

The Crummey Money Family Trust

Prepared in the offices of:
Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102-6898
(817) 877-2800

By: _____
Noel C. Ice
(817) 877-2885
teleice@earthlink.net
www.Trusts&Estates.Net

THE CRUMMEY MONEY FAMILY TRUST

Multi-Generational Extended Annual Withdrawal Trusts
Married Maker, But No Marital Deduction Gift
No Formula Gifts

Trust is Irrevocable
Maker is Not a Beneficiary
Maker's Spouse Is a Beneficiary

PART I
PREAMBLE

This is a **Trust Agreement** entered into by and between the Maker of the trust, Lotta Money ("Maker"), and the trustee of the trust, Moore Money (initial "Trustee"). This trust instrument is divided into three main parts, identified as Parts I, II and III, respectively.

ARTICLE I
GENERAL OUTLINE OF TRUST PLAN¹

1.1 Identification of Initial Primary Beneficiary and Secondary Beneficiaries (Life Tenant and Contingent Remaindermen). The initial Primary Beneficiary of the trust (the life tenant) is **Moore Money**.²

The initial "**Secondary Beneficiaries**" (the remaindermen in default of the exercise of a power of appointment) are **Maker's descendants on a**

representational basis. A Secondary Beneficiary will become a Primary Beneficiary if living at the date of death of the prior Primary Beneficiary, in default of the exercise of any applicable power of appointment.

1.1A Establishment of Protected Trusts.³ A special Subtrust will be established for each Secondary Beneficiary living at the time of a contribution to the trust.⁴ During the initial primary term, the entire trust estate of each Subtrust will be held in trust (called a "Protected Trust") for the benefit of the Primary Beneficiary for life.

Each such Secondary Beneficiary may hereinafter sometimes be referred to as "the person on whose behalf the Subtrust was created" or the "person for whom the Subtrust was created" or similar designation. A Subtrust may sometimes be referred to as a Protected Subtrust or simply as a Protected Trust. Each such Protected Subtrust may be designated by the name of the person on whose behalf the Subtrust is created. Such a Subtrust may sometimes be referred to as a "**Descendant's Subtrust.**" Except as may be otherwise specifically provided, a Descendant's Subtrust may be held as a separate share or as a separate trust, in the discretion of the trustee. **Following the death of the Primary Beneficiary, each Subtrust is generally to be administered for the benefit of the Secondary Beneficiary on whose behalf the Subtrust was created, if living at that time.** (At which point the Secondary Beneficiary will become a Primary Beneficiary.)

At the time this trust is established, Maker has two living children and no child who is deceased leaving

¹This Article I could be dispensed with altogether, since it merely restates, in simple form, the terms of the larger trust document. However, despite the fact that it adds to the length of the document, I emphasize to my clients that most of what the trust does is set forth in this Article, and if the client can read and understand the general outline, she will basically understand what the instrument is all about. The intent is to reduce the substance of the trust to two or three pages, and to put it up front. The details are found later.

²This Article I could be dispensed with altogether, since it merely restates, in simple form, the terms of the larger trust document. However, despite the fact that it adds to the length of the document, I emphasize to my clients that most of what the trust does is set forth in this Article, and if the client can read and understand the general outline, she will basically understand what the instrument is all about. The intent is to reduce the substance of the trust to two or three pages, and to put it up front. The details are found later.

³What happens if one of several beneficiaries actually exercises a withdrawal power, or if the beneficiaries exercise withdrawal rights in differing proportions? By maintaining separate trust shares, a beneficiary can exercise a withdrawal right without prejudicing the other beneficiaries. This solves quite a few problems, but is not an easy concept to draft. This approach also accommodates unequal distributions among the beneficiaries, if the trust allows for it, without the same gift tax concerns that would be present in a group trust funded by lapsed withdrawal rights in excess of the 5&5 safe harbor.

⁴Note that we have preserved the possibility that the class of secondary beneficiaries will open. If the Settlor has more children, or if a child dies leaving descendants, this trust will accommodate the situation.

descendants now living. Accordingly, there will initially be two Descendant's Subtrusts.

1.2 Distributions. Each Subtrust is generally to be administered for the benefit of the one person who is at any particular point in time the Primary Beneficiary, for life. Distributions can only be made to a beneficiary to provide for the health, education, maintenance or support of the beneficiary, in the manner and subject to the terms described in greater detail later on in this document.

1.3 Trust is Irrevocable. This trust is not amendable and is irrevocable, except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust.

1.4 Power of Withdrawal. Certain beneficiaries have been given the power to withdraw contributions made to the trust, during the periods and in the manner and amounts described later on in this instrument. The persons having withdrawal rights (the withdrawal powerholders) are **Maker's Husband and each of the Maker's descendants on a representational basis.**

1.4A Trustee Will Not Accept Property In Which Spouse Has An Interest. The trustee will not accept community or separate property in which Maker's Husband has an interest. This trust will be funded solely with the separate property of Maker or with property of persons other than Maker's Husband.⁵ To reiterate, the trustee will have no power to accept community or separate property in which the Maker's Husband has any interest whatsoever at the time of contribution. Maker intends that the income from any such gift will not be community property.

1.5 First and Subsequent Divisions of Trust. Each Subtrust will be maintained, in undivided form, for the benefit of Moore Money so long as he is living. The first division of the Subtrust estate will take place on the later of (i) the death of Moore Money or (ii) the death of the person on whose behalf a Subtrust was created. The "initial primary term" refers to the period prior to the first division of

the trust estate of each Subtrust. In general, the trusts established under this instrument will continue in existence, in reconstituted form, from generation to generation, subject to the exercise of any powers of appointment and the Maximum Duration Rule, both of which are described in detail elsewhere in this instrument. Following the first and all subsequent divisions of the trust, the remaining trust estate will either be distributed to the new Primary Beneficiaries or held in further trust for them under the Protected Trust provisions of this instrument, subject to the Maximum Duration Rule and the prior exercise of any applicable powers of appointment.

1.6 Death of Primary Beneficiary. On the death of a Primary Beneficiary of a Protected Trust, other than Moore Money, and subject to the exercise of any applicable power of appointment and the Maximum Duration Rule, the trust estate of such Trust or Subtrust will be divided into shares, at least one share for each of the then living descendants, by right of representation, of the deceased Primary Beneficiary of the Trust or Subtrust. Each descendant's share will be held in a Protected Subtrust for the descendant. The administration and terms of Protected Trusts are described in detail later on.

1.6A The Primary Beneficiary of a Protected Trust May Appoint A New Trustee Upon Reaching 35 Years of Age. A person for whom a Descendant's Subtrust or a Protected Trust has been created, and who has attained 35 years of age or more, may remove or replace a trustee of that trust following the death of Maker's Husband.

1.7 Powers of Appointment.

(a) Primary Beneficiary of a Protected Trust Has Power of Appointment. Each Primary Beneficiary of a Protected Trust, and each beneficiary having a withdrawal power, has been given a power of appointment over the beneficiary's interest in the trust. Except in the case of Moore Money (the effect of whose failure to exercise his power of appointment is described below), if a power of appointment is not exercised, the beneficiary's interest that was subject to the power will generally pass to a Protected Trust for each of the beneficiary's descendants, by right of representation, living at the beneficiary's death.

(b) Possible Generation Skipping Tax Upon Exercise or Failure to Exercise Power of Appointment. Unless an allocation of the

⁵If the spouse is both beneficiary and grantor—as would be the case here if community property should find its way into the corpus—then, presumably, IRC §2036 would bring the property back into the spouse's estate at death, and this is to be avoided if at all possible.

Generation Skipping Transfer (GST) Tax Exemption to the entire trust has been made, it is possible, though not likely, that the failure to exercise a Nongeneral Power of Appointment may result in the imposition of a GST Tax. This rate is generally the highest federal estate tax rate (currently 55%). Therefore, there may be occasions where the holder of a Nongeneral Power of Appointment may wish to exercise the power in a manner that either avoids tax altogether, or that attracts an estate or gift tax (presumably at a lower rate) in lieu of the GST tax. The Nongeneral Powers have been drafted to permit this.⁶

(b-1) Exercise of Power of Appointment to Cause Estate Tax Inclusion. There is a special provision of the IRC (§2041(a)(3) flush language) that will cause property that is the subject of the exercise of a nongeneral power of appointment to be included in the power holder's estate if the power is exercised by creating another power which can be validly exercised to postpone the vesting of the property for a period that is ascertainable without regard to the date the first power was created. It is believed that this odd provision would be invoked if the holder of a power of appointment exercised it by giving a permissible beneficiary a lifetime presently exercisable general power of appointment (a PEG power). It is believed that the effect of exercising the first power would be to cause estate tax inclusion in the first power holder's estate, which, in turn, would cause the power holder to be treated as the transferor for generation skipping transfer (GST) tax purposes, the upshot of which is that if the PEG power is given to a person or persons no more than one generation below the holder of the first power, the granting of the PEG power will not be a generation skipping transfer, and if it were given to a person more than one generation below the holder of the first power it might be within the \$1 million GST tax exemption. The use of this technique might result in transfer tax savings if the estate tax paid as a result of the exercise of the power is less than 55% of the amount involved.

(c) Surviving Spouse Will Have a Nongeneral Power of Appointment Over Trust. This instrument grants Moore Money a Nongeneral Power of Appointment over this trust. Under this

⁶In those cases where a beneficiary has been given a nongeneral power of appointment, we will be relying upon the "Delaware Tax Trap" (IRC §2041(a)(3)) to avoid the GST.

power, Moore Money may designate who will receive an interest in the Trust and in what proportions and in what manner, as set forth more particularly later on in this instrument.⁷ In the absence of the exercise of this Nongeneral Power of Appointment, the remainder of the trust estate of each Subtrust existing at the time of Moore Money's death will pass to or for the benefit of the person on whose behalf the Subtrust was created, if then living, either outright or in trust, as set forth above.

1.8 The Details of the Trust Plan Are Set Forth Later. The foregoing is but a general outline of the trust plan, but it does describe Maker's general intent. The details are set forth below and elsewhere with particularity, and will control if more specific.

ARTICLE II BACKGROUND INFORMATION AND IDENTIFICATION OF MAKER AND BENEFICIARIES⁸

2.1 Identification of Maker. Lotta Money (Lotta) was named "Lotta B. Goode" at birth. Lotta Money is also known as B. Goode, Mrs. Lotta Money and Mrs. Moore Money. **Lotta Money** is the person establishing this trust with an initial contribution of property. Under this instrument the term "Maker" refers only to Lotta Money.⁹

Lotta Money is a domiciliary of Ripple County, Texas, presently residing at 2525 West L.A. Freeway, New Minglewood, TX 76999, (817) 999-9999. Her Texas domicile was established at birth. Lotta Money is a citizen of the United States. Lotta

⁷This particular feature adds a great deal of complexity to the drafting process, and for that and other reasons, is not to be routinely employed.

⁸Because the class of beneficiaries is the spouse and descendants by right of representation of the Settlor, and because the class is open, it is particularly important to identify these people.

⁹I identify the "Settlor" as "Maker" rather than as "Trustor," because the words Settlor and Trustor do not relate to anything with which a nonlawyer would be familiar. I believe that a nonlawyer would understand who made the trust before understanding who settled it or who is the trustor, but I could be wrong. I am still searching for a good word. Perhaps the best choice would be simply to use the Settlor's name. I tried "Creator" once, but in retrospect found it to sound somewhat pretentious, if not blasphemous.

Money was born on 10/1/29 in Crazy Fingers, Dark Star County, California. Her social security number is 007-999-9999. After death, Maker (Lotta Money) is sometimes referred to in this document as the Decedent.

Maker may sometimes be referred to in this instrument as "Wife," and Maker's husband may sometimes be referred to as "Husband."

2.2 Marital Status of Maker. Lotta Money is married to **Moore Money** (Moore). They were married on 1/1/50 in Shotgun Point, Terrapin Station County, Texas. Moore Money was named "Morris Edward Money" at birth. Moore Money is also known as Mo Money and M.E. Money. Moore Money was born on 10/1/29 in Desert City, Lion's Den County, Texas. His social security number is 009-999-9999. Moore Money is presently a domiciliary and resident of Ripple County, Texas. His Texas domicile was established at birth. Moore Money is a citizen of the United States. Maker has not been previously married to any other person.

2.3 Identification of Children. Lotta Money has two children now living, identified below:

E. C. Money (Cosmic Charlie)

Date of Birth: 1/2/1950

SSN: 999-99-9090

Faith N. Money (Faith)

Date of Birth: 1/2/1951

SSN: 999-99-9000

Lotta Money has no child now deceased leaving descendants now living.

2.4 Definition of the Word "Children" / Children Born or Adopted After Signing of Instrument. All references in this instrument to "Lotta Money's children," "Maker's children," "Maker's child," "a child of Maker," or similar designation, include the children identified as such by name above, and will also include any child or children hereafter born to or adopted by Maker, *and no others*. This Section is to be interpreted literally and strictly.

2.5 Identification of Descendants. All references in this instrument to "Maker's descendants" or to the descendants of a Maker include only Maker's children (as defined above) and their descendants and no others. This Section is to be interpreted literally and strictly.

ARTICLE III FIDUCIARY APPOINTMENTS

3.1 Appointment of Trustee. Moore Money is appointed as the trustee.¹⁰ If Moore Money fails or ceases to qualify, is incapacitated, or ceases to act, **Infidelity Trust** will be the trustee. If Moore Money and Infidelity Trust fail or cease to qualify, are incapacitated, or cease to act, **Faith N. Money (Faith)** will be the trustee.

3.2 Reliance By Third Parties. If a person identified by name above certifies in writing that that person is in fact the trustee or is duly authorized to take certain action with respect to the trust, any third party may conclusively rely on such certification and will be fully protected in doing so, even if the person claiming to be trustee has been removed, is otherwise not actually serving as trustee, or is not in fact authorized to take the specified action, and such third party will be under no duty whatsoever to investigate or look behind such certification, and the doctrine of constructive notice will not apply to defeat this protection. Further, *insofar as any third party is concerned*, (a) any co-trustee, acting alone, will have all of the powers of the trustee, as if the co-trustee were in fact the sole trustee, and (b) the acts of any co-trustee acting alone will be valid as if all had acted jointly, including the conveyance of real estate.

3.3 Co-Trustees/Resignation or Incapacity of Trustee.

(a) Failure of Co-Trustee to Serve. Co-trustees, if any, may sometimes be referred to collectively as the trustee. If one or more co-trustees, if any, fails to qualify, is incapacitated, dies or otherwise ceases to act, the remaining co-trustees or

¹⁰Note that we are pushing the envelope in the document in every way, for discussion purposes. The first question to ask is whether §2036 or §2041 applies to the spouse. The regulations provide that "for purposes of §§20.2041-1 to 20.2041-3, the term 'power of appointment' does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038. . . ." Treas. Reg. §20.2041-1(b)(2). We believe that a lapse of a power created by a third party is covered by §2041 rather than §2036; else, the property would always be includible in the estate of a powerholder who retains an interest in the trust.

trustee will serve as sole trustee or as the only co-trustees, as the case may be.

(b) **Resignation of Trustee.** Any trustee may resign by giving at least 60 days' written notice (unless that notice is waived by all persons entitled to it) to all beneficiaries and to any co-trustees under this instrument.

(c) **Trustees Need Not be the Same.** Any trustee may resign or decline to serve as trustee of any trust under this instrument, while nevertheless continuing or agreeing to serve as trustee of any other trust under this instrument. Thus, the trustees of any trusts established by this instrument need not necessarily be the same.

3.4 **Office of The Trust Protector.**

(a) **The Power of Removal and Replacement.** The Trust Protector of a trust **may remove or replace a trustee (or co-trustee)** of that trust, may appoint one or more successor trustees (or co-trustees) to that trust, and may also appoint one or more special trustees (or co-trustees) to act for any general, special or limited purpose under the trust (which purpose is otherwise permitted by the trust). (This power is sometimes referred to as a "Removal and Replacement Power.") As used in this Subsection, the word "trust" includes any Subtrust of the trust, and the power may be exercised with respect to all or less than all the Subtrusts that compose the trust within the scope of the power. A special purpose includes the appointment of a special trustee to exercise trust powers over certain assets of the trust (including a Subtrust), in which case those assets will be held as a Subtrust. Notwithstanding the foregoing, the Trust Protector may not exercise his office with respect to an insurance policy on the life of the Trust Protector, unless the Trust Protector has otherwise been granted a power over the trust that is expressly referred to and denominated in this instrument as a General Testamentary Power of Appointment or General Power of Appointment.

(b) **The Power to Direct Investments.** The Trust Protector has the power, in a fiduciary capacity, to direct the trustee with respect to the investment and re-investment of the trust estate, if and to the extent that the trustee elects to consent to such direction. The decision whether or not to consent to such direction will be made solely on the basis of the convenience of the trustee, and will not be a fiduciary decision, and the trustee will have no fiduciary duty to question the direction of the Trust

Protector regarding the Trust Protector's choice of investments. If and to the extent the trustee honors an investment direction of a Trust Protector, the trustee is expressly indemnified and relieved from all liability arising out of the direction.

(c) **The Power of Substitution.** The Trust Protector has the power to substitute and appoint a successor or substitute Trust Protector to exercise any powers the Trust Protector has or had. The prior exercise of a power of substitution will survive the death or incapacity of the appointing Trust Protector, unless otherwise limited, and may be exercised either jointly, successively or concurrently with the powers of the original Trust Protector. The person appointed substitute Trust Protector will have the same authority that the original Trust Protector had, including the power of further substitution (as if the substitute Trust Protector had been appointed under this instrument instead of the original Trust Protector), unless and except to the extent that such authority is specifically limited by the Trust Protector either before or after the appointment.

(d) **Power To Convert Nongeneral Power Into Testamentary General Power of Appointment.** The Trust Protector has the power to grant the sole Primary Beneficiary of any Protected Trust a General Testamentary Power of Appointment over such trust if (i) the trust has an inclusion ratio for GST tax purposes of greater than zero, (ii) the Trust Protector is **not** the beneficiary to whom the general power is granted, and (iii) the Trust Protector exercising the power is not a Grantor with respect to the trust. (A Trust Protector who does not have the necessary qualifications will be treated as incapacitated for purposes of this Subsection.) This power in the Trust Protector is a type of nongeneral power of appointment and is not a fiduciary power.

(e) **Identification of The Trust Protector.** The following persons will occupy the office of Trust Protector, in the following consecutive order of priority:

(1) A Maker's descendant for whom a Descendant's Subtrust has been created, and who has attained 35 years of age or more, will be the Trust Protector of that descendant's trust, following the death of Maker's Husband. A Maker's descendant who has attained 35 years of age may demand at any time that a separate share maintained for that descendant will be converted to a separate trust, following the death of Maker's Husband.

(2) Moore Money will be the Trust Protector. If Moore Money and any substitute should become deceased, disqualified, or otherwise incapacitated, and no substitute has been appointed who is then ready and able to serve, then **Infidelity Trust will be Trust Protector.**

If Infidelity Trust, and any substitute, should become deceased, disqualified, or otherwise incapacitated, and no substitute has been appointed who is then ready and able to serve, then **Faith N. Money (Faith)** may exercise the powers given Infidelity Trust under the preceding provisions of this numbered Paragraph.

(3) The parent or parents of a beneficiary of a Protected Trust may exercise the powers of Trust Protector with respect to the trustee of that trust. Unless otherwise limited by this instrument, this parent may appoint himself or herself as successor trustee or co-trustee. This Paragraph does not apply to Maker or to any other Grantor.

If there are two parents living, the Trust Protector will be the parent, if any, who is most closely related to Maker and who is a descendant of a grandparent of Maker, but if neither parent is within this degree of relationship, then the power must be exercised jointly by both parents. If there is no parent then living, the guardian of the person of the beneficiary will be the Trust Protector if that office would otherwise have belonged to the parent.

If there is only one parent living (or only one parent who is not incapacitated or otherwise disqualified), but that parent is not a descendant of a grandparent of Maker, that parent may not be Trust Protector under this Paragraph if the parent was married to a descendant of a grandparent of Maker, and if at the time of this descendant's death (or at the time the power would otherwise be exercised) there was (or is) pending, or in effect, a legal or equitable action for, or decree or order of, annulment, divorce, separation, or separate maintenance, between these parents.

The parent of a beneficiary of a Protected Trust who is most closely related to Maker (if any) and who is a descendant of a grandparent of Maker may, by instrument in writing, deny or limit the powers that the other parent of that beneficiary has under this Paragraph.

The instrument in writing exercising the powers

described in this Paragraph may be executed at any time after this instrument is signed, including a time which is before Maker's death, before this instrument is probated, or before the Protected Trust is funded or comes into being.

(4) Any trustee of a trust who has accepted its office may (so long as occupying the office) **exercise the powers of Trust Protector** with respect to such trust.

