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. In traditional planning, advisors are careful to avoid general powers of appointment—as such powers cause the property to be subject to the estate tax. However, the use of general powers of appointment to trigger estate tax inclusion should be considered with the minimization of estate tax consequences and the focus on basis planning.

There are several issues to contemplate for advisors who wish to use a general power of appointment to

force estate tax inclusion: (1) how and when the general power should be given to the beneficiary; (2) when the general power should be triggered; and (3) how broad the general should power be when given to the beneficiary. A general power should be employed only if the cost of estate tax inclusion cost is less than the income tax saved by increasing tax basis. Some commentators have suggested drafting a complex formula to determine when to grant such general powers and over what property and recognized the inherent challenges in such a task.[10]

Because of the numerous challenges with the use of a formula, it may be preferable to incorporate trust language providing an independent trustee (or trust protector) the discretion to grant a general power of appointment when the tax effective increase in asset basis is desired.[11] The general power of appointment could be dependent on a number of factors including: (1) a comparison of estate taxes incurred by using the general power to any income tax savings realized if the property is included in the gross estate, (2) the amount of appreciation in each asset, (3) which assets are likely to be sold, (4) the federal and state income tax rates at the time of any potential sale, (5) the depreciation rate with respect to depreciable property owned by the trust, and (6) whether having a general power of appointment facilitates the desirable use of the powerholder's own generation-skipping transfer tax exemption to be applied to the trust property.[12] Sample language allowing the trustee the discretion to grant a general power of appointment is included in the Addendum.[13] Because many independent trustees or trust protectors will not want to be in a position of having to affirmatively determine whether or not to grant such a power, it has become increasingly common for drafters to add language requiring the independent trustee or trust protector to consider granting such a power only when that has been requested by a trust beneficiary.

Trust Protectors

Generally, a trust protector is a third party other than the settlor, trustee, or beneficiary that is granted specific powers to make decisions needed to carry out the settlor's intent or to address changing laws and circumstances. For ideal flexibility, all trust instruments will contemplate that a trust protector can make amendments to an irrevocable trust instrument. The trust protector can be viewed as a surgeon who can make important corrections, clarifications and updates to the instrument, such as adding financial powers as new investment vehicles or business structures are invented or converting a trust into a special needs trust.

Trust protectors have been around for centuries in foreign trusts, but they are a more recent trend in U.S. trusts. The desire to build in flexibility to address changed circumstances, coinciding with a trend of trusts lasting longer (e.g., 360 years, or in perpetuity), has led to an increase in the use of trust protectors. While most states have responded to this development, some states do not yet address trust protectors; even those that do are not consistent or fully developed.

Enabling a trust protector can be particularly useful in the following circumstances:

1. To Provide a Third Party With Certain Trustee Powers. It may be desirable for a settlor to give a third party powers that traditionally were held by the trustee or even the beneficiary, such as approving trustee compensation, replacing trustee vacancies, or changing governing law or situs. In some situations, the trust protector could provide a check and balance on matters relating to the trustee. For example, if the beneficiary has the right to remove and appoint trustees, the beneficiary could exert pressure on the trustee to exercise the trustee's authority or to make discretionary distributions with the implied or express threat of being removed if it does not comply with the beneficiary's wishes. As neutral third party, the trust protector can help ensure the right factors are being considered in the removal process. At the same time, the trust protector may be closer to the beneficiary or be privy to information that allows the third party to fully ascertain the situation.
2. To Provide Flexibility in Long-Term Trust. As trusts last longer and longer, it has become important to retain the ability to adjust trust provisions to comply with the settlor's goals as time and circumstances change. Some of these powers include the ability to turn off grantor trust status, add beneficiaries, change the ultimate contingent beneficiaries to facilitate a trust merger, or modify distribution provisions such as to protect a beneficiary with special needs and avoid disqualifying them for public benefits. Because a trustee has a fiduciary duty to the beneficiaries, the trustee often may not be able to perform these adjustments.

3. To Maintain Privacy of Trust Administration. While many powers given to a trust protector can be achieved by going to court, utilizing a trust protector allows a trust to maintain its privacy by having the trust protector carry out the powers that would have been open to public records in court. Some of these powers include the powers to modify the trust instrument, change the governing law of the trust, remove and replace trustees, resolve disputes among the beneficiaries or between the beneficiaries and the trustee, and interpret the terms of the trust. While granting the trust protector these powers does not prevent the trustee or beneficiaries from going to court, it does reduce the likelihood of a court proceeding.

4. To Monitor. Some practitioners believe that a trust protector should be named at the outset in order to protect the trust by monitoring the trustee's administration of the trust. This can be quite challenging since the trust protector is not privy to the day-to-day administration of the trust in the way it would be if it served as a co-trustee. Courts have determined that, unlike a trustee, a trust protector has no standing to bring an action in court, which could leave the party named as trust protector powerless to interfere if such individual did determine that something was amiss with the trust.[14]

5. Trust Protector as Enabler or Surgeon. Many believe strongly that the best way to utilize a trust protector is to permit a party (such as the party designated in the instrument with the power to appoint and remove trustees) to appoint an individual who would qualify as an independent trustee to serve as trust protector with the power to engage in making primarily substantive trust revisions. The process of appointing a trust protector to make necessary changes then can be relatively clean. A trustee appointer can appoint an independent party (often an attorney) to amend or restate the trust in ways deemed to be consistent with settlor intent to address changes in tax law, investment powers, or other changed circumstances.

6. To Mediate. A final approach is to name an individual (or succession of individuals) who could be consulted to resolve a dispute between two trustees, or other parties who have powers within the trust, such as for the appointment or removal of trustees. This may be a situation where the settlor's spouse and child or two childen are named together as fiduciaries or powerholders, but if the two of them are in disagreement, the trusted individual can resolve the dispute. As a practical matter, being named as a third party to resolve disputes sounds like a pretty unappealing role. Accordingly, if a client insists on taking this approach, it is best to have the party accept this role in advance, make it clear that the party gets involved only when called upon by the two disagreeing parties, and settle compensation for serving in the role in advance.

Many trust instruments that permit the appointment of a trust protector assume that the party serving in such role is not intended to be a fiduciary. However, some of the statutes that have blessed the existence of trust protectors have now defined them expansively (e.g., to include mere trustee appointers and removers) and have imposed fiduciary duties on such parties. These developments have made the role more frightful, particularly for individuals who are named in trust instruments as trust protector (including as trustee appointer or remover) but may have no other connections to the trust. [15]

Despite being given the title of "protector," a trust protector preferably should not be utilized with the goal of having the trust protector monitor the trustee's administration of the trust. If a settlor wants someone or entity to monitor the trustee, the settlor should either select a different trustee or appoint the party intended to serve as trust protector as a co-trustee. Often times, a beneficiary is in a better position to monitor the trustee than a named trust protector.[16]

When a client hears that he or she may make changes to an irrevocable trust, it may be tempting for the client to ask the trust protector to make changes to the trust regularly. Best practice is for trust protectors to act sparingly and in reaction only to changed circumstances and changes in the law, not purely at the settlor's request.

Settlors often want to retain as much power as possible, while minimizing tax consequences. Settlors can grant powers to the trust protector, who will act in a non-fiduciary capacity and carry out the settlor's intent without the estate tax consequences. The following are drafting suggestions for a trust that will either (i) have a Trust Protector, or (ii) permit the appointment of a trust protector if there is a change in circumstances:

1. The trust instrument should clearly state the trust protector's powers and duty of care. While the state may have established default rules, drafters should be careful of relying on state law: there is little consistency between state trust protector laws. Drafting based on one state's body of laws does not protect against the possibility of a vastly different set of laws if the trust is moved to another jurisdiction. Additionally, even if the trust never changes situs, state laws are still developing, so long-term planning entails setting out the settlor's intent.

2. Trust protectors and trust advisors perform separate and distinct roles, even though the terms may be used interchangeably, as many states do not differentiate between the two. Trust advisors should be used when the intention is to have a third party perform specific trustee powers such as investments or distributions. Trust protectors are for powers that the settlor, beneficiary, or trustee may not want to or cannot have the trustee perform. Additionally, unlike trust advisors, trust protectors are not required to act as fiduciaries as long as the governing instrument is specific in so stating.

3. The trust instrument should state the standard of care for the trust protector. Depending on the powers granted the trust protector, the appropriate standard of care will vary. In some cases, it will be lower that the standard applicable to a trustee or trust advisor because the trust protector is not necessarily a fiduciary acting on behalf of the beneficiaries. If that is what the settlor intends, then the trust instrument should clearly state that the trust protector is not a fiduciary; the instrument should specify that the trust protector is not liable for his or her actions unless he or she acts in bad faith, or reckless indifference to the purposes of the trust, or in his or her own self-interests. If the trust protector is granted powers comparable to those typical of a trustee, then the trust protector will most likely be a fiduciary and subject to the same standard of care as the trustee. The trust instrument could also provide indemnification for the trust protector from litigation fees and expenses.