(5) If there comes a time when no one is able or willing to serve as trustee of a trust, and so long as no one having a Removal and Replacement Power exercises that power, a majority of the Primary Beneficiaries of that trust will have the power, for so long as the office of trustee is vacant, to appoint an alternate or successor. If these beneficiaries fail to act within that period, then, upon the request of any interested party, the presiding judge of the District Courts of Ripple County, Texas, acting as an individual and not in any judicial capacity, will have the power to appoint an alternate or successor.

(f) Exercise Of Power. The powers of a Trust Protector described in this Section (e.g., the Removal and Replacement power and power of substitution) may be exercised at any time, with or without cause, and without the necessity of any court proceeding, and may be exercised either immediately or upon any future contingency. A power of the Trust Protector is exercised by delivering to the trustee and each adult beneficiary of that trust written notice of the exercise of the power. On receipt of a successor trustee's acceptance of the trust, a trustee who has been removed will transfer the trust estate in its possession to the successor trustee. The holder of a Removal and Replacement Power will incur no liability to anyone (under any circumstances) for not exercising the power. Further, the holder of a Removal and Replacement Power will incur no liability for exercising the power unless done in bad faith; provided, however, that if the holder of the power is a beneficiary of the trust with respect to which the power is exercised, the power may only be exercised in a fiduciary capacity and will be subject to all the restrictions and limitations to which the trustee would be subject if the trustee possessed the power. Any appointment may be changed or revoked prior to the date it becomes effective.

(g) Resolving Conflicts. The powers of the Trust Protector described in this Section supersede or supplement the provisions of this Article that appoint the trustee and name successors, and govern

in case of conflict. In the event that different Paragraphs of the Subsection appointing the Trust Protectors conflict with one another, the power described first will be superior to a power described later. In other words, the order of priority will be in numerical order, such that the smaller the number the greater the relative power. For example, a power under Paragraph (1) of the Subsection will be superior to a power under Paragraph (2) or any other Paragraph. A power under Paragraph (3) would be inferior to a power under either Paragraph (1) or (2) and would be superior to all others. And so forth. In the event that different Paragraphs of the Subsection simultaneously appoint more than one person as Trust Protector of the same trust, each such person may nevertheless exercise the power, which exercise will be valid unless it is overridden by the conflicting exercise of a superior power. However, in the exercise of a power of the Trust Protector, the powerholder may specify the conditions under which an inferior powerholder can or cannot affect a power held by a superior powerholder. Except as otherwise provided, if more than one person has simultaneously or jointly been designated as Trust Protector of the same trust under the same Paragraph, the power must be exercised unanimously, unless one or more of them is incapacitated. If one or more of them is incapacitated, the remaining co-powerholders or powerholder will serve as the only powerholder or the only co-powerholders, as the case may be.

3.5 Who May Serve As Alternate Or Successor Trustee or Protector. Except as specifically provided to the contrary herein, and subject to the provision in Part II concerning control over insurance policies on the life of a trustee, which more specific provisions will control in case of conflict with this Section, **any alternate or successor trustee, or co-trustee or Protector, appointed under this Article, may be any individual, bank or trust company, and may be domiciled anywhere,** except that a Maker's descendant who has not attained 35 years of age may not serve as trustee, and if a Maker's descendant who has not attained 35 years of age has a Removal and Replacement Power, such power may not be exercised in favor of an individual unless the individual is older than 35 years and is a descendant of a great-grandparent of the descendant exercising the power.

3.5A Special Restrictions Applicable to

Grantors.¹¹ Notwithstanding the preceding Section or anything else herein to the contrary, it is provided, however, that no one may serve in any capacity as trustee or Protector of any trust with respect to which the person is a Grantor, *unless* the distributions to be determined by the trustee are clearly limited on the face of this instrument by an ascertainable standard relating to health, education, support or maintenance. Further, Maker may not serve as trustee or Protector under any circumstances, and no Grantor may serve as trustee or Protector with respect to a life insurance policy on such Grantor's life.¹² The foregoing restrictions do not apply to a person with respect to trust property over which the person has been granted a power under this instrument that is expressly referred to and denominated as a type of General Power of Appointment or General Testamentary Power of Appointment.

3.6 Disclaimer. If a beneficiary of any trust under this instrument makes a disclaimer, and if this beneficiary is a trustee under this instrument, this trustee will have no discretionary power to direct the enjoyment of the disclaimed interest or to allocate enjoyment of that interest among members of a designated class (unless this power is limited by an ascertainable standard in the manner permitted by Treasury Regulations under IRC §2518, including Treas. Reg. §25.2518-2(e)(1)(i)), but respecting the disclaimed property or interest in property, the then acting co-trustee will have the sole power to administer and distribute the disclaimed property. If there is no co-trustee then serving, Maker appoints the next successor trustee under this instrument to

¹¹Because this trust will be investing in life insurance on the life of the grantor, we must concern ourselves with IRC §2042, and because of the substantial likelihood that even a fiduciary power will be held an incident of ownership where the insurance was purchased with the grantor's property, this is not an appropriate trust for the grantor to serve as trustee. Otherwise, if we wanted to be brave, we could rely on case law that appears to imply an ascertainable standard exception to §2036, where the transferor is acting as a fiduciary for a third party beneficiary. See *Leopold v. U.S.*, 510 F. 2d 617 (9th Cir. 1975). If the grantor was to be trustee, and if the trust was not going to be invested in life insurance, then, to be on the safe side, the distribution standard would probably be mandatory ("shall" instead of "may"), with the fiduciary being required to consider other sources of support.

¹²In this case, we are supposing that the life insurance will be on the life of the Maker, not the beneficiary.

act as co-trustee for this purpose. Further, such disclaimant may not serve as trust protector with respect to such trust, unless the trustee's power over such trust is likewise limited by an ascertainable standard in the manner permitted by Treasury Regulations under IRC §2518, including Treas. Reg. §25.2518-2(e)(1)(i).

ARTICLE IV
IDENTIFICATION OF TRUST ESTATE AND
PRIMARY BENEFICIARIES¹³

4.1 Effective Date. This agreement will be effective on the date it has been signed by Lotta Money (the "effective date").

4.2 Name of Trust. The trust (including Subtrusts if any) initially established by this instrument (including Parts I, II and III and any schedules) will sometimes be known collectively as **The Crummey Money Family Trust**. This document may sometimes be referred to as "this instrument," "this agreement," the "trust agreement," or as the "trust instrument." The trustee may freely name or rename any trust or Subtrust under this instrument.

A special Subtrust will be established for each Secondary Beneficiary living at the time of a contribution to the trust. Each such beneficiary may be referred to as "the person on whose behalf the Subtrust was created" or the "person for whom the Subtrust was created" or similar designation. The Subtrust will sometimes be referred to as a Protected Subtrust or simply as a Protected Trust. Each Protected Subtrust may be designated by the name of the person on whose behalf the Subtrust is created. Such a Subtrust may sometimes be referred to as a "**Descendant's Subtrust.**" A Subtrust created for a person will sometimes be referred to herein as that person's Subtrust, even though Maker's Husband is initially the Primary Beneficiary.¹⁴

4.3 Transfer in Trust.

(a) Schedule A is a Document of Conveyance.

¹³The material in this Article was adumbrated in the General Explanation found in Article I.

¹⁴The awkwardness we are seeking to overcome arises from the fact that the spouse is a beneficiary of each trust whose initial funding is determined on a per stirpital basis.

The property **described in Schedule A**, if any, is hereby conveyed, transferred and delivered to the trustee, in trust, without consideration. Schedule A is attached as a part of this agreement and is a part of this trust instrument. This Schedule is incorporated in this instrument for all purposes the same as if fully set forth. The property described in the Schedule is not merely being described for illustration or to reflect an intent to transfer, but **is hereby transferred**. For this purpose, this agreement, including the attached Schedule, constitutes a **deed of gift**, effective immediately.

(b) Other Property to Be Transferred. Maker may transfer other property to the trust. This may be accomplished in any way that manifests Maker's intent to make the transfer, including (a) having the property titled or retitled in the name of the trust, (b) delivering the property to the trustee, (c) changing the name of an account (including a bank or brokerage account) to the name of the trust, or (d) opening an account in the name of the trust and transferring property into it.

(c) Trustee Will Not Accept Property In Which Spouse Has An Interest. The trustee will not accept community or separate property in which Maker's Husband has an interest at the time of the initial contribution. This trust will be funded solely with the separate property of Maker or with property of persons other than Maker's Husband. To reiterate, the trustee will have no power to accept community or separate property in which the Maker's Husband has any interest whatsoever at the time of contribution.¹⁵

4.4 Identification of Primary Beneficiary and Secondary Beneficiaries (Life Tenant and Remaindermen). The initial Primary Beneficiary (the life tenant) is Moore Money, if living at the time a contribution is made to the trust.

The initial Secondary Beneficiaries (the remaindermen in default of the exercise of a power of appointment) are **Maker's descendants on a representational basis**. A Secondary Beneficiary will become Primary Beneficiary if living at the death of the Primary Beneficiary.

4.5 Establishment of Separate Subtrusts. A

¹⁵The importance of this issue cannot be stressed enough, which is why I mention it again.

Subtrust will be created, established and maintained for each of **Maker's descendants on a representational basis** living at the time of a contribution to the trust. Except as may be otherwise specifically provided, a Subtrust may be held as a separate share or as a separate trust, in the discretion of the trustee. These Subtrusts may, but need not, be held in undivided interests. **Each Subtrust under this instrument will be held as a Protected Trust under the terms generally applicable to Protected Trusts, except where otherwise expressly provided.**

(a) **Initial Division of Trust.** Accordingly, this trust will initially be divided into as many equal Subtrusts as there are children of Maker's now living. One Subtrust will be established and maintained for each child.

At the time this trust is established, Maker has two children and no child now deceased leaving descendants now living. Therefore, there will initially be two Subtrusts. If Maker has more descendants, one or more of whom becomes entitled to a representative share, and if future contributions are made at that time, then a new Subtrust will be established with respect to each such additional descendant, by right of representation.

(b) **Allocation of Contributions to Subtrusts.** Contributions will be allocated to each Subtrust on a representational basis, determined at the time of the contribution. **To the extent that a withdrawal powerholder exercises a right of withdrawal, a commensurate charge will be made against such person's Subtrust, if and to the extent the powerholder is a Secondary Beneficiary of a Subtrust.**¹⁶

¹⁶Again, the separate share approach builds in a mechanism for imposing an appropriate charge on withdrawals, or for distributions to descendants, if they are permitted during the lifetime of the spouse. Without separate shares, one must consider whether or not a distribution constitutes a gift, and if so, by whom.

(c) **Illustration of Allocation of Contributions.** To partially illustrate the principle of representational division intended above, if Maker had two children living (and there were no descendants of any predeceased children), and if Maker contributed \$120 to this trust, then (unless otherwise indicated at the time of the contribution) \$60 would be allocated to a Subtrust for one child and \$60 to a Subtrust for the other child. If at a later date, one of the children had died, but that child had

Here, distributions to descendants are not permitted so long as the spouse is alive, and further, lapses are restricted to amounts falling within the 5&5 limit, so the gift issue is not so important. However, if distributions to descendants out of a group trust were permitted, we would have to carefully consider whether one descendant has made a completed gift upon a distribution to another descendant. Further, if the spouse is a trustee as well as a beneficiary, we should consider whether the spouse is making a gift of her life estate, when, as trustee, she makes a distribution to others—not that I admit that it would be a gift. The spouse, as trustee, could probably safely be given a spray power, as long as distributions were (as they are here) restricted to lapsed gifts that fall within the 5&5 safe harbor, and are subject to a nondiscretionary ascertainable standard; however, this is an issue I would prefer to avoid.

If you are reading this closely, you will have noticed that the spouse has a nongeneral power of appointment. This does not mean however, that it would be advisable to exercise it during life. Of course, the existence of the power does not create a problem under §2041 because the spouse cannot use the power to benefit herself or her estate. The problem with a lifetime exercise is that such exercise would be in derogation of her life estate.

Another approach, using a group trust without separate shares, would be to simply impose a charge against a beneficiary's presumptive share upon termination of the trust, in an amount equal to prior withdrawals and distributions, perhaps with an interest adjustment to reflect the time-value use of the withdrawals. This might be feasible if the withdrawal rights were limited to \$5000, but if a lapse is tied to the 5% figure, the amount lapsing cannot be determined until the time of the lapse, which complicates things further in a group trust. Finally, if the trust allows a lapse to exceed \$5000 or 5%, there is gift tax exposure to the powerholder to that extent. Unless a distribution is actually made to another beneficiary out of the lapsed excess, the gift can be made incomplete by the simple expedient of giving the powerholder a power of appointment over the lapsed amount. Treas. Reg. §§25.2511-2(b). However, this simple solution is not easily implemented if there is not a separate share or trust to which the power attaches. Contrariwise, a nongeneral power over a separate share is easy to retain and define.

two children then living (and no other children then deceased leaving descendants then living), then, if \$120 were contributed at that time (and unless otherwise indicated at the time of the contribution), \$60 would be allocated to a Subtrust for the surviving child, \$30 would be allocated to a Subtrust for one of the children of the predeceased child and \$30 would be allocated to the other child of the predeceased child. If in the first example, the first child elected to withdraw \$40 immediately following the contribution, then only \$20 would ultimately be allocated to that child's Subtrust.¹⁷

4.6 Duty of Trustee to Account For Separate and Community Property. If, for whatever reason, any portion of the trust estate (including the income from it) ever consists of community property of a beneficiary, then the trustee will not commingle the community property with the separate property in a way that changes the separate or community character of the property, or in a way that the separate or community character becomes difficult to distinguish or to account for. The trustee will account for separate and community property separately. Separate or community property of whatever character may be maintained in separate Subtrusts.

¹⁷This paragraph, while not necessary, does make the issue a little easier to understand.

ARTICLE V
DISTRIBUTIONS DURING PRIMARY TERM OF TRUST
Annual Withdrawal Trust¹⁸

5.1 Protected Trusts.

(a) **Initial Establishment.** This instrument initially establishes a Protected Subtrust for each of **Maker's descendants on a representational basis** living at the time of a contribution to the trust. These Subtrusts initially comprise the entire trust estate. Each Subtrust will be treated as a Protected Trust, except that it may be held as a substantially separate share, rather than as a separate and distinct trust, if otherwise permitted under this instrument.

(b) **Conditions For Later Establishment.** Subject to the Maximum Duration Rule, and except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of this instrument, a distribution upon termination of a trust, a distribution in default of the exercise of a power of appointment, and any other distribution that is not a facts and circumstances distribution, that is otherwise to be made to or for the benefit of an individual beneficiary, will not be made directly to the beneficiary, but instead will be made to (or continued to be held by) the trustee, in trust, of a separate and distinct trust (which trust will be known as a "Protected Trust") for that beneficiary.

(c) **Distributions from Protected Trusts.** During the term of each Protected Trust, the trustee **may** distribute to or for the benefit of the Primary Beneficiary so much of the trust income and principal as the trustee, **in its sole and uncontrolled discretion**, may judge to be necessary or reasonable to provide for the **health, education, maintenance or support of the beneficiary**. In making these distributions to a beneficiary, the trustee **may, but need not, consider all other sources of support** available. Unless otherwise specifically provided, **distributions from a Protected Trust cannot be made to or for the benefit of anyone other than the Primary Beneficiary so long as the Primary Beneficiary is living**. With respect to each trust, there generally should be only one person presently entitled, or in the trustee's discretion authorized, to receive distributions, unless an applicable power of appointment or withdrawal has been exercised to the contrary. Except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of this instrument, but notwithstanding anything else herein to the contrary, no distribution may be made from a Protected Trust that would discharge a legal obligation (including a legal obligation of support) of anyone other than the beneficiary.

It is the Maker's desire that the trustee be liberal in reimbursing a beneficiary's legal guardian (if the beneficiary is not a child of Maker's or Maker's spouse or if Maker is deceased) for all expenses reasonably or necessarily incurred in providing for the health, education, maintenance or support of the beneficiary, including, to the extent within the standard, travel and transportation expenses and an allowance for the reasonable rental value of housing, in order that the guardian will not be financially burdened by assuming the office of guardian.

5.1A Distributions of The Trust Estate to Spouse.¹⁹

¹⁸This Article V contains 98% of the provisions that are solely concerned with the withdrawal right and its consequences.

¹⁹Is this a grantor trust? If so, who is the grantor?

(a) **No Distributions To Be Made to Anyone Other than Maker's Husband During His Lifetime.** The initial Primary Beneficiary of each trust created during Maker's lifetime is Maker's Husband. The initial Secondary Beneficiaries are Maker's descendants on a representational basis, living at the time of a contribution to the trust. Except as provided by power of appointment or power of withdrawal expressly granted under this instrument, distributions cannot be made to anyone other than a Primary Beneficiary, so long as the Primary Beneficiary is living.

(b) **Distributions to Spouse Charged Against Subtrusts Proportionately.** Distributions to Moore Money will be made from or charged against each Subtrust proportionately, on a representational basis, solely on the basis of the relative principal values of the historic cumulative contributions allocated to the trusts, valued at the time of the contributions, regardless of subsequent withdrawals, distributions, income or loss. This means, for example, that so long as Maker's presently living children are all still living, and remain Maker's only children, distributions to Moore Money, will be charged against each Subtrust in the same proportions that a contribution to the trust would be credited if made at the same time.²⁰

(c) **Limitation On Power to Benefit Moore Money.** Notwithstanding anything else in this instrument to the contrary, no distribution will be made to Moore Money out of property with respect to which someone else (i) has a presently exercisable withdrawal power or (ii) had a withdrawal power that lapsed, to the extent the lapsed withdrawal power exceeded the 5 & 5 limit at the time of the lapse, if the withdrawal powerholder is still alive. (As a general rule, this instrument does not permit a withdrawal right to lapse in excess of the 5 & 5 limit, so long as the powerholder is still living.)²¹

677(a)(3) clearly says that "[t]he grantor shall be treated as the owner of any portion of a trust . . . , whose income . . . in the discretion of the grantor or a nonadverse party, or both, is, or . . . may be . . . applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse." Nevertheless, under the predecessor statute to 677, a bevy of cases held that the income must **actually** be so used before grantor trust treatment will obtain, and, even then, the grantor will be treated as the owner of only so much of the income as was so used. *Rand v. Comr.*, 40 B.T.A. 233 (1939), acq., 1939-2 C.B. 30, aff'd, 116 F.2d 929 (8th Cir. 1941), cert. denied, 313 U.S. 594 (1941); *Iversen v. Comr.*, 3 T.C. 756 (1944); *Weil v. Comr.*, 3 T.C. 579 (1944), acq., 1944 C.B. 29; and *Moore v. Comr.*, 39 B.T.A. 808 (1939), acq., 1939-2 C.B. 25; see also *Chandler v. Comr.*, 41 B.T.A. 165 (1940), aff'd on other grounds, 119 F.2d 623 (3d Cir. 1941); and *Garland Est. v. Comr.*, ¶ 43,339 P-H T.C. Memo (1943). *Cf.*, PLR 8839008 (payment of premium out of income creates grantor trust even where prohibited by trust instrument). I find this nothing short of incredible, if the cases are to be believed, and cannot help but wonder whether and when the same reasoning (or lack of it) will be applied to the other grantor trust triggers.

The issue is particularly important in the case of annual withdrawal life insurance trusts, because we really need to know who the grantor is, and determining whether and the extent to which 677(a)(3) is applicable is only the first step. The next question is whether the power holder is the grantor, and if so, for how long and to what extent, and whether or not 678 trumps 677.

Under IRC §678, each person having withdrawal rights probably ought to be treated as a grantor for income tax purposes, to the extent of the power, at least for so long as the power is outstanding and perhaps for good. However, if the donor's spouse is a beneficiary, §677(a)(1) mandates that the spouse be treated as the grantor. Further, §674 may mandate that the donor be treated as the grantor if a 674 power has been retained (accidentally or on purpose). **Which provision of the Internal Revenue Code trumps the other is unclear.**

PLR 9321050 clearly implies that the donor will be treated as the grantor, rather than the withdrawal power holder, if 677(a)(1) applies. This is not all bad, because at the present time it is arguable that paying someone else's taxes under this circumstance is not a gift subject to gift tax.

²⁰It is important that the trust document specify how distributions to Lotta are to be charged against the shares of the other powerholders, whose foregone withdrawals in large measure now fund Lotta's life estate. Any reasonable approach will do. But consider what happens if the class of children expands or contracts during the spouse's lifetime.

²¹In the Crummey trusts that I have reviewed, I seldom see this issue addressed, but it really is important. A withdrawal power over property that could be used for the benefit of someone other than the powerholder, while the power is otherwise outstanding, could very well be considered as illusory.