Decanting

Decanting allows one trust to pour its assets into a new trust. This can be done at common law in a trust that permits distributions in continuing trust for beneficiaries' best interests, but many states have now enacted laws that govern the process of decanting. State decanting laws will vary. Some are more onerous than others, and over time the laws could change to become even more onerous. If the settlor's goal is to maximize future flexibility, there is no harm—and there could be significant benefit—in having the settlor expressly assent to future decanting. It is even better to spell out what decanting would look like (e.g., provide whether notice to contingent beneficiaries is waived). The Uniform Trust Decanting Act has been enacted in six states.[17]

Note that like the trust protector, decanting should be used with caution if the goal is to remove trust beneficiaries. The recent *Hodges v. Johnson* case in New Hampshire illustrates that a trustee who goes along with decanting to remove current beneficiaries could be in breach of the trustee's fiduciary duties.[18]

Trust mergers and severances can be utilized as an alternative to decanting. Most state statutes authorize mergers with substantially similar trusts, but it can be helpful to include an express authorization for trust mergers or severances to maximize flexibility in the instruments.

Including broad investment and administrative powers can reduce the need for decanting. Permitting a trustee to have broad flexibility in investments can facilitate trust administration. This can include a comprehensive list of investment and administrative powers, as well as incorporating all state statutory powers as they exist at the time of execution and at any time in the future during the trust administration. For example, the introduction to the list of powers in the trust could state something similar to the following: "*In addition to all powers now or hereafter granted by law regardless of the statutory effective date of the power, the trustee shall have the following powers with respect to each trust held under this instrument*…." Since modern families often wish to divide trustee functions in ways that have one trustee responsible for trust administration and a separate trustee or investment advisor responsible for trust investment, it can be helpful to segregate the administrative powers and the investment powers into separate sections of the trust instrument.

Grantor Trust Provisions

Utilizing intentionally defective irrevocable grantor trusts maximizes flexibility in that it requires the settlor,

who is treated as the grantor for income tax purposes, to pay the trust's income tax liabilities and also permits the settlor and the settlor's spouse to engage in income tax-free transactions with the trust such as installment sales, loans, and leases.

Traditional transfer tax planning has focused on removing assets from the gross estate—or at least discounting the value of assets included in the gross estate. Gift tax planning has encouraged lifetime transfers to take advantage of the tax-exclusive nature of the gift tax and to shift post-gift appreciation out of the donor's taxable estate. However, the landscape of income tax and transfer tax planning has changed dramatically in the past several years. The American Taxpayer Relief Act (the "2012 Tax Act") lowered the estate tax rate to 40 percent, increased the income tax rate to 39.6 percent, increased the capital gain rate to 20 percent, and implemented a new 3.8 percent surtax on net investment income tax. As discussed above, the 2012 Tax Act also made permanent the portability of a deceased spouse's unused exclusion amount (commonly referred to as the "DSUE amount") for those estates that make an appropriate election on a timely-filed estate tax return.

The Tax Cuts and Jobs Act of 2017 ("TCJA") has now increased the exemption amount to $11.4 million and lowered the highest marginal income tax rate from 39.6 percent to 37 percent, but trusts still pay taxes at the highest marginal rate starting at only $12,750 of income. The reduction of the transfer tax rates accompanied by the increase of the federal income tax rates has changed the estate planning focus with respect to most clients from reducing the estate tax to reducing the income tax of clients. As such, the strategies which planners typically employed to remove assets from a client's estate are now of little value to clients who are unlikely to face a gift or estate tax liability.

Under the current income and transfer tax structures, planners must shift their focus from just reducing federal estate tax to reducing federal income tax. In planning for estate tax inclusion and basis step-up, an advisor must be aware of those assets that reap the most income tax benefits from a step-up in basis. With proper planning, these assets will provide either lower or no recognized gain on sale, a higher basis for depreciation—and, in some cases, will provide preferred capital gain as opposed to ordinary income treatment. Choosing which grantor trust powers to include can make a difference.[19] A client may increase basis by swapping assets with a "grantor trust" for income tax purposes. Many advisors have clients who use such trusts to take advantage of the income tax result that the trust settlor/grantor is treated as the owner of the trust for income tax purposes. Thus, a grantor would not recognize gain or loss on a sale of property to the trust, and any income or deduction of the trust would be taxed to the grantor. This is particularly attractive because the trust can appreciate for the benefit of the beneficiaries without having to pay income tax. The payment of income tax by the grantor dramatically increases the value of the trust with the added benefit of not incurring gift tax. A frequent provision included in a trust to qualify it as a grantor trust is to give the settlor the power, in a non-fiduciary capacity, to reacquire trust assets by substituting assets of equivalent value.[20] A settlor has the ability to swap a high-basis asset for an asset of equivalent value (and a low basis) held by the grantor trust an asset of equivalent value. This will not be considered an exchange for income tax purposes, and the low-basis asset will then be includable in the client's gross estate—and will receive a step-up in basis at the client's death.

Including the ability to make loans to the grantor with inadequate interest or inadequate security is another popular provision that increases flexibility (for example if the settlor has gifted too much and needs access to borrow trust assets to pay expenses). Including the power to add charitable beneficiaries can also be useful as this may enable the trust to take charitable income tax deductions. This is even more beneficial under the TCJA, where individual deductions have limitations if the grantor trust status will eventually be turned off or after the death of the settlor. Finally, including the settlor's spouse as a permissible beneficiary and/or as a fiduciary with the power to make discretionary distributions can also be useful. A few sample grantor trust powers are included in the addendum.

Grantor Trust Reimbursement[21]

While originally intended to punish settlors who tried to evade income taxes by transferring assets to trusts, grantor trusts have become an essential tool in estate planning. With grantor trust status, a trust can accelerate growth without the tax drag. Also, the trust can utilize the settlor/grantor's social security number as its taxpayer identification number and avoid tax

preparation complications and fees. It can engage in desirable transactions with the settlor, like renting residential real estate, buying assets in an installment sale at low interest rates, and swapping out low basis assets for higher basis assets.

A well-drafted grantor trust will always include the ability to turn off grantor trust status in case the grantor tires of paying the trust's taxes. For example, in a year when there is an unusually large capital gain or in which the grantor may be particularly cash-strapped, the grantor might be inclined to turn off the status rather than incur the tax liability.

Turning off grantor trust status, however, is harmful to the trust and is always contrary to the best interests of the beneficiaries. It may also have unintended consequences if the grantor is engaged in otherwise non-recognized transactions with the trust, such as a lease with a qualified personal residence trust, or an installment sale to an intentionally defective grantor trust. In such situations, it is preferable for the trust to contain a discretionary trustee power to simply reimburse the grantor for the taxes in lieu of turning off the status.

Across the country, many practitioners are addressing this issue by inserting language in their trusts giving trustees the authority to reimburse grantors for taxes (or to pay the trust's share of the tax liability directly) as a disincentive for turning off grantor trust status altogether and to build in more flexibility.

The Internal Revenue Service permits reimbursement for taxes and will not include the amount of the trust in the settlor's taxable gross estate as long as the payment is not: (1) forbidden by state law, (2) subject to a pattern of abuse that suggests an agreement to reimburse, or (3) mandatory. In Revenue Ruling 2004-64, the IRS addressed this issue and determined that there would be no inclusion in the gross estate for federal estate tax purposes if the trustee has discretionary authority, under the instrument or applicable local law, to reimburse the grantor for the income tax liability. There must not be any facts indicating control by the grantor, such as pre-existing arrangements, powers to remove trustee and name the grantor as trustee, or local law subjecting the trust assets to the claims of the grantor's creditors. On the other hand, if the applicable local law or the trust's governing instrument requires a mandatory payment for the income tax liability, this will trigger inclusion in the grantor's taxable gross estate under Internal Revenue Code Section 2036(a)(1) for any trust created after Oct. 4, 2004.

Under the holding of the Revenue Ruling, no state statute expressly authorizing reimbursement for grantor taxes should be necessary, as long as such reimbursement is permitted by the instrument, and there is no local law subjecting the trust assets to the grantor's creditors' claims. Nonetheless, to provide comfort and clarity, many states have enacted statutes that address grantor trust reimbursement.