(d) **QTIP Trust Provisions Applicable During First Three Years.** If Moore Money outlives Maker, then notwithstanding any provisions in this instrument to the contrary, other than the immediately preceding Subsection, it is specially provided that if Maker dies within the three years following a contribution to the trust by Maker of a life insurance policy on Maker's life, the proceeds of the policy will be set aside in a special Marital Deduction Subtrust, and Moore Money will have a "qualifying income interest for life" in the Marital Deduction Subtrust.²² Notwithstanding anything else in this instrument to the contrary, no person will have a power to appoint any part of the proceeds of such policy to any person other than the Surviving Spouse during the lifetime of the spouse, and any Power of Appointment otherwise granted Moore Money over the proceeds will be a "testamentary" power only.²³

To the extent clearly consistent with the foregoing provisions of this Section, the Marital Deduction Subtrust will be administered and distributed in all other respects as otherwise would have been applicable in the absence of this Section.

5.2 **Withdrawal Rights.**

(a) **General Rule.** Subject to the following rules and limitations, **a person having withdrawal rights may withdraw property from the trust estate in an amount not exceeding the value (determined at the time of contribution) of any property contributed to the trust with respect to which the person's withdrawal rights have not lapsed.**

(b) **Assets Out of Which Withdrawal Right Can Be Satisfied.** The assets out of which or the proceeds of which a right of withdrawal may be satisfied include the property (or the proceeds of the property) that was contributed and that gave rise to the withdrawal right, and further include any other property (or the proceeds of property) in the trust estate of any trust created under this instrument.²⁴ (Whether the right is satisfied in cash or in other property of equivalent value at the date or dates of distribution is in the discretion of the trustee.)

(b-1) **Satisfaction of Withdrawal Right Out of Trust Other Than Trust To Which the Property Was Contributed.** If a right of withdrawal existing by virtue of a contribution of property has been satisfied out of a trust (including, as always, a Subtrust) other than the trust to which the contribution was made, the trust estate of the trust to which the contribution was made will immediately reimburse the trust out of which the withdrawal right was satisfied.

(c) **Who Has Withdrawal Rights.** The persons having withdrawal rights (the withdrawal powerholders) are **Maker's Husband and each of the Maker's descendants on a representational basis,** living at the time a

Further, as I have pointed out before, if a withdrawal right in excess of the 5&5 safe harbor has lapsed, a distribution to someone other than the powerholder will be a completed gift by the powerholder at the time of the distribution, if it was not a gift at the time of the lapse.

²²Although this may appear to be the shortest marital deduction provision on record, the truth is that the term "qualifying income interest for life" is intended to be defined in greater detail in Part II.

²³Overlooking this last sentence could have been fatal in this context, since the spouse otherwise has a power of appointment that is not so restricted, and which, if not so restricted, would keep the gift from qualifying for QTIP treatment.

²⁴Could we broaden the protection of 2514(e) by providing that the assets of every trust can be used to satisfy a demand right? The 5% figure protected by the statute is, in the words of the statute, cryptically defined as follows: "5 percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied."

particular contribution is made.²⁵

(d) **Value of Contribution.** The value of a contribution for purposes of measuring a withdrawal right will be determined at the time of the contribution unless otherwise specified.

(e) **Multiple Withdrawal Powerholders/ Amount Subject to Withdrawal.** If more than one person has a right of withdrawal with respect to a particular contribution, the value of each such person's right of withdrawal will be limited proportionately as follows:²⁶

Maker's Wife, if living, will have the sole withdrawal rights with respect to the first \$5000 in value of contributions made during a calendar year.²⁷ Next, to the extent that the contributions made during the year exceed in value the amount over which Maker's Wife has a right of withdrawal, then **the withdrawal powerholders who are Maker's Descendants will have a power to withdraw such excess value proportionately among themselves.**²⁸

Subject to any rules otherwise limiting the extent of a powerholder's withdrawal right, each descendant's proportionate part will be equal to the value of the contribution that would have been allocated to the Subtrust established for the powerholder if the powerholder had no power of withdrawal (not counting the value of the contribution over which Maker's Wife had a power of withdrawal).

For example, if \$14,000 were allocated to the trust, and if Maker had two children then living and one child then deceased leaving 2 children of the predeceased child then living (who are the predeceased child's only descendants), then Maker's Wife could withdraw \$5000, Maker's two children could each withdraw \$3000, and Maker's two grandchildren (the children of the predeceased child) could withdraw \$1500 apiece. If no one

²⁵It may be possible to give remote descendants (grandchildren whose parents are still alive) draw down powers too, but since both the spouse and the children have powers of appointment that could cut them off, there would be some risk that the Service would treat such withdrawal rights as illusory. Compare PLR 8727003 and 9045002 with PLR 9030005 and *Est. of Cristofani* 97 TC 5 (1991).

²⁶It is important to spell out just how these competing withdrawal rights interact. I have seen Crummey trusts that appeared to give everyone a withdrawal right over everything. If so interpreted, no one could be said to have a withdrawal power in all events, since its exercise would be contingent upon beating the other beneficiaries to the prize.

²⁷Now why would I do that? The reason is because I really do not want this trust to be includible in the spouse's estate for estate tax purposes, but I can live with inclusion in the estates of the younger generation. For this reason, I would ordinarily not give a spouse a hanging power, at least if I have other beneficiaries to take up the slack. The reason \$5000 is used instead of 5% of the amount subject to the power is that the latter amount cannot even be determined until it is supposed to lapse, which would make it difficult to apportion between the other powerholders who are also being given hanging powers.

The aggressive drafter may wish to consider giving the spouse a power over whatever is left after giving the other power holders \$10,000 each to withdraw. Query whether a marital deduction might be available in the case of a lapsing power over which the spouse has been given an unlimited power of appointment.

Consider the following clause: "If the value of the contributions exceeds any other limitation on the right of withdrawal applicable to persons other than Maker's «if GENDER="w"»Husband«else»Wife«endif», then Maker's «if GENDER="w"»Husband«else»Wife«endif» (unless otherwise restricted) may exercise withdrawal rights with respect to such excess." I do not recommend this clause to any but the sophisticated client, and then only when there is no other choice. Compare (a) Treas. Regs. §20.2056(b)-5(f)(8), §20.2056(b)-5(f)(6), last clause, §20.2056(b)-5(g)(1)(i), §20.2056(b)-5(g)(3) last sentence, §20.2056(b)-5(g)(5), last sentence, and §20.2056(b)-5(3), *McGehee v. Commissioner*, 260 F.2d 818 (5th Cir. 1958), *Estate of McCabe v. United States*, 475 F.2d 1142 (Ct. Cl. 1973), *Hoffman v. McGinnes*, 277 F.2d 598 (3rd Cir. 1960), and *Estate of Benjamin v. Commissioner*, 44 T.C. 598 (1965) with (b) *Estate of Mackie v. Commissioner*, 545 F.2d 883 (4th Cir. 1976), *Estate of Tompkins v. Commissioner*, 68 T.C. 912 (1977), *acq.*, 1982-1 C.B. 1; *Estate of Neugass v. Commissioner*, 555 F.2d 322 (2d Cir. 1977), *rev'g*, 65 T.C. 188 (1975); and Rev. Rul. 82-184, 1982 C.B. 215.

²⁸Is the meaning of the word "proportional" so clear that further explanation is simply superfluous?

exercised a withdrawal power, 1/3rd of \$14,000 would be allocated to a Descendant's Subtrust for the first child, 1/3rd to a Descendant's Subtrust for the second child, 1/6th to a Descendant's Subtrust for the first grandchild and 1/6th to a Descendant's Subtrust for the second grandchild. If the withdrawal power were fully exercised by Maker's Wife, and by no one else, \$9000 would be allocated to the Subtrusts in the same proportions and in accordance with their withdrawal rights, i.e., \$3000 to a Subtrust for each child and \$1500 to a Subtrust for each grandchild. If a descendant exercised a withdrawal right, the share of the \$9000 (\$3000 in the case of a child, and \$1500 in the case of a grandchild, under the facts given) that would otherwise be allocated to that Descendant's Subtrust would be reduced dollar for dollar by the value of the amount he elected to withdraw.²⁹

(f) **How To Exercise The Withdrawal Right.** A withdrawal right may only be exercised by a notarized written instrument, signed by the beneficiary, or his legal representative and delivered to the trustee, indicating the amount desired to be withdrawn. A beneficiary need not know of a contribution or of the amount of his withdrawal right in order to exercise the right, but may simply issue a blanket demand at any time for a distribution equal to the amount of the value of any withdrawal right that he may have at any point in time.³⁰

(g) **Trustee Will Maintain Sufficient Liquid Assets To Satisfy Demand Rights.** The trustee will, at all times while the demand right is outstanding and exercisable, retain sufficient funds and (or) transferable assets in the trust to satisfy the right of demand, should it be exercised. Should the trust contain insufficient liquid assets to satisfy a demand when made, the trustee will take whatever reasonable steps are necessary to assure that the demand right can be satisfied. Such steps may include borrowing (or receiving a commitment to loan) funds in order to satisfy the demand and will, if necessary, pledge trust property to secure it. A demand right may be satisfied by distribution of the proceeds of a life insurance policy, or, if the policy has value and is transferable, by a distribution of the policy itself. Furthermore, if a Grantor makes a contribution of property to the trust, and if the property is not sufficiently liquid to satisfy the withdrawal rights that some other person may have with respect to the property, then the Grantor (by making the contribution of the property to this trust) agrees and by signing this instrument legally commits to loan to the trust any funds necessary to satisfy the withdrawal rights arising by virtue of the contribution, although the trustee will not be limited to a Grantor as the source of any required loan.³¹

(h) **Distribution Following Exercise Of Withdrawal Right.** The trustee may satisfy the exercise of a withdrawal right by distribution of cash or other property, including insurance policies, within a reasonable period of time after delivery of the written instrument exercising the withdrawal right.

(i) **Exercise Of Withdrawal Right By Special Representative.** If the withdrawal right is possessed by a person who is legally incapacitated, that withdrawal right may be exercised for and on behalf of the incapacitated person by anyone having authority to act for and on behalf of the incapacitated person, including, but not limited to, a legal or natural guardian, or any other legal representative, including the holder of a valid power of attorney for the incapacitated person, and any of such persons (not necessarily exclusively) may receive notice for and on behalf of the incapacitated person, all without having to qualify before any court. In addition, any "Special Representative" of an incapacitated person may also make the withdrawal for and on behalf of the incapacitated person and may receive notice for and on behalf of the person, without having to qualify before any court. The following persons are all hereby severally designated to act as the Special Representative of an incapacitated

²⁹Once again we contemplate the opening and closing of the class, periodically. Incidentally, accounting for the fluctuating and differing interests of beneficiaries of separate share trusts is not that difficult. It is very similar to defined contribution plan end of year allocations. There are various approaches. One acceptable approach would be to (a) take the value of each beneficiary's share (account balances) as it existed on the last valuation date, (b) reduce such values by any distributions or withdrawals made during the year that are attributable to prior contributions, (c) credit income and loss among the accounts based upon the adjusted values, and (d) finally, credit each account with its proportionate share of any contributions made during the year, less withdrawals with respect to those contributions. The end result is next year's starting balance. Perhaps this should be spelled out, but I have never seen it done. Differences of opinion could arise regarding the fine points, such as whether share values should be reduced for withdrawals before or after income is credited.

³⁰This provision makes compliance with the notice provisions less crucial than would otherwise be the case.

³¹This provision and the subsection that follows are designed to add substance to the withdrawal right.

person: (a) the trustee, (b) a grandparent, child of a grandparent, and any adult sibling, of the incapacitated person, and (c) any other person hereafter designated by the trustee or Maker. Any person designated to act as the Special Representative may exercise a withdrawal right for and on behalf of a legally incapacitated powerholder, whether or not any other Special Representative agrees. Any distribution made for and on behalf of an incapacitated person, at the instigation of a Special Representative, will be made for the sole benefit of the incapacitated person in such form as is otherwise provided in the Facility of Payment provisions found in Part II. Each Grantor of property, with respect to which an incapacitated person has withdrawal rights, agrees to allow the appointment of a legal guardian who has the power to exercise those withdrawal rights for and on behalf of that person.³²

(j) **Notice of Withdrawal Right.** Each powerholder will be notified that this instrument grants the powerholder withdrawal rights that will lapse if not exercised and will further be notified of the manner in which and conditions under which the power may be exercised. If the powerholder is legally incapacitated, such notice will be given to as many Special Representatives as is reasonable in order for the withdrawal power to be meaningful; provided, however, that such notice will be given to at least one Special Representative (herein sometimes referred to as a “Qualified Special Representative”) who is **not**: (a) a person who has contributed property giving rise to a withdrawal right for and on behalf of an incapacitated person, or (b) a person who is or may be entitled to distributions from the trust to which the contribution is made.

The extent of the notice and the frequency with which additional notice is given will be whatever is reasonable and sufficient so that the powerholder or his Special Representatives could easily exercise the withdrawal power if in the least so inclined.³³ The sufficiency of the notice(s) will depend on the circumstances, including the length of the withdrawal period to which the right relates, the ease with which the right may be exercised, and the knowledge that is required in order for the withdrawal powerholder to effect the withdrawal. A Special Representative receiving such notice is a fiduciary with respect to the incapacitated powerholder with respect to the decision to exercise or not exercise the withdrawal power on the beneficiary’s behalf.

(k) **Limitations on Withdrawal Rights—Lapse of Withdrawal Right.**

(1) **Time In Which The Withdrawal Right Must Be Exercised.** *Subject to any limitations set forth elsewhere in this instrument,*³⁴ a right of withdrawal with respect to a contribution will **lapse** if not exercised by whichever of the following dates occurs first:

- (a) December 31 of the calendar year following the calendar year in which the contribution of the property with respect to which the size of the withdrawal right is measured was made;
- (b) sixty days after (i) a beneficiary who is not incapacitated, or (ii) a Qualified Special Representative, in the case of an incapacitated beneficiary, receives written notice of the right of withdrawal and the value of the contribution with respect to which the withdrawal right is measured;
- (c) the powerholder’s date of death;
- (d) in the case of Maker’s Husband, **such withdrawal right terminates no later than 60 days after the**

³²This is my own invention, and I have been told that it is overly conservative. However, I have tremendous concern where the natural guardian is a beneficiary whose interest will be directly reduced by exercising a draw down power in favor of a minor child. The Service, as we know, thinks a power is illusory if the guardian is the grantor. So much the more so, I would think, if the guardian is a beneficiary whose interest will be directly impinged by the exercise of the power.

³³I think that this is adequate, and is in fact better than spelling out specific procedures. The issue, after all, is not what the document says regarding notice, but whether, in fact, the beneficiary was possessed of sufficient information to be able to reasonably exercise his right of withdrawal.

³⁴Note this important proviso.

transfer to the trust.

Notwithstanding this general rule, for the first two calendar years of the trust that includes the effective date, the withdrawal right will lapse no later than 30 days after the date the contributions are made, provided that this special rule only applies to the first contributions made during the calendar year that do not exceed in value \$5000 times the number of withdrawal powerholders.³⁵

(2) **Withdrawal Right is Noncumulative.** Subject to any limitations set forth elsewhere in this instrument, the rights of withdrawal will be treated separately, and to the extent a right of withdrawal is not fully exercised within the time specified above, it will **lapse**. If a withdrawal right lapses, any additional withdrawal rights thereafter accruing as a result of additional contributions will not exceed the value of the future contributions at the time of contribution.

(3A) **Withdrawal Power of Spouse Limited to \$5000.** Further, Maker's Husband's withdrawal power will not exceed \$5000 in value with respect to contributions made by Maker during any calendar year.³⁶

(4) **Limitation On Amount Lapsing To Greater of \$5000 or 5% of the Trust Estate Determined at Time of Lapse.** Notwithstanding the above, the aggregate withdrawal rights or additional withdrawal rights **lapsing** during any calendar year, during the lifetime of the powerholder, **may not at any time exceed in value the greater of (a) \$5000 or (b) 5% of the aggregate value of the assets** out of which or the proceeds of which the exercise of the power of withdrawal could be satisfied, **determined at the time of the lapse**³⁷ (or determined at the time the lapse would otherwise have occurred but for this Paragraph), reduced by all prior lapses with respect to that withdrawal powerholder during the same calendar year.* The limit on the amount that can lapse at any time may sometimes be referred to as the **5 & 5 limit**.** In applying and interpreting the 5 & 5 limit, the trustee, to the best of its ability, will be guided by Maker's intent that a lapse of a power of appointment during the life of the

³⁵I have found that the trust is often formed about the time the premium payment is due "because in another 30 days the commitment will lapse." You have heard it all before. My preference, of course, is to have a healthy amount of cash in the trust well in advance of the premium payment due date, so that the withdrawal powers can have easily lapsed prior to using the contribution to pay the premium.

³⁶This limitation is for the reasons previously indicated. Some inconvenience may be reasonable to avoid inclusion of life insurance proceeds in the surviving spouse's estate.

³⁷It is important in this context to fully appreciate the difference between the size of a withdrawal right and the size of the amount that lapses during the year. In order to come within the statute, the 5% test is measured **at the time of the lapse, NOT** at the time of the gift. This makes for some difficulties. I have seen 5% withdrawal powers that were measured at the time of the gift, and this can only achieve an approximate result at best, if the intent is to avoid having a lapse treated as a release and therefore as a gift.

Also, note that a real release, such as a waiver of the right to withdraw that takes place prior to the scheduled lapse, may not be protected by the 5&5 exception. A lapse is treated as a release unless it is protected. If there is no lapse, the 5&5 rule may not be applicable.

* Note that the 5 & 5 limit is with respect to the power holder, not the transferor. Therefore, each power holder is only entitled to exclude one \$5000 (or 5%) lapse per year, no matter how many different transferors or trusts provide for lapses of withdrawal rights. This instrument sets the size of the lapse after first "taking into account all prior lapses with respect to that withdrawal powerholder during the same calendar year," and this may obviate the problem. If the instrument is not drawn in this fashion, then the 5&5 limit may be exceeded, if there are other lapses under other instruments during the year. See Rev. Rul. 85-88, 1985-2 C.B. 201.

** The Service, as we know, does not approve of hanging powers. PLR 8901004.

powerholder will not be considered a release under IRC §2514(e) or §2041(b)(2).³⁸ Any withdrawal rights outstanding at the date of death of the powerholder will lapse at that time, whether or not they would otherwise have lapsed under the preceding rules of this Subsection.

A withdrawal right that has not been exercised and that is otherwise scheduled to lapse, but that does not lapse because of the 5 & 5 limit, will lapse on the second day of the next calendar year, to the extent that the 5 & 5 limit is not exceeded at that time. So long as the trust has not terminated, this process will continue from year to year to the extent any withdrawal rights remain, until all of the beneficiary's withdrawal rights lapse or until the beneficiary dies, whichever first occurs.

(I) **Reference to Power of Appointment Does Not Include Withdrawal Right.** Any reference in this Article to a Power of Appointment (whether or not capitalized) will **not** be treated as a reference to or a limitation on a power of withdrawal otherwise expressly granted.³⁹

5.3 Portions of Trust Attributable to Different Transferors for GSTT Purposes.⁴⁰ In accordance with

³⁸It does not violate public policy to let the fiduciary know what sections of the IRC you are trying so assiduously to avoid. But I think it much better to state what we think the rule is—even if by stating it we only repeat the statute— than to say something like “to the extent that the withdrawal power would result in an estate or gift tax, it shall not exist.”

³⁹A withdrawal power is a power of appointment, so I really believe that this sentence is in order to avoid a construction question.

⁴⁰The basic concept behind the trust clauses in this and the next section were inspired by (stolen from, but substantially re-written) Barney Jones of Houston. The principal idea is that the primary beneficiary of a dynasty trust will have a nongeneral testamentary power unless a GST tax will be incurred at the power holder's death in the event that the power is not exercised, in which case the power holder will be given a general testamentary power. The general power is given only if the beneficiary is not the transferor for GST purposes, the trust has an inclusion ratio of over 3/4ths, and a generation skipping transfer will occur in the absence of the general power.

This is designed to operate as a **behind-the-scenes** fail safe for potential use only in those cases where it might subsequently turn out to be desirable to split a Crummey Trust and to include only a portion of the trust in the estate of the lower generation beneficiary. True, the provisions are complicated, but they don't necessarily need to be fully comprehended until the need arises for their employment. It seems to me that the alternatives of either leaving the issue up to the imagination, or simply giving the lower generation a blanket general power, will rarely be preferable; whereas, given these alternatives, I can see little harm in making an attempt at greater precision.

The other alternative, which was my mainstay until now, was to give a blanket nongeneral power to the beneficiary, relying on the Delaware Tax Trap to solve any potential GST problems. I still like this technique. However, the Delaware Tax Trap has problems of its own, not the least of which is that the technique does not work unless the beneficiary actually invokes the power during life. After death it's too late. I also occasionally give an unrelated trust protector a power to convert a nongeneral power to a general power. This, combined with the Delaware Tax Trap as an option has much to recommend it; but it too is a useless device unless it is recognized and invoked before the beneficiary has died.

The language developed above is primarily an alternative to simply giving the beneficiaries general powers. And the question is: does it hurt? If the attempt fails, will I be any worse off? Possibly I would in those cases where inclusion in the beneficiary's estate would be desirable for tax purposes, even though there would be no GST tax in any event. It is hard to imagine a case where inclusion of a GST exempt trust in the beneficiary's estate would be desirable, but if such a case is suspected, the Delaware Tax Trap is still available under my language, and offers a way out if the issue is spotted before death.

If the foregone alternative was to have given the beneficiary a blanket nongeneral power, it is remotely conceivable that I should find myself worse off by having forced a general power on the beneficiary, even though the general power is limited to those situations where a GST tax would have been incurred if a nongeneral power were not exercised. For example, my clause would give the beneficiary a GTPOA over property in a nonexempt trust that was to pass to grandchildren or nephews of the original grantor on the death of beneficiary/powerholder in default of the exercise of a POA. It is remotely conceivable that had the grantor's child and beneficiary been given instead only a NGTPOA, that power could have been used to appoint the trust estate to someone in the family who is not a skip person (e.g., a brother to the exclusion of a child of the power holder), postponing both GST and estate taxes. In such a case it would have been preferable, in hindsight, if the Delaware Tax Trap had been the sole remedy.

Does the technique complicate the administration of the trust? No more so than is otherwise the case, at least not during the lifetime of the Grantor and beneficiary, unless the *option* of splitting the trust is exercised, in the event that there is more than one transferor for GST purposes. At the beneficiary's death, someone will, perhaps for the first time, definitely have to figure out whether any of the trust is includable in the beneficiary's estate, but **if that is all that is involved, I suspect that the tax savings will often outweigh the cost of the effort since the issue will not arise at all unless a GST is involved.**

Note that I am not yet considering the case where a spouse is beneficiary. I believe that even if the spouse is a beneficiary, my approach is still sound, but would have to be tailored to make sense.

One advantage of my approach is that in most cases there will be little need for the lower generation beneficiary (LGB) to waste any GST allocation on the gift. You have undoubtedly heard it suggested by the commentators that both grantor and LGB ought to both utilize their respective GST exemptions if the Crummey trust is to be a GST dynasty trust. This does add to the complexity of administration, if true. I fear there is some issue here that I am not grasping.

It seems to me that the LGB will either be a "transferor" or won't be. The only way that an LGB could become a transferor (if not granted a blanket GTPOA) is (a) where the LGB dies holding a withdrawal right, and (b) where the LGB had a lapsed withdrawal right that exceeded the 5&5 limit.

If the LGB is not the transferor, a lifetime allocation by the LGB would be wasted, or possibly void under Treas. Reg. §26.2632-1(b)(2)(i), which provides:

Treas. Reg. §26.2632-1(b)(2)(i):

"An allocation of GST exemption to property transferred during the transferor's lifetime, other than in a direct skip, is made on Form 709. . . . Except as provided in 26.2642-3 (relating to charitable lead annuity trusts), **an allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust.** See 26.2642-1 for the definition of inclusion ratio. An allocation is also void if the allocation is made with respect to a trust that has no GST potential with respect to the transferor making the allocation, at the time of the allocation. For this purpose, a trust has GST potential even if the possibility of a GST is so remote as to be negligible."

If the LGB who is also a beneficiary becomes the transferor (e.g., as a result of a lapse in excess of 5&5 or death while holding a withdrawal power), **a life time allocation will be utterly useless: If the LGB is a transferor for GST purposes and is also a beneficiary, the property will be includable in the beneficiary's estate under 2041(a)(2), and if the property will be in the beneficiary's estate, the ETIP rules will prevent an effective allocation prior to death.**

Under the ETIP rules of Treas. Reg. §26.2632-1(c)(2)(A), "[a]n ETIP is the period during which, should death occur, the value of transferred property would be includible (other than by reason of section 2035) in the gross estate of —(A) the transferor . . ." If the LGB is a beneficiary who had actually made a transfer to the trust, the trust would surely be includable in the beneficiary's estate under §§2036-2038, and if so, is includable under §2041(a)(2) by virtue of the lapse:

Sec. 2041. Powers of appointment

(a) **In general.**--The value of the gross estate shall include the value of all property—

* * * *

(2) **Powers created after October 21, 1942.**--**To the extent of any property** with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or **with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includable in the decedent's gross estate under sections 2035 to 2038, inclusive.** For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

* * * *

(b) **Lapse of power.**--The lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power.

Treas. Reg. §26.2654-1(a)(2), if there is more than one transferor with respect to a trust for purposes of chapter 13 of the IRC—as there might be if (or to the extent that) the value of a lapsed withdrawal right exceeds the greater of (a) \$5000 or (b) 5% of the aggregate value of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could be satisfied, **which under the terms of this instrument ought not to happen, except, perhaps, on the death of a powerholder—, the portions of the trust attributable to the different transferors may be divided at any time** into separate trusts to reflect that treatment. The new trusts may be severed on a fractional basis. In accordance with Treas. Reg. §26.2654-1(b)(1)(ii)(C)(1), if the new trusts are severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a nonpro rata basis provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the date of death to the date of funding.⁴¹

Again, what am I missing? I must be missing something or knowledgeable commentators would not be suggesting the lifetime double allocation of the exemption. I realize also that in writing this letter I am inviting an answer that may prove embarrassing for not being obvious to me, but I am truly perplexed.

Perhaps the suggestion that is troubling me—i.e., having the LGB make a GST exemption allocation—is meant only to apply in those cases where both (a) the 5&5 limit is exceeded, (b) the power holder is not a primary beneficiary, and (c) there has been a completed gift. Even then, the allocation would only be of benefit if the property would pass to an LGB with respect to the power holder, which in most cases will be a fairly remote contingency.

Note that a GST allocation at death by the beneficiary is not precluded under the approach I am suggesting. True, at death the value of the trust would be greater than at the time the contribution was made, particularly if the trust is funded with insurance; but if a hanging power were used, and if the insured predeceased the beneficiary, the problem will likely cure itself within a couple of years. In any event, unless I am missing something, the ETIP rules would prevent an earlier allocation by a beneficiary from being effective. This is the real point. Again, maybe the commentators are only talking about power holders who are not beneficiaries and who have made completed gifts upon lapse of the power (e.g., a power holder who did not retain a special power of appointment). That is the only case I can think of where a lifetime allocation by a power holder might make sense.

Based on the above reasoning, 5.3 is the language I am now using in those cases where for simplicity's sake I might otherwise have given the beneficiary's a blanket GTPOA. (In other circumstances I am going to continue to use blanket nongeneral powers, coupled, perhaps, with giving an unrelated third party the power to convert a nongeneral into a general power.)

⁴¹This language tracks almost verbatim the regulation it cites. There is another regulation whose relationship to the one found in my language is not completely clear to me:

(i) In general. If a single trust consists **solely** of substantially separate and independent shares **for different beneficiaries**, the share attributable to each beneficiary (or group of beneficiaries) is treated as a separate trust for purposes of chapter 13. The phrase "substantially separate and independent shares" generally has the same meaning as provided in 1.663(c)-3 of this chapter. **However, a portion of a trust is not a separate share unless such share exists from and at all times after the creation of the trust. For purposes of this paragraph (a)(1), a trust is treated as created at the date of death of the grantor if the trust is includible in its entirety in the grantor's gross estate for Federal estate tax purposes.** Further, treatment of a single trust as separate trusts under this paragraph (a)(1) does not permit treatment of those portions as separate trusts for purposes of filing returns and payment of tax or for purposes of computing any other tax imposed under the Internal Revenue Code. Also, additions to, and distributions from, such trusts are allocated pro rata among the separate trusts, unless the governing instrument expressly provides otherwise. Treas. Reg. §26.2654-1(a)(1)(i).

But §26.2654-1(a)(2)(i) provides:

(i) In general. If there is more than one transferor with respect to a trust, **the portions of the trust attributable to the different transferors are treated as separate trusts** for purposes of chapter 13. Treatment of a single trust as separate trusts under this paragraph (a)(2) does not permit treatment of those portions as separate trusts for purposes of filing returns and payment of tax or for purposes of computing any other tax imposed under the Internal Revenue Code. Also, additions to, and distributions from, such trusts are allocated pro rata among the separate trusts unless otherwise expressly provided in the governing instrument.

I have to conclude that the rules described in Treas. Reg. §26.2654-1(a)(1)(i), and the rule described in §26.2654-1(a)(2)(i) address different situations and that the one does not trump the other.

5.4 Powers of Appointment.⁴²

(a) **Power of Appointment in Moore Money.** Moore Money will have a Nongeneral Power of Appointment over the property in each trust of which he is a Primary Beneficiary and with respect to which no one else has an existing withdrawal power. However, the class of beneficiaries eligible to benefit by the exercise of that power is limited to the descendants of a grandparent of a Maker or a spouse of such descendant.⁴³

(b) **Default in Exercise of Power of Appointment By Moore Money.** To the extent the Nongeneral Power of Appointment granted Moore Money is not effectively exercised, the person for whom a Subtrust has been created will become the Primary Beneficiary of the trust estate of such trust existing at the death of Moore Money, if living at that time, and will have such powers of appointment as described below. However, if the person for whom a Subtrust has been created is not living at the date of death of Moore Money, then, in default (in whole or in part) of the exercise of the Nongeneral Power of Appointment granted Moore Money, the undistributed trust estate of the trust existing at the death of Moore Money (with respect to which the power was not effectively exercised) will be subject to the secondary power of appointment described immediately below.⁴⁴

(c) **Power of Appointment in Secondary Beneficiary Who Becomes Or Would Have Become a Primary Beneficiary.** Except as otherwise provided below in this Section, the **Primary Beneficiary** of a Subtrust (other than Moore Money), and each Secondary Beneficiary on whose behalf a Subtrust was established during Moore Money's life (i.e., each withdrawal powerholder who is to become the Primary Beneficiary of such Subtrust on the death of Moore Money), **will have a Nongeneral Testamentary Power of Appointment** over the undistributed trust estate of such Subtrust existing at the date of death of such beneficiary.⁴⁵ Such beneficiary will be sometimes be referred to in this Section as the "**Testamentary Power Holder.**"

(1) **General Testamentary Power of Appointment Over GSTT Property.**⁴⁶ Notwithstanding the

Taking the language of Treas. Reg. §26.2654-1(a)(1)(i) and reading it with regard to §26.2654-1(a)(2)(i), I presume that even "[i]f a single trust [does **not**] consist **solely** of substantially separate and independent shares for **different** beneficiaries, the share attributable to each beneficiary (or group of beneficiaries) ~~is~~ [will nevertheless be] treated as a separate trust for purposes of chapter 13", if there are different transferors for GST purposes.

⁴²This part of the form is not entirely dependent upon the other provisions. The powers given could be varied according to taste and inclination, except that if the spouse is given a power, then careful coordination of the default provisions is required.

⁴³This is tricky. It complicates matters, and is not to be used routinely. However, there are certain advantages, since it allows the spouse to assess matters that may call for adjustment in the future. Of course, the grantor is out of the decision making process, even if he just might benefit.

⁴⁴Once people are given powers of appointment, care must be taken to cover a default in the exercise, which is, of course, the more likely contingency. All this makes for complicated drafting, because of the possibility of an unusual order of deaths, as the next two Subsections so aptly demonstrate.

⁴⁵Note that the Delaware Tax Trap is still an option here.

⁴⁶What is going on here is somewhat subtle, but it does make sense. We start with the notion that the beneficiary has a nongeneral power only, and then we pull back and give the beneficiary a general power in certain instances. First of all, if the beneficiary **is** the transferor for GST purposes, all the beneficiary has is a nongeneral power. Why? Why not? If property is in the beneficiary's estate anyway, there is no tax reason to give the beneficiary a general power. It would be overkill. Moreover, the nongeneral power is broad enough to satisfy most non tax concerns.

Now, it just so happens that the withdrawal rights under this trust will not lapse during life unless within the 5&5 limit. The powerholder cannot be a transferor for GST purposes with respect to lapsed 5&5 powers. But that does not mean that a GST cannot take place. On the contrary, it means that someone else, presumably in a higher generation, is the transferor for GST purposes. Therefore, if the powerholder is **not** the transferor for GST purposes, then the property will be placed in the powerholder's taxable estate by giving the powerholder a general testamentary power of appointment, *but only over GSTT* property in the trust; i.e., only over property that would attract a GST tax if the power holder failed to exercise a the power. Thus, in the typical case, if the property within the 5&5 exception would pass to the original transferor's grandchildren on default in the exercise of the power, the powerholder has a general power, but if the property would pass to the powerholder's sister, the powerholder will still only have a nongeneral power.

Except for the case of a so-called "reverse QTIP election" under IRC §2652(a)(3), "the individual with respect to whom property was most recently subject to Federal estate or gift tax is the transferor of that property for purposes of chapter 13 [i.e., the GST tax]." Prop. Treas. Reg. §26.2652-1(a). (Proposed 12/24/92). When property is first transferred to a Crummey Trust, the original donor is the most recent transfer.

The beneficiary will replace the original transferor and thus, become "the individual with respect to whom property was most recently subject to Federal estate or gift tax" *if and to the extent that the beneficiary has made a taxable gift as a result of a lapsed withdrawal right*. However, the beneficiary will not have made a transfer for estate or gift tax purposes if a lapse is protected by the 5 & 5 exception. Nor will the beneficiary have made a completed gift, so long as the beneficiary holds a nongeneral power. (So long as the beneficiary retains a nongeneral power of appointment, the gift will be incomplete, and the original grantor will remain the transferor for GST tax purposes. Treas. Reg. §25.2511-2(b).)

In order to insure a zero inclusion ratio with respect to the Estate Tax Exclusion Trust, it may therefore be necessary to allocate the exemption to the entire gift at the time of the gift. However, if the grantor is willing to wait until the withdrawal power lapses before making the allocation, then the transferor, one presumes, could avoid making an allocation with respect to any amount exceeding the 5&5 limit. As to the excess, the powerholder will, sooner or later, become the transferor for transfer tax—and hence, for GST tax— purposes.

The ETIP: Before concluding the discussion of the GST tax considerations, a word should be said about the "estate tax inclusion period" or ETIP. The GST exemption cannot be allocated until the close of the ETIP. IRC §2642(f) provides that if an individual makes a life time transfer of property, and if the value of the property would be includible in the gross estate of the transferor if the transferor died (other than by reason of IRC §2035), then "any allocation of GST exemption to such property shall not be made before the close of the estate tax inclusion period (and the value of such property shall be determined [at that time] . . ."

"The term 'estate tax inclusion period' means any period after the transfer described in paragraph (1) during which the value of the property involved in such transfer would be includible in the gross estate of the transferor under chapter 11 if he died." IRC §2642(f)(3). Under IRC §2642(f)(4), "**Except as provided in regulations, any reference in this subsection to an individual or transferor shall be treated as including a reference to the spouse of such individual or transferor.**" Thus, the GST exemption cannot be allocated during such time as the property would be includible in the estate of the transferor or spouse, if either were to die.

Note: Final GST Treas. Reg. §26.2632-1(c)(2) now defines the ETIP as follows:

(2) Estate tax inclusion period defined.

(i) In general. An ETIP is the period during which, should death occur, the value of transferred property would be includible (other than by reason of section 2035) in the gross estate of --

(A) The transferor; or

(B) **The spouse of the transferor.**

(ii) **Exceptions.**

(A) For purposes of paragraph (c)(2) of this section, the value of transferred property is not considered as being subject to inclusion in the gross estate of the transferor or the spouse of the transferor if the possibility that the property will be included is so remote as to be negligible. A possibility is so remote as to be negligible if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the property will be included in the gross estate.

preceding provisions of this Subsection, if the beneficiary (Testamentary Power Holder) of a “Separate Trust for GST Purposes” was **not** the “Transferor for GST Purposes”⁴⁷ of that trust immediately prior to the beneficiary’s death, then the beneficiary will have a **General Testamentary Power of Appointment over any “GSTT Property”** in the undistributed trust estate of such trust existing at the date of death of the beneficiary, **if** such trust had, immediately prior to the beneficiary’s death, an inclusion ratio for Federal Generation Skipping Transfer Tax purposes that was greater than three-fourths.

(1A) **Limitation on Exercise of Nongeneral Testamentary Power of Appointment.** Notwithstanding the preceding provisions of this Subsection, if a Secondary Beneficiary on whose behalf a Subtrust was established during Moore Money’s life is **not** the Transferor for GST Purposes of a Separate Trust for GST Purposes immediately prior to the beneficiary’s death, and if that beneficiary does not survive Moore Money, then any **Nongeneral** Testamentary Power of Appointment belonging to that beneficiary over that trust (and with respect to which the power in Moore Money was not effectively exercised) will be over only so much of the trust estate as exists at the death of Moore Money.

(2) **Definition of Transferor for GST Purposes.** The term “Transferor for GST Purposes” as used in this Section means a person who, under Chapter 13 of the IRC and the regulations thereunder, is either (a) the transferor of that trust or (b) is treated as the transferor. See IRC §2652(a).

(3) **Definition of Separate Trust for GST Purposes.** For purposes of this Section, the phrase “Separate Trust for GST Purposes,” means either (a) the entire trust estate, if there is only one Transferor for GST Purposes with respect to the trust, or (b) the portion of the trust estate that is treated as a separate trust for purposes of Chapter 13 of the IRC or Treas. Reg. §26.2654-1(a)(2) if there is more than one Transferor for GST Purposes with respect to the trust, as the case may be.

(4) **Definition of GSTT Property.** The term “GSTT Property” **means** property remaining in a trust at the date of the Testamentary Power Holder, if, under the facts fixed and existing at such date, a “generation skipping transfer” (within the meaning of IRC §2611 or Chapter 13 of the IRC) would have occurred (at and as a result of the Testamentary Power Holder’s death) with respect to such property if (i) the Testamentary Power Holder were the Primary Beneficiary of the Trust, (ii) Moore Money had predeceased the Testamentary Power Holder (in the case of a Testamentary Power Holder other than Moore Money) and (iii) the Testamentary Power Holder had died

(B) For purposes of paragraph (c)(2) of this section, the value of transferred property is not considered as being subject to inclusion in the gross estate of the spouse of the transferor, if the spouse possesses with respect to any transfer to the trust, a right to withdraw no more than the greater of \$5,000 or 5 percent of the trust corpus, and such withdrawal right terminates no later than 60 days after the transfer to the trust.

(C) The rules of this paragraph (c)(2) do not apply to qualified terminable interest property with respect to which the special election under §26.2652-2 has been made.

Now, we hope that we have succeeded in removing the property from both the estate of the transferor and the transferor’s spouse, if the transferor is the grantor. If the transferor is the beneficiary (because the withdrawal power exceeds 5&5 or exists at death, then, as previously noted, the ETIP will still be open —open with respect to the beneficiary but not the grantor. Therefore, we don’t really care about the 60 day §26.2632-1(c)(2)(ii)(B) exception, do we? If the spouse died holding a \$5000 withdrawal right, what would be the effect of §26.2632-1(c)(2)(ii)(B)? The \$5000 would be in the spouse’s estate. Right? So what good is a GST exemption allocation made by someone else? The problem covered by the regulation is where the grantor dies while the spouse holds the withdrawal right! So, in that case, limiting the spouse’s withdrawal right to 60 days could be of value —but not much.

⁴⁷Note that if the beneficiary is a transferor for GST purposes the property will be in the beneficiary’s estate no matter what type of POA is given.

holding only an *unexercised* Nongeneral Testamentary Power of Appointment over the property.⁴⁸

(e) **Default in Exercise of Power of Appointment By Secondary Beneficiary.** Subject to the prior exercise of the power of appointment granted Moore Money, if a Testamentary Power Holder fails (in whole or in part) to effectively exercise a power of appointment granted such person, the undistributed trust estate of such trust (with respect to which such person's power of appointment was not effectively exercised) will be distributed to or for the benefit of the person or persons who are designated in Part II as the takers in default, determined as of the powerholder's date of death; provided, however, that if the Testamentary Power Holder predeceases Moore Money, Moore Money will continue to be the Primary Beneficiary for life (with respect to so much of the trust over which such person's power of appointment was not effectively exercised), and the takers in default will merely succeed to the interest of the deceased powerholder.⁴⁹

5.5 **Skip Person Trusts.**⁵⁰

(a) **Beneficiary Who Is A Skip Person.** Notwithstanding the above or anything else in this instrument to the contrary, (1) if Moore Money should predecease Lotta Money and (2) if, following that event, a beneficiary having a right of withdrawal under this instrument is either (i) a grandchild of the Grantor, (ii) a natural person assigned to a generation that is two or more generations below the generation assignment of the Grantor (transferor), or (iii) a skip person with respect to the Grantor (transferor) within the meaning of Chapter 13 of Subtitle B of the IRC, including §2613,⁵¹ then, any property (and its proceeds) contributed by that Grantor, over which the beneficiary has or had a right of withdrawal, will be set aside in a special Subtrust for the beneficiary under this Section. This Subtrust may be known as a **Skip Person Nonexempt Trust** (or Subtrust). (If a Skip Person Nonexempt Trust has already been created for the powerholder under this Subsection, the property or proceeds may be added to the preexisting trust.)