Funding Formulas

Due to federal legislation enacted in 2001 which eliminated the pick-up tax, a number of states have passed separate estate tax regimes. For states in which the federal and state estate tax exemption amounts do not match, the estate taxes are described as "decoupled." As a result of this, some states like Illinois now have state-only "QTIP" marital deduction elections to be made upon the first spouse's death.[22]

Planners have several options available to them when drafting documents to take advantage of a state QTIP election—and the strategy implemented will depend on a client's particular situation and the flexibility desired. Additionally, the strategy chosen may also depend on the portability of the predeceased spouse's estate tax exemption amount and the applicablility of estate taxes and income taxes.

Consideration of income taxes is increasingly important now that the highest income tax rates can exceed the highest transfer tax rates. Part of planning for flexibility is to consider that sometimes it will be in the best interests for trust assets to be distributed outright to a beneficiary such as (1) to shift income from the trust's bracket to the beneficiary's bracket or (2) to receive a step-up in basis at that beneficiary's death. Along the same lines, it may be desirable for certain beneficiaries to be granted general powers of appointment over trust assets to secure a step-up in basis over those assets at death.

When preparing estate planning documents for a client, a planner may utilize one of the following options (and sample language for each is included in the Addendum):

1. Rely purely on portability as discussed in more detail below.

2. Use a Credit Shelter Trust with the lower of the federal and state estate tax exemptions, and a QTIP-able Marital Trust. Under this approach, the funding formula (whether fractional or pecuniary) for the credit shelter trust provides that the largest amount that will not incur federal *or* state estate taxes is allocated to the credit shelter trust. Any remaining assets are allocated to a QTIP-able trust. The executor could then make a federal QTIP election over such trust and a state QTIP election over the gap amount—resulting in no federal or state estate tax being payable upon the predeceased spouse's death.

3. Use a Credit Shelter Trust with the *greater* of the federal and state estate tax exemptions and a QTIP-able Marital Trust. Under this approach, the funding formula (whether fractional or pecuniary) for the credit shelter trust provides that the largest amount that can pass free without incurring federal estate taxes only ($11.4 million in 2019) is allocated to the credit shelter trust. Any remaining assets are allocated to a QTIP-able trust. The executor could then make a federal QTIP election over such trust—resulting in no federal estate tax being payable upon the predeceased spouse's death. If the credit shelter trust qualifies for QTIP treatment, the executor may make a partial state QTIP election for the gap amount of the credit shelter trust. While this strategy was utilized widely prior to decoupling and is likely a part of a significant number of existing plans, it has a couple of drawbacks:

    a. In many cases, the credit shelter trust will not be drafted in a manner that will allow it to qualify as a QTIP-able trust—as it will not require a mandatory distribution of income or will name beneficiaries other than the surviving spouse. Therefore, the state QTIP election will be unavailable, and the credit shelter trust will generate some state estate tax—which may potentially be avoided if the credit shelter trust had qualified for the state QTIP election and the surviving spouse was not subject to state estate taxes upon death.

    b. Even if the credit shelter trust is a QTIP-able trust, it will cause the credit shelter trust to be a "leaky" trust—as the income from the entire trust must be distributed to the surviving spouse (as opposed to the discretion to retain the assets in trust for the surviving spouse's benefit).

Three-Trust Strategy

Pursuant to this strategy, the credit shelter trust is funded with a formula (whether fractional or pecuniary) that provides for the largest amount that will not incur federal or state estate taxes. Any remaining assets are allocated to a QTIP-able trust—and further divided by formula between a "State QTIP Trust" (for the gap amount) and a "Federal QTIP Trust" (for the balance of the assets). The executor could then make a state QTIP election over the "State QTIP Trust" and a federal QTIP election over the "Federal QTIP Trust"—resulting in no federal or state estate tax being payable upon the predeceased spouse's death. While this approach already works well in some states that have decoupled, it could also be useful in boilerplate in case clients move from a state where it isn't necessary to a state that has decoupled from the federal estate tax and permit a state-only QTIP election.

QTIP-able Trust Approach

Under this approach, sometimes referred to as a "single fund QTIP" approach, all assets are allocated to a trust over which the decedent's executor can make a QTIP election. The executor would then make a partial QTIP election for a portion of the trust to avoid federal estate taxes and a state QTIP election over the gap amount. Similar to the strategy above of funding the credit shelter trust with the greater of the federal and state estate tax exemptions, this strategy will result in all assets being held in a "leaky" trust—as the income from the entire trust must be distributed to the surviving spouse (as opposed to the discretion to retain the assets in trust for the surviving spouse's benefit).

Disclaimer Approach

With this approach, there is typically an outright bequest to the surviving spouse with a provision that any amount disclaimed by the surviving spouse passes to a QTIP-able trust or to a Family Trust. The disclaimer must be made within nine months. The executor would have up to nine months (or 15 months, if an

extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election. If a QTIP election is not made, then the portion over which no election was made could pass to a credit shelter trust. Otherwise, if the QTIP election is made, then the executor could make a reverse QTIP election and allocate the predeceased spouse's GST exemption to the trust. One potential hazard to this approach is that the surviving spouse may decide—after the death of the predeceased spouse—not to execute a disclaimer (and simply receive all assets outright and free of trust).

Clayton Trust

The Clayton contingent QTIP election is a more flexible variation of the traditional partial QTIP election.[23] A Clayton contingent QTIP election permits a surviving spouse's income interest in a QTIP marital deduction trust to be contingent on the fiduciary's election to treat the marital trust property as QTIP property under Section 2056(b)(7) of the Internal Revenue Code. The property elected for QTIP treatment remains in the QTIP marital deduction trust, while the non-elected portion of the QTIP trust property is generally distributed to the surviving spouse and the decedent's descendants in a traditional Family Trust.[24] Under the provisions of a Clayton trust, the residue of the decedent's estate (to the extent the assets qualify for the marital deduction) is left to a single QTIP marital deduction trust for the benefit of the surviving spouse. Through the use of a Clayton contingent QTIP election, the decedent's fiduciary determines how much of the QTIP trust property should qualify for the marital deduction. With a 6-month extension to file the decedent's federal estate tax return, the decedent's fiduciary will have 15 months to determine the appropriate contingent QTIP election amount.

Additional Considerations

Although there are several options to be considered with respect to decoupling, the most appropriate option to include will involve other factors—such as (1) whether the priority is the minimization of estate tax or the reduction of income tax, and (2) the option for married couples to take advantage of portability. For these reasons, the appropriate strategy will involve a discussion and analysis with clients of all such possibilities and their goals.

Portability

Portability was first introduced as part of the Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010 (the "2010 Tax Act"). It became effective for married persons dying on or after January 1, 2011. Specifically, Section 303(a) of the 2010 Tax Act provides for the portability of any unused exclusion amount for a surviving spouse if the decedent's executor makes an appropriate election on a timely-filed estate tax return that calculates the unused exclusion amount. The unused exclusion amount is referred to in the legislation as the "deceased spousal unused exclusion amount" (commonly referred to as the "DSUE amount"). The surviving spouse can apply the DSUE amount either to gifts by the surviving spouse during his or her lifetime or for estate tax purposes at the surviving spouse's death. Additionally, an individual can only use the DSUE amount from his or her last deceased spouse. As a result of the passage of the 2012 Tax Act, portability is now a permanent part of the transfer tax system.

The following summarizes various aspects of portability:

1. The portability election is made by the executor of the deceased spouse's estate by filing a timely and complete Form 706.
2. The surviving spouse's DSUE amount is not subject to reduction if Congress subsequently reduces the basic exclusion amount.
3. If the decedent made gifts requiring the payment of gift tax, the excess taxable gift over the gift exemption amount (on which gift tax was paid) is not considered in calculating the DSUE amount.
4. The surviving spouse can use the DSUE amount any time after the decedent's death, assuming the portability election is eventually made by the executor.
5. Any gifts made by the surviving spouse are first covered by the DSUE amount, leaving the spouse's own exclusion amount to cover later transfers.
6. DSUE amounts from multiple spouses may be used to the extent that gifts are made to utilize the DSUE amount from a particular spouse before the next spouse dies.

Because the portability provisions are permanent, married clients are more likely to consider implementing

a simple plan that leaves all assets to the surviving spouse and relies on portability to take advantage of the estate tax exemptions of both spouses. However, such an approach is not helpful in planning for the estate tax in most states—as only two states have adopted portability, Hawaii and Maryland.

When deciding about whether to rely on portability, the following factors should be considered:

1. The age and life expectancy of the surviving spouse;
2. Whether assets in the predeceased spouse's estate are likely to appreciate substantially;
3. Whether assets in the predeceased spouse's estate are likely to be sold during the surviving spouse's lifetime or retained until the surviving spouse's death—and the related tax effects;
4. Whether the assets will be used by the surviving spouse during his or her lifetime; and
5. Whether the surviving spouse resides in—or will move to or from—a state with a state estate tax (e.g., Illinois).