(b) **Each Skip Person Nonexempt Trust Will Have Only One Beneficiary Entitled To Distributions At Any One Time.** During the lifetime of each Primary Beneficiary of a Skip Person Nonexempt Trust, no portion of the corpus or income of the trust may be distributed to (or for the benefit of) any person other than the Primary Beneficiary. In this regard, it is intended that a generation skipping transfer to a Skip Person Nonexempt Trust will qualify as a direct skip that is a nontaxable gift, within the meaning of IRC §2642(c)(2), if the transfer is made following the lifetime of Moore Money and at a time when Moore Money is no longer the Primary Beneficiary.

(c) **Beneficiary of Skip Person Trust Will Have General Testamentary Power of Appointment.** Notwithstanding the preceding Section or anything else in this instrument to the contrary, the Primary Beneficiary of a Skip Person Trust will have a General Testamentary Power of Appointment over the trust estate of that Subtrust existing at his death.

(d) **Withdrawal Right Accruing Limited By Available Annual Exclusion.** Notwithstanding the above, the amount set aside in a Skip Person Trust for any particular Primary Beneficiary under this Section for contributions made by any particular donor and the donor's spouse (other than Moore Money, who, as we know, is not allowed

⁴⁸Note that this is broader than another widely used alternative (which is probably sufficient 98% of the time) that grants a GTPOA if the beneficiary is survived by descendants. This clause triggers a GTPOA whenever a GST tax would be attracted under the default provisions that operate if a POA is not exercised, and thus, would cover a situation where a child has no children, and the only remaining family members are the grantor's grand nephews and nieces. This approach was first suggested to me by Barney.

⁴⁹Again, the double powers of appointment adds complication.

⁵⁰Things are beginning to get complicated. Just in case, following the death of the spouse, there is a grandchild that is a beneficiary, and I want a GST exemption to attach, this section should do the job.

⁵¹I believe (ii) and (iii) say the same thing and that (i) is a subset of the others; however, the client may not appreciate the meaning of (ii) or (iii), whereas (i) is understandable, as well as being the most likely.

to be a donor), may not exceed in value the amount of the annual gift exclusion (under §2503(b) of the IRC) then available to the donor of the property and the donor's spouse with respect to the powerholder during the calendar year, taking into account previous transfers by the donor and the donor's spouse to the powerholder, as if gift splitting under IRC §2513 will be elected in full.

ARTICLE VI
REVOCATION

6.1 **Revocation-Trust is Irrevocable.**

(a) This Trust is irrevocable. It may not be altered, amended, revoked or terminated in any respect by any Maker under any conditions. Except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust, it may not be altered or amended in any respect by anyone else, nor may it be terminated other than through distributions permitted by this instrument. The provisions of this Article will control in the event of conflict with any other provision of this instrument.

(b) **Maker will have no right or power, whether alone or in conjunction with others, in whatever capacity, to alter, amend, revoke, or terminate the trust, or any of the terms of this trust Agreement, in whole or in part, or to designate the persons who will possess or enjoy the trust property, or the income from it.** By this trust Agreement Maker intends to, and does relinquish absolutely and forever all possession or enjoyment of, or right to the income from, or reversionary interest in, the trust estate, whether directly, indirectly, or constructively, and relinquishes every interest of any nature, present or future, in the trust property, whether now or hereafter acquired, including but not limited to any insurance policies assigned to or acquired by the trustee.

(c) The income of the trust (without the approval or consent of any grantor or other adverse party) may be applied by the trustee to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse. For purposes of this Subsection the term "grantor" and "grantor's spouse" will have the same meaning as that used in IRC §677(a)(3). Further, notwithstanding the above, upon and after the death of Moore Money, Maker will have the power, exercisable in a nonfiduciary capacity, to reacquire trust corpus (other than life insurance on the life of the Maker) by substituting other property of an equivalent value, without the approval or consent of any person in a fiduciary capacity.

Maker realizes that because her Husband is a beneficiary of this trust (and perhaps for other reasons), Maker will be treated as the owner or "grantor" of the trust for Federal Income Tax

purposes.

ARTICLE VII
MISCELLANEOUS TRUST PROVISIONS

7.1 **Payment of Estate Taxes, Debts and Expenses of Probate Administration.** Subject to the explicit limitations provided elsewhere in this instrument on the powers of any individual trustee who is also a trust beneficiary of a trust he is administering, which limitations and restrictions govern in the case of conflict, the following provisions will apply:

(a) **Contribution and Reimbursement For Taxes, Debts and Expenses On Nonprobate Assets.** The trustee will contribute to or reimburse a Maker's probate estate for any estate taxes attributable to property that is a part of the trust estate of any trust under this instrument at the date of the Maker's death and that is (other than by virtue of this Section) includible in the Maker's gross estate for federal estate tax purposes, in the manner set forth in Maker's Will or as otherwise required by law, except where it has been specifically provided to the contrary elsewhere in this instrument. Such reimbursement will not exceed, however, what would otherwise be required by law in the absence of this Subsection as if Maker's Will were silent on the subject.⁵² The trustee will also contribute to or reimburse the Maker's probate estate, in the manner set forth in Maker's Will making specific reference to this trust, or as otherwise required by law, for any debts and expenses for which the Maker's probate estate is liable, if the trust estate (other than by virtue of this Subsection) is also liable for these debts and expenses.⁵³ The requirement of reimbursement or contribution may be waived by Maker's executor as a matter of convenience if such waiver does not materially affect the beneficial interests of the beneficiaries. Such reimbursement will not exceed, however, what would otherwise be required by law in the absence of this Subsection as if Maker's Will

⁵²Note that this only applies if the property would otherwise be includible in Maker's gross estate for federal estate tax purposes. If it would, then I do not believe it is an impermissible retained power to provide that the estate will be reimbursed in such case for taxes.

⁵³Note that this only applies if the property would otherwise be liable for debts and expenses. If it would, then I do not believe it is an impermissible retained power to provide that the estate will be reimbursed in such case.

were silent on the subject.

(b) Source of Contribution or Reimbursement. Contribution and reimbursement (if otherwise applicable) will generally be made from the sources described in Maker's Will, using the abatement and apportionment scheme described in that Will, *as if* the Decedent's share of the trust estate were a part of Maker's probate estate. Again, however, reimbursement will not be permissible unless the law would otherwise have permitted such reimbursement in the absence of this Subsection if Maker's Will were silent on the subject.

7.2 Special Miscellaneous Provisions Relating To the Administration of Trusts. Subject to the explicit limitations provided elsewhere in this instrument on the powers of any individual trustee who is also a trust beneficiary of a trust he is administering, which limitations and restrictions govern in the case of conflict, the following provisions will apply:

(a) Valuation For Funding and Distribution Purposes. Except as may otherwise be specifically provided, distributions of property will be valued and credited at the fair market value of the property determined as of the date or dates of distribution.

(b) Limitations On The Exercise of Certain Administrative Powers.

(1) In the case of an individual who is a fiduciary and who is also a beneficiary, such person's administrative and fiduciary powers that could affect his beneficial interest will extend no further than the mere power of management, investment, and custody of assets, and the power to allocate receipts and disbursements as between income and principal, **exercisable in a fiduciary capacity**, whereby that fiduciary has no power to enlarge or shift any of the person's beneficial interests except as an incidental consequence of the discharge of its fiduciary duties.

(2) The foregoing provisions of this Subsection do not prohibit the exercise of a power to consume, invade or appropriate income or corpus, or both, for the benefit of a beneficiary that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiary, as those terms are described in Treas. Reg. §20.2041-1(c)(2), and do not prohibit scheduled distributions over which the trustee has no discretion.

(3) A person will have no power to alter, amend, revoke, or terminate any interest of which the person has at any time made a *transfer*. The words used in the preceding sentence have the same meaning as they have in IRC §2038 (e.g., the lapse of a withdrawal right created by someone else may be a release under IRC §2041, but would generally not be a transfer under §§2036-2038).

(4) No distribution may be made by a fiduciary to any other beneficiary that would discharge a legal obligation (including a legal obligation of support) of that fiduciary.

(5) This Subsection governs in the event of conflict with any other provision of this instrument or any trust under this instrument.

(6) This Subsection does not apply with respect to any interest over which the person has been expressly granted a General Power of Appointment or a General Testamentary Power of Appointment by this instrument.

(c) Support Obligations. No distribution (except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust) will be made from a trust that would discharge a legal obligation (including a legal obligation of support) of anyone other than the beneficiary, if the person whose obligation would be discharged is either the Maker, a trustee, or a Protector who appointed the trustee, unless (in any case) the person whose obligation would be discharged has otherwise been granted a power that is expressly referred to and denominated in this instrument as a General Testamentary Power of Appointment or General Power of Appointment over the property distributed. This Subsection governs in case of conflict with any other provision of this instrument.

(d) Provisions With Respect To Life Insurance. The trustee is authorized and empowered, in its sole and uncontrolled discretion, to purchase one or more insurance policies on the life of anyone *other than the trustee*. Such investment is *per se* authorized under this instrument and not subject to any other requirement

that trust investments be diversified.⁵⁴ The trustee will solely exercise all incidents of ownership, including all right, title, and interest to policies in which the trust has an interest. This right, title, and interest specifically includes all “incidents of ownership,” as that term is contemplated by IRC §2042, as currently in effect or subsequently amended. By way of example and not by limitation, the right, title, and interest of the trustee to the life insurance policies subject to this trust include, without limitation, all rights, powers, options, privileges, or other incidents of ownership such as the power to change any beneficiary consistent with this agreement, the power to surrender or cancel any policy consistent with this agreement, the power to revoke any assignment consistent with this agreement, the power to pledge any policy for a loan consistent with this agreement, the power to obtain from the insurer a loan against the surrender value of any policy consistent with this agreement, or the power to convert insurance from term to whole life or whole life to term insurance. The words “consistent with this agreement” when used in the foregoing sentences are intended to be interpreted in a manner that the trustee's legal ownership of any policies is not diminished, but are used only to evidence the trustee's fiduciary obligations under this agreement. The trustee will sustain no liability to anyone if any policies should lapse for nonpayment of premiums, assessments, or other charges because there were inadequate funds in the trust to enable the trustee to make those payments.

Notwithstanding the above, a trustee may not purchase or exercise any incidents of ownership over a policy of life insurance on the life of the trustee, or on the life of a “Protector” who appointed the trustee. If it is necessary for someone to exercise any incidents of ownership over a policy of life insurance on the life of a trustee or on the life of a “Protector” who appointed the trustee, it will be done by the person who would have such power in the event the

insured trustee were incapacitated or deceased. It is specially provided, however, that the restrictions on a trustee imposed by this Subsection do not apply with respect to a trust over which the trustee has otherwise been granted a power that is expressly referred to and denominated in this instrument as a “General Testamentary Power of Appointment” or “General Power of Appointment.”

**[END OF PAGE, END OF ARTICLE VII AND
END OF PART I OF TRUST AGREEMENT]**

⁵⁴Many insurance agents will tell you that there is no better investment in the world than life insurance, whether it is on the life of the grantor, the beneficiary, or anyone else in whom the owner has an insurable interests. The death benefit is purely incidental to this way of thinking, and one wonders why intelligent people would invest in anything else. (One also wonders just what the insurance company is investing in to be able to regularly outperform the market, if that is what it does.) Despite all of this, a fiduciary probably needs some additional protection if it is going to invest a substantial portion of the trust corpus in life insurance in lieu of other prudent investments.

PART II*

Irrevocable Annual Withdrawal Trust
Maker is Not a Beneficiary

ARTICLE I
DEFINITIONS

As used in this instrument, the following terms, whether or not capitalized, will be given the following meanings, unless the context very clearly indicates otherwise.

1.1 Fiduciaries, Personal Representatives and Maker.

(a) The words “**executor,**” “**administrator,**” “**personal representative,**” “**trustee,**” and “**guardian,**” and the pronoun “**it,**” in reference to such words, always refer to the male or female person or persons, or to the institution, or to any combination of them, holding the executorship or administration of a decedent's estate, or a trusteeship of any trust under a will, under this instrument, or a guardianship under a will or otherwise, as the case may be. The term “**fiduciary(ies)**” refers collectively and interchangeably to each and every executor, administrator, trustee, guardian and ancillary fiduciary at any time acting, as the context indicates. Unless otherwise indicated, the term “**trustee**” generally means the trustee identified in the instrument creating The Crummey Money Family Trust. The term “**personal representative**” means “**executor**” and vice-versa, and the term “**executor**” means “**executrix**” if the person appointed or serving as “**executor**” is a female.

(b) **Such words also refer to any successor or alternate,** including corporations that succeed to the fiduciary business of the named fiduciary (a corporate successor) by consolidation, division, merger, purchase or acquisition of assets, change of name **or otherwise,** and the appointment of a

corporate trustee or ancillary fiduciary will be treated as including the appointment of its corporate successor, whether or not such change or succession occurs before or after the signing of this instrument. All successor or alternate fiduciaries will have the same powers, authorities, obligations and limitations as the original fiduciary, unless other provisions of this instrument specifically provide to the contrary.

(c) The term “**Testator**” means the person making a will, whether or not the person is male or female.

The term “**Maker**” means Testator, in the case of a will, or settlor(s), trustor(s), or creator(s) in the case of a trust.

Upon and after death, Maker is sometimes referred to as the “**Decedent**” or as the “**Deceased Maker.**” If, however, the word “**decedent**” is not capitalized, the term may include a deceased person other than Maker. (If the word “**Decedent**” is capitalized, it will usually refer only to Maker.)

The term “**Grantor**” as used in this instrument includes Maker, but will otherwise refer to anyone who has at any time made a “**transfer**” of property to a trust under this instrument (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth). The term “**transfer**” for this purpose will have the meaning used for federal estate and gift tax purposes. The term “**Grantor**” will include a spouse of a Grantor to the extent that the Grantor contributed community property of the spouse.

1.2 Adoptions.

(a) A person who is **under nineteen (19) years of age when legally adopted** will be treated as the child of his adoptive parent. **This presumption will not operate to exclude any such person as a beneficiary under this instrument,** unless such child, before the age of two (2) years, is adopted out of both sides of his biological family such that neither legal parent is biologically related to the child within the fourth degree of relationship.

(b) A person who is nineteen (19) years of age or older when legally adopted will not be treated as the child of his adoptive parent.

(c) The provisions of this Section will control all others in the case of conflict, provided, however that, in any event, a person identified by name in the

*Part II precedes Part III and follows Part I in physical order at the time of signing. All or a portion of Part II may have been produced by means of photocopying. If so, it has been done in the interest of efficiency, and Part II is as much an original part of this instrument as the "ribbon copy." The authenticity of Part II is indicated by Maker’s initials found in the right hand bottom corner of each page. If Part II is intended to be modified by other parts of this instrument, such modification will be explicit.

provisions of Part I identifying Maker's family will be considered to be related to Maker as indicated in it, no matter what.

1.3 **By Right of Representation-Per Stirpes.**

(a) The term “**by right of representation,**” or “**per stirpes**” as used in this instrument, means *per stirpes*, as further defined in subsection (b) below. This means that **lineal descendants will represent their ancestor**, that is, will stand in the same place as such ancestor would have had he been living. For this purpose, a living descendant excludes his own descendants, and a dead descendant is represented by his own descendants. A division “by right of representation” may sometimes be referred to as a division on a “representational basis.” The shares created in a division on a representational basis may sometimes be referred to as “representational shares.” Such a division may also be referred to as a “representational division.” For example, if a person was survived by 4 children and 2 grandchildren who were the only children (surviving or otherwise) of a predeceased child, a division by right of representation would provide 2 equal shares for each child who survived, and one share for each of the children of the predeceased child (ten shares in all). This would be true regardless of whether the surviving children had children then living, or whether the surviving grandchildren had living descendants.

(b) Unless otherwise clearly indicated, **the stirpes** (i.e. the roots or stocks selected for the purpose of making the first division of the estate on a per stirpital or representational basis) **are to be those of the generation nearest the common ancestor of which one or more of the members survived**, and for this purpose, a disclaimant will be treated as if he survived. This is not necessarily strict *per stirpes* and is sometimes referred to as “*per capita* with right of representation,” since, for example, the grandchildren of a decedent will take equal shares, if no children are living at the time the division is determined.

1.4 **Residuary Estate.** Except as otherwise expressly limited, the term “**residuary estate**” generally means all property (including lapsed gifts) that is disposable under this instrument and that, other than by the gift of the residuary estate, has not been disposed of by it. A “residuary gift” is a gift of property passing as part of the residuary estate. A “nonresiduary gift” is a gift of property passing other than as a part of the residuary estate. If a gift

(including a residuary gift) lapses, it will be added to the remainder of the residuary estate, so long as there is any, unless otherwise specifically provided to the contrary in this instrument.

1.5 The term “**including**” means “including but not limited to.” The term “includes” means “includes but is not limited to.” The term “include” means “include but are not limited to.” Any “**examples**” given are by way of illustration and not by way of limitation, unless otherwise stated.

1.6 The term “**separate share,**” as applied to a trust, will mean a substantially separate, distinct, and independent share, which will be treated for all practical purposes as if it were a separate trust. Distributions from a separate share must be made exclusively for the benefit of the beneficiaries of that share. A separate share may consist of undivided interests or divided (segregated or earmarked) interests in the trust of which it is a part. If a beneficiary has an interest in a separate trust, distributions from which must be made exclusively for his benefit for so long as he is living, his “share” will be the entire trust. If there is only one trust, the separate share will mean the entire trust. **The trustee will have the discretion to elect to transform a separate share into a separate trust at any time.**

1.7 The “**trust**” means the “**trusts**” where apparent from the context, and generally refers to the trust or trusts (including Subtrusts) created under this instrument, or to a particular trust or trusts created under this instrument, where the context indicates. The word “trust” means “Subtrust” and vice-versa unless the context clearly indicates otherwise. (Therefore, it is not necessary to add the phrase “including Subtrusts” after the word “trust” if applicable, except as an occasional reminder.) Accordingly, a reference to a “Protected Trust” would describe a “Protected Subtrust” as well.

1.8 A “**Subtrust**” must be held either as a separate share or a separate trust. Whether a Subtrust is held as a separate share or as a separate trust will be within the sole and unfettered discretion of the trustee, unless this instrument clearly specifies otherwise. **If there is only one trust, the term Subtrust will mean the entire trust.**

1.9 **Powers of Appointment.** A power of appointment may be either general or nongeneral (special), and may be either testamentary or *intervivos*, depending on its nature. A power of

appointment is not a fiduciary power. The holder of a power of appointment will never be liable to anyone under any circumstances for exercising or failing to exercise a power of appointment. A power of withdrawal, including the power of a Special Representative to exercise a power of withdrawal for and on behalf of another, is a power of appointment and is not a fiduciary power. A power of appointment over property may generally be exercised with respect to such property in a manner that varies the provisions of this instrument that would otherwise apply, whether or not this instrument otherwise states that the provision in question is or is not subject to the exercise of an applicable power of appointment.

(a) A **“General Power of Appointment”** is a power of appointment that is exercisable by the powerholder alone and in all events. The appointment may be in the amounts and proportions (which need not be equal) and on the terms and conditions, either outright or in further trust, or subject to further general or nongeneral powers (including the power to create another power of appointment in the holder or any other person that under the applicable local law can be validly exercised to postpone the vesting of any estate or interest in the property, or suspend the absolute ownership or power of alienation of the property, for a period ascertainable without regard to the date of the creation of the first power), as specified by the powerholder in the manner provided in this instrument, and the trust estate or other property that is subject to the power may be distributed to such individuals (including the powerholder), corporations, trusts, estates, and entities, in such shares, proportions and amounts, and on such terms and conditions, and subject to such powers, as the powerholder will determine. Without limiting the foregoing, this power of appointment may be exercised in favor of the powerholder, the estate of the powerholder, the creditors of such powerholder, or the creditors of such powerholder’s estate.

Unless the General Power of Appointment is a General Testamentary Power of Appointment, the power will be exercisable presently⁵⁵ or on any future event, and must be exercised either by will in the manner of a General Testamentary Power of

Appointment, or by any other written instrument signed by the powerholder and notarized, whether or not such written instrument is executed before or after Maker’s death. **The exercise of a General Power of Appointment during the lifetime of the powerholder will be revocable so long as the powerholder is living and has a legal or beneficial interest in the property, unless the exercise of the power is expressly made irrevocable.** A Power of Appointment that is not a Testamentary Power of Appointment may be exercised by an attorney-in-fact under a power of attorney.