Different Approaches

Arguments Favoring Credit Shelter Trusts

Although spousal portability allows the surviving spouse to avail himself or herself of the predeceased spouse's unused federal estate tax exemption amount, there are possible pitfalls which could occur if married couples rely on it for utilization of the federal estate tax exemption of the first spouse to die, which include the following:

1. First, relying on portability does not leverage the federal estate tax exemption of the first spouse to die. If assets appreciate and there is no credit shelter trust (i.e., if all of the couple's assets are in the surviving spouse's name or revocable trust) or if the credit shelter trust is not fully funded (*i.e.*, if the value of the assets in the predeceased spouse's name is less than his or her federal estate tax exemption amount), then the appreciation on such assets is fully taxable in the surviving spouse's estate. Alternatively, if the assets in the predeceased spouse's credit shelter trust appreciate after the first death, then the appreciation passes free of estate tax to the family.
2. In addition, assets passing to a surviving spouse in a credit shelter trust are afforded protection from the surviving spouse's creditors, whereas assets held in the surviving spouse's individual name or in the name of his or her revocable trust are not protected from creditors. Therefore, if a couple relies on portability instead of titling sufficient assets in each spouse's name (and if the majority of the couple's assets are titled in the name of the surviving spouse), then those assets will lose the creditor protection that they otherwise would have been afforded had the assets passed to the predeceased spouse's credit shelter trust upon his or her death.
3. The predeceased spouse might use a credit shelter trust to restrict the surviving spouse's ability to access the trust assets and provide for the management of the assets by appointing a trustee who is not the surviving spouse.
4. Furthermore, a surviving spouse can only avail himself or herself of the unused portion of the federal estate tax exemption of his or her last spouse to die. As a result of this limitation, it is possible that remarriage by a surviving spouse could cause the loss of the portability if the new spouse predeceases the surviving spouse but uses his or her full federal estate tax exemption.
5. Because portability does not apply to the GST tax, it is still necessary to fund both estate tax exemptions (to the extent possible) to fully leverage the GST exemptions of both spouses.
6. Finally, portability is not an option with state estate tax in any state other than Hawaii (and soon to be in Maryland) as referenced above.

Arguments Favoring Portability

While relying on portability is the simplest approach, there are other reasons why a married couple might employ portability as the better alternative to credit shelter trusts, such as the following:

1. A couple may have a desire for simplicity and not wish to be burdened with the extra duties and reporting obligations which are attendant to trusts. Additionally, there may be administrative costs and disadvantageous income tax consequences incurred as a result of the use of trusts.

2. A couple may be more motivated in obtaining the step-up in basis of their assets, rather than removing future appreciation of those assets from their taxable estates.

3. Portability works well for a married couple, who has not been married before and does not have any other children from a prior marriage.

4. There are assets in the predeceased spouse's estate that would be difficult to administer in a trust, such as a residence.

Drafting Considerations

A married couple's decision on which strategy to use will likely depend on factors such as: the need to protect assets from federal and state estate taxes and from other creditors, control of assets, administrative simplicity, and evaluation of income tax consequences. While planners may draft documents which implement either of the strategies above, the optimal approach is to draft documents which provide flexibility for the surviving spouse to decide whether to rely on portability after the death of the predeceased spouse. There are a couple of options which provide this flexibility: (1) a QTIP-able trust, and (2) a disclaimer approach—both of which allow a couple to "punt" on the decision until the first death.

QTIP-able Trust Approach

A QTIP-able trust approach affords substantial flexibility to a surviving spouse. By allocating all assets to a trust over which the decedent's executor can make a QTIP election, the factors discussed above can be analyzed after the death of the predeceased spouse. By drafting a QTIP-able trust into an estate plan, the predeceased spouse's executor has up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a QTIP election and over what portion of the trust the election should be made. If a QTIP election is made by the executor, then a reverse QTIP election could be made to allocate the predeceased spouse's GST exemption to the trust. A QTIP-able trust also makes it straightforward to fully utilize the predeceased spouse's exemption amount without paying state estate taxes upon the predeceased spouse's death.

Disclaimer Approach

Under this approach, there is an outright bequest to the surviving spouse—with a provision that any amount disclaimed by the surviving spouse passes to a QTIP-able trust. The executor would have up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election. If a QTIP election is not made, then the portion over which no election was made could pass to a credit shelter trust. Otherwise, if the QTIP election is made, then the executor could make a reverse QTIP election and allocate the predeceased spouse's GST exemption to the trust. Under this approach, there are a couple of different choices: (i) The spouse could decide not to make any disclaimers and keep the assets, and the executor would then make the portability election; or (ii) the spouse could disclaim all or a portion of the outright bequest and the disclaimed assets would pass to the QTIP-able trust. The executor would have up to nine months (or 15 months, if an extension is filed) after the predeceased spouse's date of death to decide whether to make a full or partial QTIP election.

Clayton Trust

The Clayton contingent QTIP election is often viewed as the most flexible variation. It permits a surviving spouse's income interest in a QTIP marital deduction trust to be contingent on the fiduciary's election to treat the marital trust property as QTIP property under Section 2056(b)(7) of the Internal Revenue Code. [25] The property elected for QTIP treatment remains in the QTIP marital deduction trust, while the non-elected portion of the QTIP trust property can be distributed to a Family Trust (i.e. Credit Shelter Trust). With a six-month extension to file the decedent's federal estate tax return, the decedent's fiduciary will have up to 15 months to determine the appropriate contingent QTIP election amount which provides more time than the Disclaimer Approach.

Combination Approach

In fact, the most flexible approach is for an instrument to permit both (i) a spouse up to nine months to disclaim and also (ii) to permit an independent fiduciary 15 months to make a Clayton election. See sample language in Addendum.

ADDITIONAL DRAFTING CONSIDERATIONS

Protecting Privacy

Protecting privacy in the modern era is increasingly important. Here are a few suggestions for how to do so:

Pour-over Wills

Because wills are eventually public instruments, pour-over wills are useful because assets are transferred into a trust, which does not become public. If a will must reference specific family members or specific assets, the drafter should include adequate details so that the appropriate individuals and property can be identified but disclose as little as possible beyond the minimum amount of information.

Exercising Testamentary Powers of Appointment

Along the same lines, testamentary powers of appointment should not be required to be exercised in a will, and certainly not a will that must be probated. Ideally, references to existing family trusts and information about a testamentary plan should be in trusts and other instruments that do not need to be filed with a court. This requires specifying that testamentary powers of appointment can be exercised in a will or, for example, "other instrument that is delivered to the trustee [of the trust over which the powers are being exercised] during the decedent's life or at death." Then, the terms for any continuing trust can either be made in a separate trust instrument (such as a "Power of Appointment Trust") or could be contained within the decedent's revocable living trust.

Gender-Neutrality

Gender-neutral language should be used in drafting. In the 21st century, there is no reason to risk offending clients, or to be imprecise in gendered pronouns. For example, do not use masculine pronouns and then put in the interpretive rules that such references also include the feminine. Drafting with gender-neutrality is particularly critical when thinking about how to be sensitive to the preferences of any transgender or gender clients or family members or those who identify as gender fluid or non-binary.

CONCLUSION

Over the past several decades, the concept of family and the planning environment have changed significantly. It is crucial for estate planning attorneys to consider how these changes impact their clients' estate planning needs and wishes. The modern family may include children from assisted reproductive technologies with donor gametes, children from first and second (and subsequent) relationships, multiple ex-spouses, and/or nonmarital partners. Estate planning professionals should be sensitive to these multitude of changes when working with clients. Moreover, to ensure that planning documents are responsive to the evolving family structures and the many anticipated future changes, should build in flexibility.