(b) A **“General Testamentary Power of Appointment”** or a “Testamentary General Power of Appointment” is a type of General Power of Appointment that may only be exercised by a provision found in the powerholder’s last will (including a codicil) duly admitted to probate and specifically referring to and exercising the power of appointment (and not by referring to and exercising powers of appointment generally), whether or not such will or codicil is executed before or after Maker’s death.

(c) A **“Nongeneral Power of Appointment”** means a power of appointment that would be a General Power of Appointment, except that it is **not** exercisable in favor of the powerholder, the estate of the powerholder, the creditors of the powerholder, or the creditors of the powerholder’s estate, or to discharge a legal liability of the powerholder, and may not be exercised in any manner that would cause the power to be a “general power of appointment” within the meaning of IRC §§2041(b)(1) or 2514(c). A Nongeneral Power of Appointment may be otherwise limited by the provisions granting the power. A Nongeneral Power may sometimes be referred to as a Special Power. (In determining Maker’s intent regarding the scope and definition of the phrase “Nongeneral Power of Appointment,” it will be noted that such power is not intended to fall within the definition of “general power of appointment” within the meaning of IRC §§2041(b)(1) or 2514(c) or the regulations thereunder. The meaning of the phrase “Nongeneral Power of Appointment,” as used herein will be construed accordingly.)

(d) A **“Nongeneral Testamentary Power of Appointment”** or “Testamentary Nongeneral Power of Appointment” is a type of Nongeneral Power of Appointment that may only be exercised by a provision found in the powerholder’s last will (including a codicil) duly admitted to probate and

⁵⁵You may wish to note and to consider the consequences of the fact that many of the powers under this instrument are not *testamentary* powers. You may also note that a nontestamentary power is not public.

specifically referring to and exercising the power of appointment (and not by referring to and exercising powers of appointment generally), whether or not such will or codicil is executed before or after Maker's death. (Any reference to a General Power of Appointment includes a General Testamentary Power of Appointment, and any reference to a Nongeneral Power of Appointment includes a Nongeneral Testamentary Power of Appointment, since a testamentary general or nongeneral power is a type or member of the class of general or nongeneral powers.)

1.10 Default in the Exercise of a Power of Appointment.

(a) **Takers in Default.** Except as otherwise specifically provided to the contrary, **in default of the exercise of a power of appointment** by a powerholder (in whole or in part), the undistributed trust estate of the trust (with respect to which the power was not effectively exercised) will be distributed on the death of the powerholder for the benefit of the "takers in default" as follows and in the following order of priority.

(1) The powerholder's then living descendants, by right of representation.

(2) But if there are no descendants of the powerholder then living, to the then living descendants, by right of representation, of the nearest ancestor (whether or not deceased) of the powerholder, which ancestor has descendants then living and who is or was a descendant of the Maker.

(3) But if there is no such ancestor then living, to the then living descendants, by right of representation of Maker.

(4) But if the Maker has no descendants then living, to the surviving spouse of the powerholder, if any.

(5) But if none of the persons described above are then living, this distribution will be made as provided in the Subsection entitled "Final Alternate Distribution."

(b) **More Than One Ancestor/Descendants of the Half Blood.** If there is more than one ancestor, the descendants of whom are to share in the estate based upon a relationship with such ancestor, an equal division will initially be made, at the same generational level of each such ancestor, so that the

combined per stirpital shares of the members of a group consisting of the descendants of one such ancestor is equal to that of the group consisting of the descendants of any other such ancestor. A descendant may belong to more than one group, however, receiving a share from each.

(c) **Form of Distributions.** Subject to the Maximum Duration Rule, distributions in default of the exercise of a power of appointment will generally be to a Protected Trust to be established for the beneficiary.

1.11 "Eligible Marital Deduction Property" means property that is included in a deceased Maker's gross estate for federal estate tax purposes and which it is possible, by election or otherwise, to obtain a federal estate tax marital deduction if used to fund the Marital Deduction Gift.

1.11A A "qualifying income interest for life" in property has the meaning given under IRC §2056 and the regulations under it. The remainder of this Section is subject to this overriding rule in case of conflict. A Surviving Spouse who has a qualifying income interest for life in property will be entitled for life to all the income from such property, payable annually or at more frequent intervals, and no person will have a power to appoint any part of the property to any person other than the Surviving Spouse during the lifetime of the spouse. For purposes of this Section, property includes a trust. (The right to the income will not be affected by the failure to make the QTIP election.) This Section will govern all others in case of conflict.

If the assets of a trust in which the Surviving Spouse has a qualifying income interest for life ever include **unproductive or under productive property**, then the Surviving Spouse (or the Surviving Spouse's guardian or other legal representative) is specifically permitted to require that the trustee either make the property productive or convert it within a reasonable time.

The assets composing a trust in which the Surviving Spouse has a qualifying income interest for life will at all times be held and administered by the trustee so that the income interest in it will provide the Surviving Spouse with a degree of beneficial enjoyment sufficient to satisfy the rules applicable to marital deduction trusts under Treas. Reg. §20.2056(b)-5(f). The fiduciary is encouraged to look to this regulation for guidance in interpreting the income distribution standard described in this

Section. At a minimum, the Surviving Spouse will have the power to compel the trust to afford the Surviving Spouse substantially that degree of beneficial enjoyment of the trust estate of The Marital Deduction Trust during the Surviving Spouse's lifetime that the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, and the trustee will not exercise its discretion in a manner that is not in accord with this expressed intention. The Surviving Spouse will have the power to compel the trustee to invest the trust estate of The Marital Deduction Trust so that it will produce for the Surviving Spouse an income or use that is consistent with the value of the trust estate and with its preservation.

Without limiting the foregoing and subject to it, the phrase "entitled for life to all the income" will mean, at a minimum, that the spouse has such command over any income that it is virtually the spouse's. Accordingly, the Surviving Spouse will have the unqualified right, exercisable at least annually, to demand and receive the immediate distribution of all trust income to the Surviving Spouse. The Surviving Spouse will also be entitled to demand and receive a distribution (at any time after funding) of all of the income attributable to the Marital Deduction Gift during the period of administration. (In the case of a pecuniary gift the "income" may be "interest" as otherwise provided in this instrument.) These rights may be exercised in writing or in any other reasonable manner clearly specified by the Surviving Spouse, and may be exercised in advance, or immediately, or upon any future contingency specified. Any power exercisable by the Surviving Spouse may also be exercised by the Surviving Spouse's legal representative acting on the Surviving Spouse's behalf.

Upon the death of the Surviving Spouse, all accrued but unpaid income will be paid to the Surviving Spouse's estate.

1.12 *Notwithstanding anything else herein to the contrary*, the term "**Maker's Husband**" or "**Maker's Spouse**" or *Moore Money* means the person to whom Maker is legally married at the time of (1) any distribution or contribution to the trust, or (2) Maker's death if sooner. (For this purpose, Moore Money will be treated as legally married to Maker even if there was a defect in the marriage ceremony or otherwise, so long as they are living together as husband and wife.) (The provisions of this Section were inserted in reliance upon the published position of the Internal Revenue Service as

articulated in Rev. Rul. 80-255.)⁵⁶

A "**Divorced Spouse**" is a person who (i) is or was the husband or wife of a *descendant* of any of Maker's grandparents, and (ii) who is to be treated as deceased under the next sentence. A Divorced Spouse will be treated as being deceased, and as having predeceased the descendant to whom the spouse is or was married (and will **not** be treated as the spouse or "surviving spouse" of such person) at such times as a "divorce action" is pending or in effect, or if a "divorce action" is pending or in effect at the descendant's death. Among other things, this means that a Divorced Spouse will be treated as having died, may not serve in a fiduciary capacity, may not (and a substitute of a Divorced Spouse may not) exercise a Removal and Replacement Power, and will not be entitled to receive any benefits under this instrument. The rule described in this Section may be referred to as the "**Divorced Spouse Rule.**"

For purposes of this Section, the term "**divorce action**" will mean a decree or order of annulment or divorce (not followed by remarriage between the spouse and the descendant), separation, or separate maintenance, between the spouse and the descendant, or an action brought by the spouse for annulment or divorce, separation, or separate maintenance.⁵⁷

The Divorced Spouse Rule will not affect, however, a person's rights or entitlement to benefits, otherwise provided hereunder, existing solely by virtue of the community or separate property laws.

A "**Surviving Spouse**" is a spouse who is married to a person at such person's death and who survives such person, whether or not such spouse later remarries. Notwithstanding the foregoing, however, the term "Surviving Spouse" as applied to a Maker does not include anyone other than the person identified as Maker's Spouse in the provisions of

⁵⁶Note well what is going on here. This is my "generic spouse" clause. It means (a) that the grantor's spouse is discouraged from divorce as a result of this trust—rather than the other way around, and (b) in the event of divorce, the grantor is a particularly eligible bachelor, due to the fact that whoever marries him, is automatically a beneficiary of the trust! This is expressly permissible under Rev. Rul. 80-255.

⁵⁷The conservative may wish to delete the references to separation and separate maintenance.

Part I identifying Maker's family.

1.13 A **child in gestation** who is born alive will be considered a child in being throughout the period of gestation, and will be considered to have been living throughout the period of gestation.

1.14 The word "**descendants**" or "lineal descendants," as used in this instrument, means legitimate lineal descendants of all degrees, conceived and in the mother's womb during the lifetime of the relevant parent, provided that, in any event, the term will not include a person (if any) apparently excluded under the terms of the provisions of Part I identifying Maker's family, which will control if in conflict with this definition. For this purpose, the term "**legitimate**" means that the child was born to a mother who was married to the father at the time of birth or conception. The term "descendants" also includes any person identified as such by name in this instrument, and that person's descendants. The term "descendants" also includes a person who, but for the requirement of legitimacy, would be a "descendant" as defined above, provided that the person lived as a regular member of the household of the relevant natural parent or of that parent's parent, sibling or Surviving Spouse. Whether a person was a "regular member" of another's household will be determined in the reasonable discretion of the fiduciary. (The "relevant parent" means the parent through whom membership in the class of descendants is claimed.)

1.15 The "**child**" or "**children**" of a person, as those terms are used in this instrument, include only such person's lineal descendants of the first degree, and do not include remote descendants such as grandchildren or great-grandchildren, provided that, in any event, the terms will be construed strictly in accordance with the provisions of Part I identifying Maker's family, which will control if in conflict with this definition. If the name, social security number, date of birth, etc., of a person identified in Part I by name is incorrect as a result of an obvious typographical error or similar mistake, but there is no real doubt about the person that Maker intended to describe, the mistake will be ignored.

1.16 A "**Primary Beneficiary**" is a person who (or whose estate) is entitled or authorized to receive distributions under this instrument (including a termination distribution) either presently in the fiduciary's discretion, or at any time subject to a standard. However, a beneficiary is not a Primary Beneficiary so long as distributions to or for the

benefit of the person are not permitted until the death of a person who is then living. A "**Secondary Beneficiary**" is a person who under the circumstances then existing would become a Primary Beneficiary (in default of the exercise of any applicable unexercised power of appointment) on the death of a Primary Beneficiary who is then alive. A "**Tertiary Beneficiary**" is any other person who is or may become entitled or authorized to receive distributions under this instrument either presently or in the future (other than by virtue of the exercise of a power of appointment), whether the interest is contingent, vested or other. Unless the context clearly indicates otherwise, the word "**beneficiary**" or "beneficiaries" will not include a Tertiary Beneficiary.

If any beneficiary is a minor or incapacitated, irrespective of whether legally so adjudicated, then any parent, guardian, conservator, or adult person with whom the beneficiary resides may act for the beneficiary for all purposes, but in a fiduciary capacity, of course.

1.17 The term "**presumptive share**" refers to the share of the trust estate to which a particular beneficiary will be presumptively entitled upon termination of a trust in which he is a beneficiary.

1.18 Wherever it is provided in this instrument that a person must "**survive**" someone, must "outlive" someone, or must be living at the date of a person's death, or where any other survivorship condition is explicitly expressed, it is intended that such survivorship requirement override, and be construed without regard to, any anti-lapse or similar statute that would defeat such express provision. Wherever it is provided in this instrument that a person must "**survive**" or must be "**surviving**" some other person, it means that such person must not have predeceased such other person, and must be living at the other person's death. Other provisions of this instrument may require survival for an additional specified period. If a beneficiary is not a human being, the beneficiary must be eligible to take (entitled by law to receive the benefit), and if not eligible to take, e.g., if not in existence, the person will be treated as if not surviving.

1.19 The "**trust estate**" of a trust (including a Subtrust) created under this instrument means all assets and property, however and whenever acquired, including income as well as principal, that may belong to the trust, including its Subtrusts. The term "**estate**" will mean trust estate or probate estate, or

both, as the context indicates. The term “Maker’s estate” will mean the trust estate of a trust under this instrument, or Maker’s probate estate, or both, as the context indicates.

1.20 Unless otherwise indicated, the references contained in this instrument to the “**Code**” or the “**IRC**” are to the Internal Revenue Code of 1986, as amended, and as may be from time to time hereafter amended, or any corresponding provisions of any subsequent federal tax laws. Unless clearly contrary to the manifest intent otherwise expressed in this instrument, any reference to a specific IRC Section or other provision of law will be interpreted as a reference to such IRC Section or other law as amended, changed or redesignated after the signing of this instrument.

1.21 As used in this instrument, whenever the context so indicates, the masculine, feminine or neuter **gender**, and the singular or plural **number**, will include the others.

1.22 All references in this instrument to “**herein**,” or “**this instrument**,” or to “**this agreement**” are to all Parts of this document, including but not limited to all trusts under this instrument.

1.23 The term “**fee simple**” means an absolute estate, free of trust, in which the owner is entitled to the entire property, with the unconditional and unrestricted power of disposition during life and at death.

1.24 A distribution to the “**estate**” of a decedent means a distribution to the personal representative of the decedent, if any, to be held, administered and distributed as part of the decedent’s general probate estate, or if there is no personal representative at the time of distribution, then to the persons entitled under applicable state law to succeed to the ownership of the decedent’s property as a result of the death of the decedent.

1.24A The term “**taxable estate**,” will have the meaning given that term under IRC §2051.

1.25 The term “**probate estate**,” “**probate assets**” or “**probate property**” refers to property that is disposable under the terms of a will (other than a part of a will directing a trustee with respect to the disposition of nonprobate assets outside of probate), whether or not subject to administration; provided, however, that such term does not include

property subject to an unexercised power of appointment. “**Nonprobate estate**,” “**nonprobate assets**” or “**nonprobate property**” consists of property that is not a part of a probate estate.

1.26 **Organization of Instrument.** Each Part of this Instrument (Parts I, II and III) has been primarily organized into **Articles**. Each Article has been consecutively signified by a Roman numeral. Each Article may be further divided by consecutively numbered **Sections** (e.g., “4.1” or “4.1A” or “4A.1”). Sections may be divided into Subsections, Paragraphs, Subparagraphs, Clauses and Subclauses, in that order, in a manner similar to the organization of some parts of the IRC. For example, unless the context clearly indicates otherwise, **4.1(a)(5)(E)(i)(I)** would ordinarily be described as being composed of Section 4.1, Subsection (a), Paragraph (5), Subparagraph (E), Clause (i) and Subclause (I). Sometimes a Paragraph, Subparagraph, Subclause, etc. if referred to in full, will simply be referred to as a Section, for convenience; e.g., Section 4.1(a)(5)(E)(i)(I).

The provisions following Maker’s first signature may be identified by Articles, whether or not they are technically a part of the instrument. The article containing the notarizing of the signing of this instrument is an example of this.

1.27 **Termination and Distribution.**

(a) Subject to the Maximum Duration Rule, the “**termination**,” “**time of termination**,” “**termination date**” or the “**date of termination**” of a trust will be the date specified for the trust to terminate, even if the trust estate will be held in further trust, and even if, for administrative reasons, the entire trust estate is not finally distributed until a later time. Typically, and except as may be otherwise specifically provided, all interests in the trust will be vested on the date of termination, if not vested sooner, whether or not a beneficiary actually survives to the date of ultimate distribution, and if a beneficiary having a present interest on the termination date does not survive, the interest to which the beneficiary was entitled but for the winding up period will be paid to his estate.

(b) Typically, there will be a “**winding up period**” that follows the termination of a trust, even if all interests have vested. During this period, the affairs of the trust are to be settled and the assets then distributed as soon as it is administratively practical. During the winding up period, the trustee

will have all of the powers that the trustee had prior to the termination date. For example, the trustee will have the power during the winding up period to make such sales or exchanges of trust property as the trustee believes to be necessary or helpful to the orderly distribution and partition of the trust estate pending final distribution.

(c) The term “**terminate**” may include a division, redesignation, reconstitution or merger, as the context requires. A trust may be reconstituted following a termination, and the term “**termination**,” as used in this document, may refer to a mere division, redesignation, reconstitution or merger of the trust, whether or not the trust has “**terminated**” for state or tax law purposes.

(d) The term “**then living**” with reference to a termination distribution generally means living at the time of termination.

(e) The “**distribution date**” or “**time of distribution**” of cash or other property refers to the time that property is actually distributed by the fiduciary and will not necessarily be coterminous with the termination or time of termination of the trust.

(f) Every distribution to or for the benefit of a beneficiary is either a “**facts and circumstances distribution**” or a “**scheduled distribution**.” A “**facts and circumstances distribution**” is a distribution from a trust to or for the benefit of a beneficiary that is either (a) discretionary with the fiduciary or (b) to be made in accordance with a standard (e.g., health, education, maintenance, support, comfort, welfare, etc. are standards) determined by the fiduciary. A “**scheduled distribution**” is a distribution from a trust to or for the benefit of a beneficiary that is not a facts and circumstances distribution.

(g) Every scheduled distribution is either an “**interim scheduled distribution**” or a “**termination distribution**.” An “**interim scheduled distribution**” is a scheduled distribution that is (1) a mandatory distribution of all or a stated portion of trust income, (2) a partial distribution from a trust that is set to occur when a beneficiary reaches a certain age or upon some other fixed and stated event (other than someone’s death), or (3) a distribution that is the result of the exercise of a withdrawal right. A “**termination distribution**” is a scheduled distribution that is not an interim scheduled distribution.

1.28 The term “**691 items**” means items of property constituting income in respect of a decedent under §691 of the IRC.

1.29 The term “**notarized**” means that the instrument or an attachment to it reflects that the person who signed the instrument either did so under oath, or acknowledged his signature, or signed the instrument, in the presence of a notary public or other person authorized to take acknowledgments for purposes of the laws of recorded instruments.

1.30 The term “**property**” includes “**interests in property**” and “**proceeds of property**.” Except as otherwise limited, the term “**property**” includes assets of whatever nature and wherever situated.

1.31 The “**proceeds**” of property include receipts with respect to the property, interest earned with respect to the property, increase from the property, and any change in form of the property, whether by transmutation, division, sale or exchange or otherwise. If property existing at a certain date is to pass to a person or is subject to a power of appointment, the property passing or the property subject to the power will include the proceeds of the property, unless specifically provided to the contrary.

1.32 The term “**education**” includes private school, college, graduate and vocational study.

1.33 The term “**sources of support**” includes all sources of earnings, independent resources, earning ability, income, principal or support, including a legal obligation of support and including governmental (whether state, federal, county or other) and nongovernmental sources of aid, if known by the trustee to be reasonably available to the beneficiary.

1.34 The “**family**” or “**member of the family**,” or “**family member**,” of a person (or similar expression) means a person's parents, spouse, step-children, and the descendants of either parent of the person.

1.35 The term “**vested**,” “**vesting**,” or “**vest**” generally means that *the beneficiary's interest* is fixed and determined whether or not subject to divestment. The term “**vested**” does not necessarily mean vested in fee simple or vested in possession or vested in specific assets or that the beneficiary has a general power of appointment over the interest. Notwithstanding the foregoing, the term “**vest**,”

“vested,” or “vesting” will be given its usual meaning under state law for purposes of interpreting the Maximum Duration Rule and in applying the definition of a power of appointment.

1.36 A “**power of appointment**,” whether general or nongeneral (special), if expressly referred to as such, is not a fiduciary power. A “power of withdrawal” or a “withdrawal right” or “withdrawal power,” if expressly referred to as such, is not a fiduciary power.

1.37 The term “**so much of**” includes all or none or some. For example, if a trustee is authorized to distribute “so much of” the trust estate as it determines pursuant to a standard (which may or may not involve discretion), the trustee may distribute all or none or some of the trust estate, depending on the standard and depending on the amount of discretion conferred.

1.38 The term “**incapacitated**” or “incapacity” will include death, and legal incapacity or legal disability, whether or not so adjudicated. A fiduciary (or a fiduciary appointee) will also be incapacitated if the person is unable or unwilling to discharge the normal fiduciary duties associated with the office, for whatever reason, including death, or physical or mental infirmity. A fiduciary who was previously incapacitated, but who after that becomes able and willing to discharge the normal fiduciary duties associated with the office, may resume his or her fiduciary office.

A person adjudicated as legally incapacitated or under a legal disability will be treated as incapacitated under this instrument. In the absence of a judicial finding of capacity or incapacity, the determination of whether or not a person is incapacitated may also be made in the sole and unfettered discretion of the person having the power under this instrument to make this determination. That person will be fully protected and indemnified from the assets of the estate in making or not making a determination that a person is incapacitated. (Although that person will have the power, he will not have the duty to make this determination.)

The person(s) having the power under this instrument to make the determination of incapacity are as follows: The fiduciary will have the power to determine whether or not a beneficiary is incapacitated. The person who would be entitled to act if a fiduciary (or a person having the power to appoint or remove a fiduciary) should then cease to

act will have the power to determine whether or not a fiduciary (or a person having the power to appoint or remove a fiduciary) is incapacitated, following the procedure set forth below.

In the absence of a judicial finding of capacity, a fiduciary (or a person having the power to appoint or remove a fiduciary) will be treated as incapacitated if the following conditions are met: The person who would be entitled to act in such person’s stead if the fiduciary should then cease to act must first determine that the fiduciary is incapacitated, and then notify the fiduciary in writing of this determination. Second, for so long as the fiduciary does not deny this determination in writing, then the fiduciary (or a person having the power to appoint or remove a fiduciary) will be treated as incapacitated. If the fiduciary denies this determination in writing, the fiduciary will still be treated as incapacitated if two licensed physicians determine in writing that the fiduciary is incapacitated. Notwithstanding the above, in the absence of a judicial finding of incapacity, **the fiduciary may not be treated as incapacitated if two licensed physicians determine in writing that the fiduciary is not incapacitated.**

Any third party is absolutely entitled to treat a person as “incapacitated” for purposes of interpreting or carrying out the terms of this instrument, if the party that has the power under this instrument to make this determination states in writing that the person is incapacitated, and the third party will be indemnified from the assets of the estate from any damages arising as a result of relying upon this determination.⁵⁸

1.39 The term “**person**” includes an individual, trust, estate, partnership, association, company, corporation or other entity. An “**individual**,” on the other hand, means a person who is a human being.

1.40 When the sense so indicates, use of the conjunctive (e.g., “**and**”) may include the disjunctive (e.g., “**or**”), and vice-versa.

1.41 Unless otherwise limited in the context used, “**debts**” means legally enforceable debts, the expenses of last illness and funeral, but does not include expenses of administration. “**Expenses**” generally means other expenses of administration.

⁵⁸This is not particularly relevant to the topic at hand, but I included it anyway in the hope of inviting comments.

Neither term includes estate taxes or gifts made under this instrument.

1.42 “Exempt property” and “exempt assets” is property that is exempt from garnishment, attachment or other seizure by a creditor of the Decedent or of the Decedent’s estate.

1.43 “Estate tax” or “estate taxes,” unless otherwise modified, will have the meaning given by Texas Probate Code §322A at the time of death, and will generally include estate, inheritance, transfer, or death tax, owed because of the death of a person, imposed by federal, state, local, or foreign law, including interest and penalties. Estate tax does not include a tax imposed under IRC §2701. **“Death tax” or “death taxes”** mean estate taxes.

1.44 Unless otherwise indicated by the context, **“income”** available for distribution generally means net income, i.e., gross income reduced by applicable charges. **“Principal”** and **“corpus”** refer to the same thing, and both refer to the portion of an estate or trust that is not income or designated as accumulated income.

1.45 The term **“net”** generally means after payment of estate taxes, debts and expenses charged against the property, unless the context clearly indicates a contrary intent.

1.46 The term **“GST”** or **“GST tax”** means the Federal Generation Skipping Transfer Tax described in Chapter 13 of the IRC. The term **“GST exemption”** means the generation-skipping transfer exemption provided in §2631(a) of the IRC. The term **“skip person”** and **“non-skip person”** will have the meaning given in IRC §2613 or in Chapter 13 of the IRC. A **“generation skipping transfer”** will have the meaning given in IRC §2611 or in Chapter 13 of the IRC.

ARTICLE II PROVISIONS RELATING TO POWERS AND ADMINISTRATION

2.1 Duties of Fiduciaries. Each power, duty, discretion or right described below in this Section 2.1 is expressly made subject to the explicit limitations provided in this instrument on the powers of any individual trustee who is also a trust beneficiary of a trust he is administering, which limitations and restrictions will govern in the case of conflict with anything below.

(a) Prudent Person Standard. Except as otherwise specifically provided to the contrary, in acquiring, investing, reinvesting, exchanging, retaining, selling, supervising and managing property for the benefit of another, each fiduciary will exercise the judgment and care under the circumstances then prevailing **that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs,** not in regard to speculation but in regard to the permanent disposition of their funds, considering the particular needs and desires of the beneficiaries and remaindermen. This rule may be referred to as the “Prudent Person Standard.”

It is specifically provided that the Prudent Person Standard will not apply to any assets that are acquired by the trust by gift or testamentary transfer, if the assets were closely held by the Grantor or members of the Grantor’s family, and the fiduciary will be under no duty to diversify or dispose of such assets. The trustee will have the discretion to interpret and apply the phrase “closely held” for this purpose. In such case the trustee may assume that it was the intention of the Grantor that such assets be retained, regardless of the Prudent Person Standard or any other rule of law, absent compelling evidence of a contrary intent.

(b) Duty of Impartiality and Fairness. All fiduciaries will be under an obligation and duty to act with impartiality and fairness with respect to all beneficiaries.

(c) Valuation Of Distributions In Kind. Unless specifically and explicitly provided otherwise in this instrument, distributions made in kind will be on the basis of fair market value of such assets at the time of distribution.

(d) Trustee Prohibited From Operating Trust As a Device To Carry On a Business. Although the fiduciaries have been given broad powers, including the power to carry on a business under appropriate circumstances, the trusts created under this instrument are created for the primary purpose of protecting or conserving the trust property for beneficiaries, and the trustee is prohibited from operating the trust simply as a device to carry on a profit-making business to the exclusion of the primary purpose.

(e) Typographical Errors. Maker realizes that in an instrument of this size typographical and

similar errors may occur. Therefore, if a person's name is misspelled, or if a date or number is entered incorrectly, but the Maker's intent is not seriously open to question, the mistake will be ignored by the fiduciary, and will be corrected by the fiduciary administratively.

2.2 Powers of Fiduciaries.

(a) Broad Grant of Power. Within the limitations of the foregoing standards, and subject to the explicit limitations provided elsewhere in this instrument on the powers of certain fiduciaries, which limitations and restrictions will govern in the case of conflict, **each fiduciary will have complete power and discretion to administer any trust under this instrument, and each fiduciary will have all powers conferred on trustees by the Texas Trust Code** (including any amendments to it subsequent to the signing of this instrument).

(b) Specific Powers. In addition to those powers now or subsequently conferred by law, this grant, *subject to the above limitations*, includes the following powers, all of which may be exercised without the necessity of securing the approval or order of any court:

(1) **to buy from, sell to, loan to, borrow from, and generally deal with any person or entity regardless of the relationship or identity of any fiduciary to or with that person or entity**, and to hold or invest all or any part of any estate or trust, created by Maker or otherwise, in common or undivided interests (including temporal interests) with that person or entity, including but not limited to the power to purchase from, borrow from, loan to, sell to and deal with relatives, beneficiaries and with themselves individually and as a fiduciary of any estate or trust created by Maker or otherwise, or with partnerships, including limited partnerships and limited liability partnerships, corporations, limited liability companies, and financial or business organizations in which they or their relatives may own an interest, **to the maximum extent permitted by law** where such powers are (as here) specifically authorized, provided that any otherwise permissible self-dealing transaction is in all respects fair, prudent, and fully disclosed ahead of time to all beneficiaries;

(2) **to make distributions or trust divisions in kind**, in money, or partly in each, or in divided or undivided shares (including temporal shares), without requiring pro rata distribution of specific

assets, **without distinction in order of priority between realty and personalty**, including distributions in satisfaction of pecuniary legacies or of residuary gifts or in payment of debts, expenses, taxes, etc., with no obligation to take account of the tax basis of the assets;

(3) **to partition** and distribute the trust estate or other estate, in divided (non pro rata) or undivided shares or in kind, (including temporal shares or interests) (without regard to whether the property is real, personal or mixed) among beneficiaries, on the basis of fair market value at the time of partition and distribution (provided that pro rata distribution of specific partitioned assets will not be required); **to sell or partition real estate or any other property for any purpose without limitation, and to give warranties of title;**

(4) **to retain any property or assets, without diversification** of kind or amount, and to retain or acquire unproductive property (i.e., property that either is not income producing or produces little income) *provided, however*, a majority of the Primary Beneficiaries of a trust (including a Subtrust) under this instrument will have the power (with respect to that trust) to direct the trustee of that trust, by instrument in writing signed by such beneficiaries, to diversify and to make unproductive property in that trust productive or to convert such property to income producing property within a reasonable time;

(5) **to continue, invest in, reorganize, or liquidate, any partnership, proprietorship, corporation or business**, and to convert such business interest from one form (e.g., proprietorship, partnership, corporation) to another;

(6) **to determine all matters of accounting** in accordance with generally accepted principles of accounting as established **by controlling law** *or*, in the absence of controlling law or if the law is unclear or uncertain, in accordance with what is reasonable and equitable in view of the interests of those entitled to income and principal;

(7) **to acquire**, by purchase or otherwise, retain, invest in, deal with, reinvest in, sell, and manage, temporarily or permanently, **any realty or personalty**, including shares of open or closed end investment trusts or companies, wasting assets, oil, gas and mineral interests of every kind, undivided interests, securities, bonds, debentures, preferred stocks, options, and common stocks of domestic and

foreign corporations and investment trusts or companies (including any trustee bank), limited and general partnership interests (domestic or foreign), mutual funds, mortgages, mortgage participations, certificates of deposit, savings or demand deposits (with any trustee bank or other financial institution), and interests in common trust funds, all with complete discretion to convert realty into personalty or personalty into realty or otherwise change the character of the trust estate, without limitation, to the full extent that an individual could with his own property or estate, without being limited by any law otherwise restricting the permissible forms of investments of a fiduciary;

(8) to engage in all actions necessary to the effective **administration of securities**, including voting securities in person or by proxy, engaging in voting trusts or voting agreements, and consenting to or participating in any alterations of corporate structure affecting securities held by the Trustee;

(9) to **alter, improve, repair, replace, abandon and demolish assets**;

(10) to **sell, exchange, encumber or lease for any period** (which need not be limited to the term of the trust or estate) or for any purpose, or to otherwise dispose of any asset, publicly or privately, with or without notice, wholly or partly for cash or credit, without appraisal, and to give options for those purposes;

(11) to **advance or borrow money** and to hold, mortgage and pledge property for the repayment of same;

(12) to **maintain, defend, abandon, compromise, contest and arbitrate claims and controversies**, without the joinder or consent of any beneficiary;

(13) to **hold title in the name of a nominee**, with no indication of the fiduciary character, or in a form permitting title to pass by delivery;

(14) to **employ and compensate agents, managers, attorneys, accountants and other employees**, and to delegate to them any and all discretions and powers;

(15) to **sell, convey or lease and otherwise deal with any oil, gas and other minerals** and mineral rights and royalties, and operate and develop oil, gas and other mineral properties and interests; to pay all

reasonable expenses in connection therewith; to execute and deliver any deeds, conveyances, leases, contracts or written instruments of any character appropriate to effectuate any of the powers or duties of the trustees; to negotiate, enter into, make, sign, execute, acknowledge and deliver every kind and character of contract, agreement or other instrument for or relating to the acquisition, drilling, development, operation, handling, management, sale or disposal of oil, gas and mineral leases and interests in them and any other interests in oil, gas and minerals, including but not limited to, oil, gas, and mineral leases, pooling and/or unitization agreements, royalty and mineral deeds and contracts, dry hole and bottom hole contribution letters and agreements, net profit agreements, carried interest agreements, assignments of oil, gas and mineral leases and interests in them and personal property and equipment used or obtained in connection with such leases, division orders, transfer orders, and contracts for purchase or sale of oil, gas or other minerals or any component part of it, **none of which need be limited to the term of the trust**;

(16) except as may be specifically limited elsewhere in this instrument, to **invest in life insurance** on the life of anyone, including but not limited to Maker's life or the life of any beneficiary, and to invest all or substantially all of the trust estate in one or more of such policies; provided, however, that the trustee will sustain no liability to anyone if any policies should lapse for nonpayment of premiums, assessments, or other charges because there were inadequate funds in the trust to enable the trustee to make those payments; provided further, that trust income may not be used to invest in life insurance on the life of a Maker unless other provisions of this instrument specifically and explicitly allow it.

2.3 Provisions Relating To Administration.

The following provisions are expressly made *subject to the explicit limitations and restrictions on fiduciaries*, provided elsewhere in this instrument, which limitations and restrictions will govern in the case of conflict.

(a) **Purchase or Loans of Probate Assets By Trustee.** The trustee may purchase any assets from any probate estate at fair market value, and may also loan property belonging to the trust estate to a probate estate, a beneficiary, a trust, or to anyone else, on fair and equitable terms appropriate to the trustee's fiduciary responsibilities, except where this instrument otherwise specifically limits such loans. However, any assets that are not includible in a

person's gross estate for federal estate tax purposes will not be liable for or contributed for the purpose of paying any taxes, liabilities, debts or any other claims or charges against the person's probate estate. Further, any assets that are not includible in a person's gross estate for federal estate tax purposes will not be used in any manner for the benefit of the person's probate estate; and in particular will not even be used for the payment of (or loaned for the purpose of paying) any taxes, liabilities, debts or any other claims or charges against the person's probate estate, if to do so would cause such assets to be includible in the person's estate for federal estate tax purposes.

(b) Freedom From Court Supervision. Unless in conflict with applicable local law, any trust will be administered **free from the active supervision of any court.**

(c) Annual Accountings Required.

(1) During the administration of any trust or estate, **the fiduciary (or former fiduciary) will render an accounting of the subject of his fiduciary office no less frequently than annually, to each beneficiary (or successor fiduciary) or Protector (or successor Protector) who requests such an accounting in writing.** Such request must be made before the end of the third fiscal year of the trust (or estate) following the fiscal year of the trust or estate for which such request is made. Such reports will be made under oath and will set forth the receipts, disbursements, expenditures, and distributions, itemized to reflect both principal and income, during the period of accounting, and the invested and uninvested principal and undistributed income at the time of such report.

(2) The records of the fiduciaries, including tax returns and a true and correct copy of this instrument, will be open at all reasonable times to the inspection and copying of each beneficiary or his duly authorized representative.

(3) The rights of a beneficiary as described in this Subsection are in addition to and not in limitation of any other rights to an accounting provided by law.

(d) Additions to Trust Estate.

(1) In General. Any person may, with the consent of the trustee, add to any trust created under this instrument any property that is acceptable to the

trustee, under conditions acceptable to the trustee. Such property, if received and accepted by the trustee, will become part of the trust estate. Any additions to the trust may be made by supplemental instruments that describe the additional property that will become part of the trust. By adding any insurance policy or policies to the trust, or by assigning such policies to the trustee, or by causing the trustee to be named as beneficiary thereunder, the person or persons making the addition or assignment will be considered to have relinquished and transferred to the trustee all incidents of ownership in such insurance policy or policies and will, at the request of the trustee, execute all instruments reasonably required to effectuate such relinquishment. A person, other than a beneficiary, who makes such a contribution will be bound by all of the terms and restrictions of this instrument otherwise applicable to the Maker, except to the extent inconsistent with any special terms of the contribution made in accordance with paragraph (2) below. A beneficiary who makes or who is treated as having made a contribution (by virtue of the lapse of a withdrawal right or otherwise) will be treated as a Grantor but not a Maker.

(2) Additions Subject to Special Instructions. Notwithstanding the above, any person making a contribution or addition to the trust estate of any trust under this instrument may give the trustee specific written instructions at the time the contribution is made regarding the terms of the contribution. These instructions will be honored by the trustee, if the trustee accepts the contribution. Such instructions may contain any terms acceptable to the trustee (including the presence or absence of withdrawal rights or any other matter) whether or not consistent with the terms of this instrument, **provided, however,** that such instructions pertain only to the contribution then being made by such person and do not affect other property included in the trust estate intended to be governed by the terms of this instrument.

(e) Collective Investment Permitted. If at any time the trustee of any trust under this instrument will also be acting as trustee of any other separate trust, created by any trust instrument or by will, the trustee will not be required to physically segregate the assets of such separate trusts, but, for collective investment purposes and for convenience, the trustee may manage and invest the assets of all the separate trusts collectively as one trust fund; however, each trust will continue as a separate trust for all other purposes, and separate accounts will be maintained by the trustee for each such trust. This provision

will not apply to the extent inconsistent with any terms or provisions applicable to trusts intended to qualify for the estate tax marital deduction.

(f) **Waiver of Bond.** No fiduciary will be required to give bond or other security in any jurisdiction, unless bond is required by law or court rule that cannot be waived, and in that event no surety will be required.

(g) **Texas Law to Govern/Situs of Trust.** This instrument has been drawn and executed in the state of Texas. Except as provided below, all questions concerning the meaning and intention of any of its terms, its validity, or the exercise of the powers of appointment, if any, or the administration of any trusts or powers created in this instrument, or any other matters, will be determined in accordance with the laws of the state of Texas (without giving effect to Texas choice of law principles).

Subject to the Sections dealing with the limitation on the powers of certain fiduciaries, and the distribution standards, which will control in the event of conflict, if the situs of any trust created under this instrument is, at any point in time, in a state or country other than Texas, *or* if there is any other reasonable nexus between any such trust and a state or country other than Texas, then the trustee, in the exercise of its discretion, may, by notarized written instrument, signed by the trustee, elect for the laws of such other jurisdiction to apply instead of Texas law.

(h) **Instrument Not Contractual.** This instrument is not being executed because of any agreement between Maker and anyone whatsoever.

(i) **Effect of Inoperative, Invalid or Illegal Provisions.** If any provision of this instrument is held to be inoperative, invalid or illegal, it is intended that all of the remaining provisions of it will continue to be fully operative and effective as far as is possible and reasonable.

(j) **Distributions/Facility of Payment Clause.**

(1) Subject to the Sections dealing with the limitation on the powers of certain fiduciaries, and the distribution standards, which will control in the event of conflict, any authorized distributions (either during the term of a trust or upon final distribution of a trust or a distribution exercising a withdrawal right made for and on behalf of an incapacitated withdrawal powerholder and whether or not otherwise required to be made in fee simple) may be

made as follows:

(A) to or **for the benefit of** the beneficiary,

(B) **directly to** the beneficiary,

(C) **on behalf of** the beneficiary for the beneficiary's benefit,

(D) **to a Protected Trust** established for the beneficiary, under the terms and conditions described for Protected Trusts,

(E) **to any account in a bank or savings institution** either in the name of such beneficiary, or in a form reserving title, management and custody of such account to a suitable person for the unrestricted use of such beneficiary and solely for expenditure on the beneficiary's behalf,

(F) in any form of **annuity**,

(G) in the case of a person under 21 years of age or under a disability (as the case may be), **in all ways provided by laws dealing with gifts or distributions to or for minors** (including but not limited to the **Uniform Transfers (or Gifts) to Minors Act** of Texas or of any other state) or persons under disability,

(H) to an agent, attorney-in-fact, or other legal representative of the beneficiary, who is in each case duly authorized to act and receive property on behalf of the beneficiary, *and*

(I) **to any suitable person with whom the beneficiary resides** or who has the care or control of the beneficiary, for the sole and unrestricted use of such beneficiary and **for expenditure on the beneficiary's behalf.**

This Subsection will not limit the absolute power of withdrawal otherwise conferred on a powerholder.

(2) In the case of a distribution in a manner provided by laws dealing with gifts or distributions to or for minors (including but not limited to the Uniform Transfers (or Gifts) to Minors Act of Texas or of any other state), the fiduciary making the distribution will have the power and discretion to designate a suitable custodian, who need not be a member of the minor's family and who may be a corporate fiduciary.

(3) The receipt of a distribution by any such

person will fully discharge a fiduciary, and a fiduciary will be without obligation to see to the further application of such distribution.