ADDENDUM: SAMPLE TRUST LANGUAGE

A. Distribution Standards

B. Trustee Succession Plan

C. Dividend Trusteeship/Directed Trusts

D. Granting Broad Special Powers of Appointment

E. Method of Exercise of Powers of Appointment

F. Power to Create Testamentary General Power of Appointment

G. Trust Protectors

H. Decanting

I. Grantor Trust Power to Substitute

J. Grantor Trust Power to Borrow

K. Grantor Trust Power to Add Charitable Beneficiaries

L. Grantor Trust Provisions

M. Funding Formulas

N. Digital Assets

O. Definition of Descendants

P. Expanded Definition of Spouse

A. Distribution Standards

For Family Trust or Other Spousal Lifetime Access Trust:

The trustee shall distribute to any one or more of my spouse and my descendants living at the time of the distribution as much of the net income and principal of the trust, even to the extent of exhausting principal, as the trustee determines from time to time to be required for their respective health, support, and education, and as the independent trustee, if any, believes to be desirable from time to time for their respective best interests; provided, however, that: (1) the trustee shall add any undistributed net income to principal from time to time, as the trustee determines; (2) my primary concern during the life of my spouse is for the health and support of my spouse, and the trustee shall not make a distribution to any other beneficiary under this paragraph if the trustee believes it may jeopardize the trustee's ability to make such distributions to my spouse in the future; (3) to the extent that the trustee believes it advisable, the trustee shall not distribute principal of the Family Trust to my spouse as long as any principal remains in the Marital Trust; (4) no distribution made under this paragraph to a descendant of mine shall be charged as an advancement; and (5) the trustee may make unequal distributions to the beneficiaries or may at any time make a distribution to fewer than all of them, and shall have no duty to equalize those distributions. The term "trustee" and any pronoun referring to that term designate the trustee or trustees at any time acting hereunder, regardless of number or gender, and the term "independent trustee" means a trustee who is not a beneficiary of the trust or a related or subordinate party, as defined in Section 672(c) of the Code, with respect to any beneficiary of the trust. The term "trustee" includes the term "independent trustee."

For Child's Trust:

If the child for whom the trust is named is living on the division date, then commencing as of the division date and during the life of that child, the trustee shall distribute to the child as much of the net income and principal, even to the extent of exhausting principal, as the trustee in the trustee's sole and absolute discretion believes to be desirable for the best interests of the child, without regard to the interest of any other beneficiary; provided, however, that if the trustee is not an independent trustee, then the distributions shall be limited to those that the trustee determines to be required for the health, support and education of the child. The trustee shall add any undistributed net income to principal from time to time, as the trustee determines.

B. Trustee Succession Plan

The Trustee Appointer may appoint any one or more Qualified Appointees as additional or successor trustees, Trustee Appointers or Trustee Removers. Any appointment of an additional or successor fiduciary hereunder shall be in writing, may be made to become effective at any time or upon any event, may be for a specified period or indefinitely, may be for limited or general purposes and responsibilities, and may be single, joint or successive, all as specified in the instrument of appointment. The Trustee Appointer acting from time to time may revoke any such appointment made by that Trustee Appointer before it is accepted by the appointee, may revoke or supersede an appointment by a previous Trustee Appointer that has not been accepted by the appointee unless the previous Trustee

Appointer's instrument of appointment specifies otherwise, and may supersede the appointments otherwise made in this Article. If two or more instruments of appointment or revocation by the same Trustee Appointer exist and are inconsistent, the latest by date shall control. The Trustee Appointer shall act only in a fiduciary capacity in the best interests of all trust beneficiaries. For purposes of this instrument: (1) the Trustee Appointer means my spouse, if not disabled, otherwise the beneficiary for whom the trust is named (the "Named Beneficiary") if any, or if none, the beneficiaries to whom the current trust income may or must then be distributed by majority; and (2) a Qualified Appointee means any person who has attained the age of ____ years, or any bank or trust company, within or outside the State of ___________.

C. Dividend Trusteeship/Directed Trust

The Trustee Appointer acting from time to time may appoint one or more Qualified Appointees as Investment Direction Advisor of the trust pursuant to paragraph [-] of the Trustee Provisions of this instrument. Despite the general powers of the trustee, the following provisions shall apply, where the context admits, to each trust from time to time held hereunder, during any period in which an investment advisor shall be acting:

1. The trustee shall follow the written directions of the Investment Advisor with respect to the purchase, sale, retention, or encumbrance of trust principal and the investment and reinvestment of funds held hereunder and shall have no duty to review or monitor trust investments.

2. The trustee shall issue proxies to vote all securities held by the trustee to or on the written order of the investment advisor, and the trustee shall not thereafter be liable for the manner in which those securities are voted, for any direct or indirect result of that voting, or for any failure to vote those securities.

3. No trustee shall be accountable for any loss or diminution in value sustained by reason of following a direction by the Investment Advisor or from failing to take an action with respect to trust principal in the absence of a direction from the investment advisor pursuant to the preceding provisions of this paragraph, and no person dealing with the trustee shall be required or privileged to inquire whether there has been compliance with those provisions.

4. Any Investment Advisor acting hereunder may resign at any time, and from time to time may waive for limited periods of time or delegate to any other person (including the trustee with the trustee's consent) any or all of his or her rights under this paragraph, by written notice delivered to the trustee. In the case of any such delegation, the person to whom rights and powers are delegated may take any action or make any decision for the investment advisor making that delegation, within the scope of the delegated rights and powers, with the same effect as if the investment advisor making that delegation had participated in that action or decision.

5. The rights and powers herein conferred on the Investment Advisor shall be exercisable only in a fiduciary capacity.

6. The term "investment advisor" means the person named or designated in the manner provided in this Article from time to time acting as investment direction advisor hereunder.

[Despite the preceding provisions of this Article, (i) if any person who at any time has made a gift or transfer to any trust held under this instrument is acting as investment advisor hereunder, such person shall not have the power to vote, or to direct the trustee to vote or give proxies to vote, shares of stock in any corporation which is a "controlled corporation," as defined in Section 2036(b) of the Code, with respect to that person, and (ii) no person shall act as investment advisor hereunder with respect to any insurance policy, or such policy's proceeds or avails, under which that person is an insured.]

D. Granting Broad Special Powers of Appointment

If the Primary Beneficiary is living on the creation of the trust, then at such time at or after the date of the creation of the trust as the Primary Beneficiary has reached the age of [30] years, the trustee shall also distribute to any one or more persons or organizations as much or all of the principal of the trust as the Primary Beneficiary may appoint either by will or from time to time by signed instruments delivered to the trustee during the Primary Beneficiary's life, which instruments shall specify whether such appointment is to be effective immediately, upon the Primary Beneficiary's death, or at some other time and shall be irrevocable unless made revocable by their terms. Notwithstanding the

foregoing, the Primary Beneficiary shall not have the power (i) to appoint any principal under this paragraph to the Primary Beneficiary, the Primary Beneficiary's estate, or the creditors of either, or (ii) to satisfy any legal obligation of the Primary Beneficiary, including any obligation to support or educate any person; provided, however, that the Primary Beneficiary may exercise this power to create a successor trust of which the Primary Beneficiary is a beneficiary as long as the Primary Beneficiary's beneficial interests in, and fiduciary and non-fiduciary powers over, that successor trust are no broader than the interests and powers of the named beneficiary in the trust named for the named beneficiary under this instrument.

E. Method of Exercise of Powers of Appointment

The trustee shall distribute any trust principal or net income as to which a power of appointment is exercised to the designated appointee or appointees (whether living at the time of exercise or thereafter born) upon such conditions and estates, in such manner (in trust or otherwise), with such powers, in such amounts or proportions, and at such time or times (but not beyond the period permitted by any applicable rule of law relating to perpetuities) as the holder of the power may specify in the instrument exercising the power. To be effective, the exercise of any power of appointment granted hereunder shall make specific reference to the provision creating the power. The donee of a power of appointment granted hereunder may provide that if no descendant of mine is living, then the property subject to that power may be distributed to one or more beneficiaries other than those set forth in the [Contingent Ultimate Disposition Provisions] of this instrument (excluding the donee, the donee's estate and the creditors of either) without violating the terms of that power. In determining whether a testamentary power of appointment has been exercised by will, the trustee, without liability (unless there is proof of bad faith), may rely on a will believed by the trustee to be the will of the holder of the power of appointment, assume that the holder left no will in the absence of actual knowledge of one within three months after the holder's death, or require that any will purporting to exercise a power be admitted to probate.

F. Power to Create Testamentary General Power of Appointment[26]

An independent trustee is authorized in its sole discretion with respect to all or any part of the principal of any trust created hereunder, by an instrument in writing, to:

1. create in a beneficiary a testamentary general power of appointment within the meaning of Section 2041 of the Code (including a power the exercise of which requires the consent of some other person other than any beneficiary or trustee);
2. limit a testamentary general power of appointment created under this paragraph, as to all or part of such principal at any time prior to the death of such beneficiary by narrowing the class to whom such beneficiary may appoint the property subject to such appointment, so as to convert such power into a special power of appointment;
3. eliminate such power for all or any part of such principal as to which such power was previously created at any time prior to the death of such beneficiary;
4. irrevocably release the right to limit or eliminate such power with respect to such trust; and
5. divide such beneficiary's share of such trust principal into two fractional shares based upon the portion of such beneficiary's share of such trust that would be then includible in the gross estate of such beneficiary holding such power if he or she died immediately before such division (in which case the power shall be over the entire principal of one share which has an inclusion ratio of one and over no part of the other share which has an inclusion ratio of zero), including through effecting a qualified severance (as defined in Section 2642(a)(3) of the Code), and each such share shall be administered as a separate trust unless the trustee, in the trustee's sole discretion, thereafter directs the trustee of the trusts to combine such separate trusts into a single trust which the trustee is hereby authorized to do.

In granting such power to the independent trustee, it is my desire, which is not binding on the independent trustee, that a testamentary general power of appointment be created when the independent trustee believes the inclusion of the property subject thereto in the beneficiary's gross estate may achieve a

significant savings in income taxes by subjecting such assets to an estate tax.

I hereby direct that the independent trustee's decisions under this Article shall be absolutely binding on all beneficiaries of the trust and of the estates of all such beneficiaries and that the independent trustee shall incur no liability by reason of any adverse consequences of such decisions to any beneficiary.

G. Trust Protectors

The Trustee Appointer may appoint any one or more individuals who would qualify as independent trustees and who are not then disabled as Trust Protector. Any appointment of a Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single, joint or successive, all as specified in the instrument of appointment. The Trustee Appointer may revoke any such appointment before it is accepted by the appointee. An appointment that has not been accepted by the appointee may be revoked by a subsequent Trustee Appointer unless the instrument of appointment specifies otherwise. In the event that two or more instruments of appointment or revocation by the same Trustee Appointer exist and are inconsistent, the latest by date shall control.

The Trust Protector may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee Appointer and any other Trust Protector then acting. No trust created under this instrument is required to have a Trust Protector, and all trusts created hereunder need not have or continue to have the same Trust Protector.

The Trust Protector, by written instrument delivered to the Trustee, may modify or amend the terms of the trust, as such terms apply to one or more of the trusts created hereunder, in order to achieve tax advantages or to preserve tax benefits otherwise available with respect to the trust, to convert a beneficiary's interest to a supplemental needs interest that would allow the trust (with respect to that beneficiary) to qualify as a trust for a disabled beneficiary under applicable law or to qualify as a "qualified disability trust" under Section 642 of the Code, or for any other reason that the Trust Protector believes to be necessary or desirable, and, if the instrument so provides, any such modification or amendment shall apply retroactively to the inception of the trust. The Trust Protector may convert a beneficiary's interest to a supplemental needs interest only if the Trust Protector believes that the conversion is necessary for the beneficiary to qualify for benefits from a federal, state or local government or agency thereof ("public benefits") and that the conversion is in the best interests of the beneficiary. The document implementing a conversion to a supplemental needs interest may provide for the possibility that the beneficiary's interest may be converted back to its original form hereunder if such a reconversion would be in the best interests of the beneficiary. Notwithstanding the foregoing, the Trust Protector may not make a modification or amendment that would (i) significantly change any beneficiary's beneficial interests under the trust, except if necessary and in a beneficiary's best interests to convert the beneficiary's interest to a supplemental needs interest to allow the beneficiary to qualify for public benefits, (ii) require any beneficiary to return to the trust amounts previously vested or distributed, (iii) modify the qualifications to act as Trust Protector, or (iv) change this sentence. For purposes of the preceding sentence, an amendment that changes the tax characteristics of the trust (including, but not limited to, an amendment that causes the trust to be or not to be a grantor trust or that grants or eliminates a general power of appointment) shall *not* be deemed a significant change in a beneficiary's beneficial interests. The term "supplemental needs interest" means the ability to receive distributions for the beneficiary's safety and welfare to the extent that such needs are not covered by public benefits that the beneficiary receives due to handicap, disability or financial need. Distributions made to a beneficiary with a supplemental needs interest may only be made to the extent that they supplement (and not supplant) the beneficiary's public benefits.

At any time when more than one person is acting as Trust Protector, the Trust Protectors must act unanimously.

The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector and shall be binding and conclusive on all persons. The

Trust Protector is not required to exercise any power or discretion granted under this instrument. Absent proof of bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise by the Trust Protector of the powers and discretions conferred under this instrument.

The Trust Protector acting from time to time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred on the Trust Protector under this instrument by a written instrument delivered to the trustee and the Trustee Appointer.

H. Decanting

The trustee shall have the power at any time and from time to time, in the sole and absolute discretion of the trustee, to distribute any portion or all of the principal of any trust held hereunder to the trustee of another trust under any other instrument, by whomever created, to the maximum extent permissible under applicable law. The trustee's exercise of the foregoing power need not comply with the requirements in [Section _____ of the _________Act], or any equivalent statute under the laws of the State whose laws then govern the administration of this trust, if such requirements are not otherwise mandatory for the exercise of the power under this paragraph. Notwithstanding the foregoing, if a beneficiary of the trust is acting as trustee hereunder, such beneficiary may exercise the power under this paragraph only to the extent that the beneficiary's beneficial interests in, and fiduciary and non-fiduciary powers over, the successor trust are no broader than the interests and powers of the beneficiary under this instrument.

I. Grantor Trust Power to Substitute

At any time during my life, I may reacquire any part or all of the trust principal by substituting other property of an equivalent value upon written notice to the trustee, which power shall be exercisable for my personal benefit in a nonfiduciary capacity and without the approval or consent of any person in a fiduciary capacity, subject to the requirement that property of an equivalent value be substituted. I may irrevocably release the power at any time by written instrument delivered to the trustee. A guardian, conservator or personal representative may exercise my rights under this paragraph on my behalf during any period in which I am disabled.

J. Grantor Trust Power to Borrow

Option 1: At any time during my life, the independent trustee may from time to time lend to me principal or income of the trust without security. The trustee may irrevocably release this power by written instrument filed with the trust records and delivered to me and the current income beneficiaries. Any release made under this paragraph shall bind all successor trustees.

Option 2: At any time during my life, I may borrow principal or income of the trust without security, but this shall not relieve the trustee of any fiduciary obligation with respect to the other terms of the loan, including the obligation to confirm that a promissory note or other evidence of indebtedness given to the trust is of sufficient value. I may irrevocably release the power granted to me in this paragraph at any time by written instrument delivered to the trustee. A guardian, conservator or personal representative may exercise my rights under this paragraph on my behalf during any period in which I am disabled.

K. Grantor Trust Power to Add Charitable Beneficiaries

During my lifetime, the independent trustee may add or delete any one or more charitable organizations as additional beneficiaries under paragraph [-] of this Article, and the trustee may distribute such amounts of income and principal to them, in such proportions, as the trustee believes to be desirable.

L. Grantor Trust Provisions [27]

Income Tax Reimbursement or Payment. If the Settlor is treated (under Subpart E, Part 1, Subchapter J, Chapter 1 of the Code) as the owner of all or part of any trust under this Agreement, the Trustees (other than a Trustee who is, with respect to the Settlor, a "related or subordinate party" within the meaning of Section 672(c) of the Code) may, in their absolute discretion, reimburse the Settlor for any amount of the Settlor's personal income tax liability that is attributable to the inclusion of such trust's income, capital gains, deductions and credits in the calculation of the Settlor's taxable income. The Trustees may pay the Settlor directly or may pay the reimbursement amount to an appropriate taxing authority on the Settlor's behalf, as they

see fit. No policy of insurance on the Settlor's life, if any is held in a trust from which the Settlor is reimbursed, nor its cash value nor the proceeds of any loan secured by an interest in the policy may be used to reimburse the Settlor or to pay an appropriate taxing authority on the Settlor's behalf.

M. Funding Formulas[28]

Credit Shelter Trust (Lower of Federal and State Estate Tax Exemptions) and QTIP-able Trust:

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "Family Trust"), (a) all property in the trust estate, if any, as to which a federal estate tax marital deduction would not be allowed if it were given outright to my spouse, and (b) after giving effect to (a), the largest amount, if any, that would not result in or increase either (i) federal estate tax or (ii) state death taxes based upon the state death tax credit being payable by reason of my death. In determining the amount, if any, the trustee shall assume that none of this Family Trust qualifies for a federal estate tax deduction and that the Marital Trust hereinafter established (including any part thereof disclaimed by my spouse or on my spouse's behalf) qualifies for the federal estate tax marital deduction. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have [survived me/predeceased me] if the order of our deaths cannot be proved.

Credit Shelter Trust (Greater of Federal and State Estate Tax Exemptions) and QTIP-able Trust:

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "Family Trust"), (a) all property in the trust estate, if any, as to which a federal estate tax marital deduction would not be allowed if it were given outright to my spouse, and (b) after giving effect to (a), the largest amount, if any, that would result in no federal estate tax (or the least possible federal estate tax) being payable by reason of my death. In determining the amount, if any, the trustee shall assume that none of this Family Trust qualifies for a federal estate tax deduction, and shall assume that the Marital Trust hereinafter established (including any part thereof disclaimed by my spouse or on my spouse's behalf) qualifies for the federal estate tax marital deduction. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have [survived me/predeceased me] if the order of our deaths cannot be proved.

Three-Trust Strategy:

6.1 Creation of Marital Share and Family Trust. After the payment of Estate Expenses, Federal Death Taxes and State Death Taxes pursuant to the previous provisions of Article V hereof, if the settlor's spouse survives the settlor, the Trustee shall divide the balance of the trust estate of the trust into fractional shares as follows:

(a) Creation of Marital Share. If the settlor's spouse survives the settlor, the Trustee shall, as of the date of the settlor's death, set aside from the trust estate a fraction of the "Qualified Property," as hereinafter defined, as a separate share (undiminished by any Federal Death Taxes and State Death Taxes to the extent possible) which shall be designated as the "Marital Share." The numerator of the fraction shall be that amount which when added to all marital deductions, if any, allowed for property or interests in property passing or which have passed to the settlor's spouse otherwise than by the terms of this Article, will equal the minimum marital deduction necessary so that the least possible Federal Death Taxes and State Death Taxes will be payable by the settlor's estate. The minimum marital deduction shall be determined after taking into account all credits and deductions allowed to the settlor's estate for federal estate tax purposes (other than the marital deduction); provided, however, that the credit or deduction for State Death Taxes shall only be considered to the extent the use of such credit or deduction does not increase the combined Federal Death Taxes and State Death Taxes payable by the settlor's estate. The denominator of the fraction shall be the federal estate tax value of all Qualified Property. The Marital Share shall be further divided between the "Federal QTIP Marital Trust" and the "State QTIP Marital Trust", as provided in Section 6.2 of this Article VI.

(b) Creation of Family Trust. The balance of the trust estate of the trust which shall not be allocable, distributable or payable pursuant to the foregoing provisions of this instrument shall be retained in trust by the Trustee as a separate trust, to be designated as the "Family Trust", and held, administered and distributed pursuant to the provisions of Article VII hereof.

6.2 Division of Marital Share Into Separate Marital Trusts.

(a) Creation of Federal QTIP Marital Trust. Upon creation of the Marital Share, the Trustee shall set aside as a separate trust, designated as the "Federal QTIP Marital Trust," a fraction of the trust estate allocated to the Marital Share, to be held, administered and distributed as hereinafter provided in this Article VI. The numerator of the fraction shall be that amount which when added to all marital deductions, if any, allowed for property or interests in property passing or which have passed to the settlor's spouse otherwise than by the terms of this Article, will equal the minimum marital deduction necessary so that the least possible federal estate tax will be payable by the settlor's estate. The minimum marital deduction shall be determined after taking into account all credits and deductions allowed to the settlor's estate for federal estate tax purposes (other than the marital deduction); provided, however, that the credit or deduction for State Death Taxes shall only be considered to the extent the use of such credit or deduction does not increase the combined Federal Death Taxes and State Death Taxes payable by the settlor's estate. The denominator of the fraction shall be the federal estate tax value of the Marital Share.

(b) Creation of State QTIP Marital Trust. All of the Marital Share not otherwise allocated to the Federal QTIP Marital Trust shall be allocated to a separate trust, which trust shall be designated as the "State QTIP Marital Trust", to be held, administered and distributed as hereinafter provided in this Article VI.

(c) Marital Trusts. The Federal QTIP Marital Trust and the State QTIP Marital Trust are hereinafter sometimes referred to individually as a "Marital Trust" and collectively as the "Marital Trusts."

QTIP-able Trust Approach:

If my spouse survives me, then upon my death the trustee shall set aside out of the trust estate, as a separate trust (herein referred to as the "QTIP Trust"), all property in the trust estate. I recognize that certain taxes and expenses may reduce the amount. For purposes of this instrument, my spouse shall be deemed to have [survived me/predeceased me] if the order of our deaths cannot be proved.

Disclaimer Approach:

If my spouse survives me, then upon my death the trustee shall distribute, outright and free of trust, all property in the trust estate. Any part of such distribution disclaimed by my spouse or on my spouse's behalf shall be added to or used to fund the Family Trust provided for herein, to be held and administered as a part thereof.

Clayton Election:

After first satisfying all of my just debts and approved claims against my estate, the expenses of the administration of my estate, and the payment of any specific devises contained in this trust agreement or under my will, if I am survived by my spouse, Trustee shall distribute the remaining trust property to the QTIP Marital Deduction Trust; provided, however, Trustee shall first distribute to the Family Trust any trust property that: (i) does not qualify for the federal estate tax marital deduction, or (ii) is excluded from inclusion in my gross estate for federal estate tax purposes, or (iii) is otherwise exempt from federal estate tax in the first instance. Only property that qualifies for the federal estate tax marital deduction shall be distributed to the QTIP Marital Deduction Trust. If an election is made to qualify a fractional or percentile portion (but not all) of the QTIP Marital Trust for the federal estate tax marital deduction under IRC Section 2056 (b)(7), I give to the QTIP Marital Deduction Trust only that fractional or percentage share of the QTIP Marital Deduction Trust as to which my fiduciary shall make the QTIP election under IRC Section 2056 (b)(7). That portion of the QTIP Marital Deduction Trust as to which my fiduciary shall not make the IRC Section 2056 (b)(7) QTIP marital deduction election shall be distributed to the Family Trust to be administered, distributed and disposed of under the terms of that trust. If I am not survived by my spouse, Trustee shall instead distribute the remaining trust property to the Family Trust.

Disclaimer/Clayton Alternative: [29]

"Family Trust. If the settlor's [SPOUSE] survives the settlor, the trustee shall, following the death of the settlor, set apart out of the trust estate and hold the following-described property as the principal of a separate trust for the primary benefit of the settlor's [SPOUSE] (which is referred to in this declaration as the Family Trust):

(1) if the Federal estate tax is applicable to the settlor's estate, and if the settlor's personal representative does not make the Election as to any portion of the

Residuary Trust Estate, such portion or all of the Residuary Trust Estate as to which the Election is not made; and

(2) if the settlor's [SPOUSE] makes a qualified disclaimer, (within the meaning of Section 2518 of the Internal Revenue Code) and/or a disclaimer under applicable State law (which disclaimer, in either case, is referred to in this Article as the "Disclaimer") with respect to any portion or all of the Marital Trust, such portion or all of the Marital Trust as to which the Disclaimer is made."

"Disclaimer by the Settlor's [SPOUSE]. If the settlor's [SPOUSE] (or the settlor's [SPOUSE]'s legal representative or agent acting under a duly executed power of attorney) makes a qualified disclaimer (within the meaning of Section 2518 of the Internal Revenue Code) and/or a disclaimer under applicable State law of all or a specific portion of the Marital Trust, the property comprising the portion (or all) of the Marital Trust as to which the settlor's [SPOUSE] makes such disclaimer shall be added to and dealt with as part of the Family Trust under Article II or, if the Family Trust is not in existence, as the initial principal of the Family Trust under Article II; provided, however, that, in either case, the settlor's [SPOUSE] shall have no power of appointment under Subdivision (B) of Article II, whether exercisable by written instrument executed during the settlor's [SPOUSE]'s life or by the settlor's [SPOUSE]'s last will, with respect to the property so disclaimed."

N. Digital Assets

[My executor/the trustee] shall have the power to access, control, handle, conduct, continue, distribute, dispose of, or terminate my digital assets, digital accounts and loyalty programs. The term "digital assets" means, but is not limited to, all digital files, including emails, documents, images, audio, video and similar files stored on digital devices, including, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored. The term "digital accounts" means, but is not limited to, email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs and other online accounts. The term "loyalty programs" refers to all frequent flyer programs and similar award programs.

O. Definition of Descendants

In determining who is a descendant of mine or of any other person:

1. Legal adoption before the adopted person reached the age of twenty-one years, but not thereafter, shall be equivalent to blood relationship[, as long as the adoption was initiated before an adoptive parent's death and completed within __ months after the adoptive parent's death];

2. A person born out of lawful wedlock and those claiming through that person shall be considered to be descendants of (i) the natural mother and her ancestors, and (ii) if the natural father acknowledges paternity, the natural father and his ancestors, in each case unless a decree of adoption terminates such natural parent's parental rights;

3. A child born as a result of assisted reproductive technology shall be considered a child of the individual whose status as such child's parent determines whether such child becomes a beneficiary under this instrument. An individual shall be considered the natural parent of a child:

   a. If such child was conceived using (a) such individual's ovum or sperm and the ovum or sperm of such individual's spouse, (b) such individual's ovum or sperm and the ovum or sperm of a donor other than such individual's spouse [or partner], or (c) the ovum or sperm of a donor and the ovum or sperm of such individual's spouse [or partner, if such spouse or partner provided a signed, written acknowledgment that he or she is an intended parent of the child]; [or if the individual is an intended parent of such child under a written agreement with a gestational carrier, regardless of the enforceability of that agreement;]

   b. Regardless of whether such ovum was fertilized *in utero*;

   c. Regardless of whether the child was carried to term by such individual, such individual's spouse, or any other person; and

d. Regardless of whether such child has been legally adopted by such individual if such adoption is required under applicable law at the time of such child's birth to establish that such individual is such child's parent;

4. Any individual who may be considered a natural parent of a child solely because of having donated ovum or sperm or having acted as a surrogate mother and who would not otherwise be a beneficiary under this instrument, and any other individual who is related to such individual by consanguinity or affinity, shall not be a beneficiary under this instrument; and

5. A genetic child of a parent who was deceased or disabled at the time of such individual's placement in gestation shall be deemed to be a descendant of such parent only if:

   a. such individual was born within [one / two / three] year[s] after such parent's death;

   b. such parent gave signed, written permission to the surviving parent to use his or her genetic material to place such individual in gestation after such parent's death or disability; and

   c. such deceased parent would have had legal rights and obligations as a parent of such child upon his or her birth under local law.

6. The term "partner" means an individual's companion in a marriage, civil union, domestic partnership, or substantially similar legal relationship with the individual.

P. Expanded Definition of Spouse

The "spouse" of any individual means the person, if any, who is married to, in a civil union with, or the registered domestic partner of that individual and not living separate and apart from that individual (other than for medical, business, or professional reasons), or who satisfied these requirements at that individual's death.

Notes

1 Unif. Trust Code § 404 (2000). (a "trust and its terms must be for the benefit of its beneficiaries."). For more on the benefit of the beneficiary rule, see Lee-ford Tritt, The History, Impact, and Future of the Benefit-of-the-Beneficiary Rule, Parts I & II, Est. Tax & Pers. Fin. Plan Update (Dec. 2014/Jan. 2015). Note that the Illinois Trust Code legislation excludes this language, which has been criticized by some. See, e.g., Daniel P. Felix, New Illinois Law Guarantees Your Trust a Flat Tire, LinkedIn (Oct. 18, 2017), https://www.linkedin.com/pulse/new-illinois-law-guarantees-your-trust-flat-tire-daniel-p-felix.

2 See Gary, Borison, Cahn, & Monopoli, *supra* note 49, Ch. 10.

3 IRC §§ 2041(b)(1)(A); 2514(c)(1).

4 Rev. Rul. 95–58, 1995–2 C.B. 1; But see Estate of Vak v. Comm'r, 973 F.2d 1409 (8th Cir. 1992); Estate of Wall v. Comm'r, 101 T.C. 300 (1993) (rejecting IRS limitation against appointing related or subordinate parties as successor trustees).

5 See Rollins v. Branch Banking and Trust Company of Virginia, 56 Va. Cir. 147 (2001) (Where the trust instrument gave the power to make investment decisions to the beneficiaries of the trust and stated the trustee could not be responsible for losses resulting from the retention of an investment. The court ruled in favor of the corporate trustee and cited the trust instrument and the state's directed trustee statute in ruling that "the beneficiaries, alone, had the power to make investment decisions" and that "the court cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made." However, the court refused to excuse the trustee from all fiduciary duties in the case and stated that the trustee cannot rid itself of its "duty to warn." In refusing to grant the trustee demurrer in the case, the court stated that a trustee has a duty to keep beneficiaries informed about the conditions of the trust and as to any subject matter or facts that a beneficiary may need to know to protect his/her interests. Rollins was settled out of court after the court refused to grant demurrer but prior to final determination of the merits of the case.)

6 760 ILCS § 5/16.1(f)(3) (2015).

7 See In re Peierls Family Inter Vivos Trusts, 77 A.3d 249 (Del. 2013), for the rule that absent language in a trust instrument restricting a change in the governing law or language indicating that the initial governing law shall always govern administration of the trust, changing the initial governing law of the trust is permitted.

8 See generally, Jonathan G. Blattmachr, Kim Kamin & Jeffrey Bergman, Estate Planning's Most Powerful Tool: Powers of Appointment Refreshed, Redefined, and Reexamined, 47 Real Prop., Tr. & Est. L.J., 3 (2013).

9 IRC § 2041(a)(2) (1976).

10 See, e.g., Michael A. Yuhas and Carl C. Radom, The New Estate Planning Frontier: Increasing Basis, 122 J. Taxation 1 (2015).

11 If a trustee is granted the power to confer a general power, then the trustee should be exculpated for liability for any decision to exercise or not exercise the power.

12 Please note that the amount of estate tax incurred will be dependent on a number of factors (e.g., elections made by the executor and administrative expenses incurred by the estate).

13 The Delaware tax trap is another way that a beneficiary may possess a general power of appointment. Under Section 2041(a)(3) of the Internal Revenue Code, a beneficiary is deemed to possess a general power of appointment when the beneficiary exercises a non-general power of appointment to create another power of appointment—which under

the applicable local law could be validly exercised so as to postpone the vesting of any estate or interest in such property for a period ascertainable without regard to the date of the creation of the first power. This provision has generally been interpreted to mean that a beneficiary who holds a special power of appointment will be subject to estate tax on the assets if he or she exercises the special power of appointment to create a new trust—the terms of which grant the beneficiary thereof a general power of appointment.

14 Schwartz v. Wellin, No. 2:13-cv-3595-DCN, 2014 WL 1572767 (D.S.C., Apr. 17, 2014) (where Trust Protector filed suit against trustees, suit was dismissed since the Trust Protector lacked standing as he was neither a trustee nor a beneficiary).

15 In Robert T. McLean Irrevocable Trust v. Ponder, 418 S.W.3d 482 (Mo. Ct. App. 2013), the court refused to hold the trust protector liable for failing to monitor the trustees or direct their activities. The court deferred to the trust instrument, which granted the trust protector the ability to remove and appoint trustees. The trust protector was granted no other powers. The court held that the trust protector's powers were limited by the trust instrument and no other powers were implied by law or the trust instrument.

16 See McLean, supra.

17 ULC, Legislative Fact Sheet — Trust Decanting (2018), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Decanting.

18 Hodges v. Johnson, 177 A.3d 86 (N.H. 2017) where the New Hampshire Supreme Court found that although the statute permits decanting to remove beneficial interests, the way in which it was accomplished violated the trustee's duty of impartiality.

19 See IRC §§671-679 and the regulations thereunder.

20 IRC § 675(4)(C) (1998).

21 This section on grantor trust reimbursements is drawn from Kim Kamin, Where are all the Grantor Trust Reimbursement Statutes?, Wealth Management (Jan. 16, 2018), http://www.wealthmanagement.com/estate-planning/where-are-all-grantor-trust-reimbursement-statutes.

22 35 Ill. Comp. Stat. Ann. 405/2 (LexisNexis 2018).

23 See Estate of Arthur M. Clayton, Jr. v. Comm'r, 976 F.2d 1486 (5th Cir. 1992); see also 26 CFR § 20.2056(b)-7(d)(3) (2004).

24 Typically, the non-elected portion will be allocated to a credit shelter trust that will provide for discretionary distributions of income and principal to the surviving spouse and/or the grantor's descendants.

25 26 U.S.C § 2056 (LexisNexis 2018).

26 Sample Language based on sample from Much Shelist, P.C. See Kim Kamin, Pamela Lucina and Kevin Noonan for the Illinois Institute of Continuing Legal Education 58th Annual Estate Planning Short Course, Modern Trust Drafting (2015).

27 Sample Language from Proskauer Rose LLP. See Kim Kamin, Where are all the Grantor Trust Reimbursement Statutes?, Wealth Management (Jan. 16, 2018), http://www.wealthmanagement.com/estate-planning/where-are-all-grantor-trust-reimbursement-statutes.

28 Except as otherwise indicated, the following Sample Language is all from Much Shelist, P.C. See Kim Kamin, Pamela Lucina and Kevin Noonan for the Illinois Institute of Continuing Legal Education 58th Annual Estate Planning Short Course, Modern Trust Drafting (2015).

29 From Diana S.C. Zeydel and Todd A. Flubacher, Care and Feeding of a Dynasty Trust: High Protein or Low Fat? (52nd Annual Heckerling Institute 2018) Chapter 3, pp. 82-83.