(4) The fiduciary is expressly authorized to exercise a right of set off in connection with any distribution, and to deduct from any distribution otherwise to be made under this instrument to a beneficiary such amount that the beneficiary owes to any trust created under this instrument. Further, **the fiduciary will set off and deduct against a beneficiary's share of the estate, any and all costs and expenses incurred by the estate as a result of any action brought by the beneficiary against the estate or against the fiduciary, including attorney fees and accountant fees, unless and except to the extent that the beneficiary prevails in such action.**

(k) Protection Against Alienation — Interest in Trust Not Transferable.

(1) Except for a power of appointment or withdrawal specifically given under this instrument, no beneficiary or remainderman will have any right to anticipate, alienate, transfer, assign or encumber any part of his interest in any trust created under this instrument (whether voluntarily or involuntarily), and no beneficiary may substitute any other person for himself. The interest of each beneficiary in any trust created hereby will be free from control or interference by any creditor or the spouse of any beneficiary and will not be liable for his debts or obligations (including alimony but not child support), whether contractual or by tort, and will not be taken by any such person by any process whatsoever and will not be subject to attachment, garnishment, execution, creditor's bill, or other legal or equitable process. (It is recognized that applicable law may limit the effectiveness of this Subsection in special cases; for example, if a trust established under this instrument is self-settled.)

(2) Each trust created under this instrument is a "spendthrift trust," as that term is used in Texas Trust Code §112.035(b).

(3) This Subsection will apply to all beneficiaries and remaindermen, including contingent beneficiaries and contingent remaindermen.

(4) Notwithstanding the above provisions of this Subsection, (1) the fact that a trust is a spendthrift trust does not preclude a qualified disclaimer, (2) the trustee or other fiduciary may

exercise a right of set off or enter into another security arrangement to satisfy indebtedness under a loan of trust property to a beneficiary or to satisfy any other obligation of a beneficiary to the trust, and (3) the beneficiary may enter into validly enforceable settlement agreements with the fiduciary and other beneficiaries in the event of a genuine controversy.

(l) **Liability of Third Party.** No purchaser at any sale made by a fiduciary or persons dealing with a fiduciary under this instrument will be obliged to see to the application of any money or property paid or delivered to the fiduciary. **No person dealing with a fiduciary will be obliged to inquire into the expediency or propriety of any transaction or the authority of the fiduciary to enter into and consummate the transaction** upon such terms as the fiduciary may judge advisable.

(m) **Presumptive Order of Deaths.** Subject to the Maximum Duration Rule, for all purposes of this instrument, and except as may otherwise be very specifically provided, **if any beneficiary dies within 180 days from the date of death (counting the day of death) of a person (including Maker), such beneficiary will be treated as having predeceased such person** and not to have survived him.

(n) **Gift To Include Future Income.**

(1) The income, earnings, and increase from the subject matter of any gift under this instrument or to it is to be the beneficiary's separate property, to the maximum extent allowable by law. Any gift of property under this instrument will include all the income, earnings, increase or property that might at any time arise from that gift of property.

(2) This Subsection will not affect the standard for distributions from any trust under this instrument, but will be used in construing the character of the property distributed from such a trust, or the character of the income, earnings or increase from it, whether arising before or after the gift or distribution, it being expressly intended that to the maximum extent allowable by law such property, including the income, earnings and increase from it, whenever or however arising, will be separate and not community, whether held by the beneficiary or by the fiduciary, and whether or not distributed.

(3) No person will have any interest in any gift under this instrument, including the income or increase from it, merely by virtue of being married to

a beneficiary, unless and to the extent otherwise specifically and explicitly provided in this instrument.

(4) The beneficiary of a specific gift of property other than money is entitled to the net income from it during administration, from the time that such gift becomes payable. If an interest in specific property becomes payable as a result of a person's death, the right to the net income from it accrues from the date of death.

(o) **Advancements.** No gifts made under this instrument or otherwise will be treated as advancements against any gift or devise under this instrument or otherwise, except as otherwise specified.

(p) **Maximum Duration Rule/Rule Against Perpetuities Savings Clause.**

(1) Notwithstanding the remaining provisions of this Subsection or anything else in this instrument to the contrary, each trust created under this instrument, or created by exercise of a power of appointment under this instrument, will in all events terminate (if it has not or would not have terminated sooner), and all interests in the trust will vest, one day prior to the expiration of the permissible period under the relevant application of any applicable Rule Against Perpetuities ("the Rule"). This rule is paramount and overriding, and any of the provisions of this instrument (including the remainder of this Subsection) that would cause any applicable Rule Against Perpetuities to be violated will be void.

(2) As an illustration of the preceding Paragraph, if, at a time when an interest is required to be vested, a beneficiary's interest under this instrument were subject to the Texas Constitution and Texas Property Code §112.036 in the form that it existed when this instrument was signed, then that interest would vest under this instrument, if at all, not later than 21 years after the death of the relevant life in being, living at the time of the creation of the interest, plus a period of gestation.

(3) For purposes of applying the applicable Rule Against Perpetuities, but only to the extent consistent with it, "the time of the creation of the interest" will generally mean, the **effective date of this instrument**, except that, in the event of the exercise of a Power of Appointment that creates another power of appointment *that under the applicable local law* is validly exercised to postpone

the vesting of any estate or interest in the property subject to the power, or to suspend the absolute ownership or power of alienation of the property, for a period ascertainable without regard to the date of the creation of the first power, then in that case the time of creation of the interest will be the date the power is exercised.

(4) For purposes of applying the applicable Rule Against Perpetuities, **the measuring life ("life in being") will be the last person to die among the class of individuals who are living at the time of the creation of the interest and who are ascertainable descendants of any great-grandparent of anyone who, at the time the Rule is applied, is or ever was a Primary Beneficiary of any trust created under this instrument.**

(5) For purposes of applying the applicable Rule Against Perpetuities, an ascertainable descendant is a person of whom the trustee has actual knowledge before the expiration of the period allowed by the Rule. The trustee will be under no duty to acquire knowledge of the existence of such descendants, beyond making reasonable inquiry of the beneficiaries.

(6) Regarding any property that at any time is part of the trust estate of any trust created under this instrument and with respect to which (under the laws of any state applicable to the property) that trust is required to be terminated at any time prior to its normal termination pursuant to the provisions of this instrument, the trust, as to that particular property, will terminate at the time so required. Upon such termination of the trust, in whole or in part, as the case may be, the assets and property as to which the trust is terminated will vest and will be delivered and distributed in fee simple and free of trust unto those persons who at the time of such termination are living and constitute the "beneficiaries" (as normally defined in this instrument) of the trust estate. Generally such distribution will be by right of representation, in accordance with each beneficiary's presumptive share of the trust. However, since Maker is unable to clearly anticipate each situation that might trigger a premature distribution under this instrument, it is provided that if Maker's fiduciaries, in their sole and uncontrolled discretion, determine that such distribution scheme is clearly inappropriate or contrary to Maker's intent as apparent in this instrument, such distribution will be in such proportions as Maker's fiduciaries will determine in their sole and uncontrolled discretion, employing equitable and actuarial principles. It is provided, however, that a distribution upon

termination of a Protected Trust, made by virtue of this Subsection, will be made in fee simple to the life beneficiary of such trust.

(7) The rules described in this Subsection may sometimes be referred to as the Maximum Duration Rule.

(q) **Partial Distributions.** Prior to final distribution of the trust estate, the trustee may make partial distributions to one or more beneficiaries or trusts. A distribution may be made subject to any indebtedness or liability of the trust estate.

(r) **Establishment of Separate and Distinct Trusts.** The fiduciaries will have complete discretion to divide, create and establish separate and distinct trusts in place of or in addition to any trust otherwise established under this instrument; provided, however, that each such separate trust will have the identical provisions and beneficiaries as the original trust, in every respect. (The fact that the trusts are identical does not mean that investments, tax elections, powers of appointment, distributions, etc., must be made or exercised identically with respect to each trust, since the fiduciary is to take all action consistent with the trusts being separate entities.) Maker desires, but does not require, that the fiduciary use this power so that the federal generation skipping transfer tax (GST) exclusion ratio described in IRC §2642(a) for each trust created under this instrument be either zero or one, or as close to zero as possible.

(s) **Merger of Trusts.**

(1) If at any time the trustee of any trust under this instrument will also be acting as trustee of any other trust, created by trust instrument or by will, for the benefit of the same beneficiary or beneficiaries and upon substantially the same trusts, terms and conditions, the trustee is authorized and empowered, if in its discretion such action is in the best interest of the beneficiary or beneficiaries of the trust, to transfer and merge all of the assets then held in trust under this instrument and with such other trust and thereupon and thereby to terminate the trust under this instrument. It is provided, however, that the trust estate so merged will be subject to the same terms and conditions as before the merger, and such merger may not result in a distribution standard that is different from the distribution standards hereunder. Further, any such merger will be subject to the Maximum Duration Rule, originally applicable to the trust prior to the merger.

(2) The trustee is further authorized to accept the assets of any other trust that may be transferred to it under this instrument and to administer and distribute such assets and properties so transferred in accordance with the provisions of this instrument. For purposes of the Maximum Duration Rule, "the time of the creation of the interest" will be the date otherwise applicable to the trust if there had been no merger, or, if applicable and if sooner, the time of the creation of the original interest in the transferred assets.

(3) The provisions of this Subsection are subject to the express limitations set forth elsewhere in this instrument on the powers of a trustee of a trust intended to qualify for the estate tax marital deduction or of a trustee who is a beneficiary of a trust he is administering, which limitations will control in the event of conflict with this or any other provision of this instrument. Accordingly, this Subsection does not apply to the Marital Deduction Gift or to any trust to which an election under IRC §2056(b)(7) is available, during the lifetime of Maker's spouse.

(t) **Control Over Insurance Policy On Life of Trustee.** Notwithstanding anything else herein to the contrary, no individual fiduciary who is insured under any policy of life insurance in which the trust estate owns an interest may exercise any incident of ownership under or control over any such policy. All control over such interest in any such policy will be exercisable only by the noninsured fiduciary or fiduciaries, but if there is no other noninsured fiduciary then acting with the insured fiduciary, then by the successor under this instrument who would then be entitled to act if the insured fiduciary should then cease to act. If an interest is held in a cash value life insurance policy, whether or not on the life of the trustee, the fiduciary may surrender or sell the interest in such policy. This Subsection does not apply to a person with respect to a trust over which the person has been granted a power that is expressly referred to and denominated in this instrument as a General Testamentary Power of Appointment or General Power of Appointment. This Subsection will control in case of conflict with any other provision of this instrument.

(u) **Joint Fiduciaries.** Except as otherwise specifically provided to the contrary in this instrument, wherever a power under this instrument is vested in three or more fiduciaries, such power must be exercised by a majority of such fiduciaries. If such power is vested in only two fiduciaries, they

must act unanimously, unless provided otherwise in this instrument. If there will be more than one fiduciary, they may authorize any one or more of them to sign papers, checks and other instruments on their behalf. Further, the fiduciaries may agree among themselves that the acts of any one or more of them will be valid as if all had acted jointly, including the conveyance of real estate, under either all circumstances or such limited circumstances as their agreement may provide.

Notwithstanding the preceding provisions of this Subsection, if one co-trustee is a Maker and another is not, the trustee who is a Maker need not obtain the consent of or act in concert with the trustee(s) who is not a Maker. Each co-trustee (other than Maker) will have the duty to keep the other trustee fully informed of all unilateral acts.

(v) Limitations On The Exercise of Certain Administrative Powers.

(1) No individual fiduciary will have any administrative or fiduciary power, as a fiduciary, whatsoever (including a power in the determination of accumulations of income or of any distributions of income or principal or the apportionment of receipts and expenses between principal and income or the establishment and maintenance of reserves in the trust, or any power in any other determination, election or distribution), that:

(A) would cause any portion of the undistributed trust estate to be includible in such individual's estate for estate tax purposes, or

(B) the exercise or release of which power would result in such individual being treated as having made a gift for gift tax purposes.

(2) But such determinations, elections or distributions, or the exercise of such power, will be made in the sole discretion of:

(A) the corporate trustee, if any, or, if none,

(B) the other trustee or trustees, or, if there is no other trustee,

(C) the successor under this instrument who would be entitled to act if the individual trustee should then cease to act.

(3) Notwithstanding the above, this Subsection (as should be obvious) does not apply to that portion

of the undistributed estate that would be includible in such individual's estate for estate tax purposes, or with respect to which the individual would be treated as having made a gift for gift tax purposes, if the administrative or fiduciary power in question had been conferred on an independent third party corporate fiduciary, instead of on the individual. Accordingly, this Subsection does not apply with respect to undistributed property that is explicitly *required* by the terms of this instrument to be distributed to such individual, such that any other fiduciary could eventually be compelled by the individual to make the distribution for reasons other than abuse of fiduciary discretion. Further, this Subsection does not apply to property over which the individual has been granted a power that is expressly referred to and denominated in this instrument as a General Testamentary Power of Appointment or General Power of Appointment. Moreover, this Subsection will not prevent the exercise of a power of withdrawal expressly conferred by the terms of the trust.

(4) This Subsection will govern in the event of conflict with any other provision of this instrument.

(w) Discretion of Fiduciary to Determine Separate and Community Property.

(1) A fiduciary may be required to determine whether or not certain items of property in the estate constitute or constituted community property or separate property.

(2) Such fiduciary will make this determination in good faith. However, subject to this duty of good faith, each fiduciary will have full and sole discretion in making such determination, and such determination will be binding on all concerned. Moreover, no fiduciary will be held liable for mistakes in determining what property is separate and what property is community, provided that such determination is made in good faith.

(x) Liability for Predecessor Fiduciary.

(1) Except as provided below in this Subsection, no fiduciary under this instrument, whether original or successor, will be liable for the default of any other existing or prior fiduciary, or legal representative of the fiduciary, or for failing to contest the accounting rendered by such fiduciary.

(2) Similarly, except as provided below in this Subsection, any fiduciary under this instrument,

whether original or successor, may accept the assets as delivered to it by such fiduciary, prior fiduciary or the legal representative of such prior fiduciary, and will be responsible only for such assets. A fiduciary will be relieved of any duty, liability or responsibility that it may have as a successor fiduciary because of receiving assets or being entitled to receive assets from a prior fiduciary.

(3) It is intended that these provisions expedite the funding of any trust created pursuant to this instrument and expedite the succession of trusteeship under this instrument.

(4) Nothing in this Subsection will limit the power of any fiduciary under this instrument from conditioning the acceptance of the trust or any assets upon a proper accounting, or from requiring such an accounting or requiring the rectifying of a prior default from a predecessor fiduciary. Further, if a beneficiary requests the fiduciary, in writing, to contest the action of a predecessor fiduciary, to rectify a default, or to seek or contest an accounting from a prior fiduciary, the fiduciary will do so if such contest or action would be reasonable, notwithstanding the prior provisions of this Subsection.

(y) **Pecuniary Legacies Are Entitled to Appropriate Interest.** Except as otherwise specifically provided in this instrument to the contrary, pecuniary gifts or divisions of a trust made on a pecuniary basis, if any, will not share in estate income, but instead, will bear "appropriate interest." Appropriate interest means that interest will be payable from the date of Maker's death to the date of payment at the statutory rate of interest, if any, applicable to pecuniary bequests under the law of the state whose law governs the administration of the trust, or, if no such rate is indicated under applicable state law, 100% of the rate that is applicable under IRC §7520 at the date of death of Maker. It is provided, however, that a pecuniary bequest will be considered to carry appropriate interest to the extent the payment is made or property is irrevocably set aside to satisfy the pecuniary payment within 15 months of Maker's death. See Treas. Reg. §26.2642-2(b)(4)(i) and (ii). (In the unlikely event that this instrument provides for a pecuniary payment in the future out of a trust, upon a stated event or following the passage of a term of years, other than a payment in the normal course of administration following Maker's death, then interest will be payable from the date of the stated event or the passage of a term of years, rather than from the date of Maker's death. An example would

be a provision that states that upon the death of a beneficiary, another beneficiary will receive a pecuniary payment.) Notwithstanding the foregoing, "appropriate interest" is a term that will be construed consistently with the Treasury Regulations under Chapter 13 of the IRC (the GST tax), and in accordance with Maker's expressed intent that all trusts under this instrument are to have an inclusion ratio of zero or one for GST purposes, to the extent possible.

(z) **Compensation.** Each fiduciary will be entitled to reasonable compensation for services actually performed and to reimbursement for expenses necessarily incurred in the administration of any trust under this instrument, without regard to statute. The determination of the amount of such compensation will be made in the reasonable discretion of the fiduciary. With respect to any corporate fiduciary, however, such compensation will not exceed such fiduciary's usual and customary fees for comparable services to others similarly situated.

(aa) **Disclaimer.** Texas Trust Code §112.010(d) allows for the disclaimer of an interest in trust, stating that "[u]nless the terms of the trust provide otherwise, the interest that is the subject of the disclaimer passes as if the person disclaiming had predeceased the transfer." This instrument provides otherwise. Nonprobate assets that are disclaimed will pass in the manner set forth, if any, in the contract, beneficiary designation, or other instrument governing the disposition of such assets, as the case may be, as permitted under Texas Probate Code §37A(c), which provides that "[n]othing herein will prevent a person from providing in a will, insurance policy, employee benefit agreement, or other instrument for the making of disclaimers by a beneficiary of an interest receivable under that instrument and for the disposition of disclaimed property in a manner different from the provisions hereof." Assets subject to this instrument (as well as nonprobate assets if the instrument governing their disposition does not otherwise provide) that are disclaimed will not pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent, except to the extent clearly and explicitly consistent with the following, but instead, will pass as follows:

(1) **Meaning of "Property Held In Trust."** As used in this instrument in connection with a disclaimer, the phrase "held in trust" means held in trust under the dispositive provisions of this instrument. Accordingly, the phrase does not refer

to property held in trust under a retirement plan or IRA, except insofar as such proceeds are to be retained in a trust under this instrument, and property that is the subject of a specific gift, not in trust, will not be treated as held in trust, even if, prior to the event giving rise to the gift, the property was trust property.

(2) **Property In Trust.** Except where specifically provided to the contrary elsewhere in this instrument, if a disclaimant disclaims all of his or her interest in all (or any portion) of any trust, the trust (or the affected portion) will be administered and distributed as if the disclaimant died after having survived the event giving rise to the interest, such as a contribution of property by the Maker, even if this results in the acceleration of a remainder interest or closes an otherwise open class, and even if this results in the removal of the property from the trust (which in many cases it would). Except where specifically provided to the contrary elsewhere in this instrument, if a disclaimant disclaims less than all of his or her interest in all (or any portion) of any trust, the trust (or the affected portion) will be administered and distributed as if the disclaimed interest had been omitted from the terms of the trust.

(3) **Disclaimer of Specific Assets Out of a Trust or Residuary Estate.** A beneficiary of a trust is entitled to disclaim all or an undivided portion of a specific item or items of property, in accordance with the foregoing rules. If the specific item disclaimed is sold or converted during administration, the disclaimer will extend to the proceeds of sale. **A disclaimer of a specific item or items of property held by a trust will result in such property being removed from the trust with respect to the disclaimant.** If the disclaimed property would continue to be held in trust for the benefit of other beneficiaries in the event of the disclaimant's death, and if the disclaimant retains interests in other trust property, the disclaimed property (or its proceeds) will be segregated and held in a separate trust in which the beneficiary will have no interest, to the extent necessary to satisfy the preceding sentence. (Property disclaimed from the residuary estate is still a part of the residuary estate for purposes of paying taxes, debts and expenses if the residuary estate has that obligation; therefore, the disclaimer must, of necessity, be subject to the right, if any, of the fiduciary to pay taxes, administration expenses and debts with the property, or to otherwise administer the property, prior to funding or other distribution, in the same manner as in the absence of a disclaimer.)

(4) **Property of the Decedent Held By The Crummey Money Family Trust Only As A Conduit.** Property that is to be distributed free of trust upon the death of the Decedent will be treated as property "not held in trust," for purposes of this Subsection.

(5) **Qualified Disclaimer.** If the disclaimer is expressly intended to be a qualified disclaimer under §2518 of the IRC, and if the disclaimant is not Maker's spouse, the disclaimed property or interest will pass to someone other than the disclaimant without any direction on the part of the disclaimant, and the disclaimer will be considered to extend to succeeding interests in the same property as necessary to achieve this end. If the disclaimed interest disappears (such as might be the case with a disclaimed power) and does not pass to the disclaimant, the disclaimed interest will be treated as passing to someone other than the disclaimant, unless this would cause the disclaimer to be disqualified. Such disclaimant will have no discretionary power to direct the enjoyment of the disclaimed interest or to allocate enjoyment of that interest among members of a designated class (unless this power is limited by an ascertainable standard in the manner permitted by Treasury Regulations under IRC §2518, including Treas. Reg. §25.2518-2(e)(1)(i)), and, if, in the absence of this Paragraph, the disclaimant would have had a power of appointment or withdrawal over the disclaimed property, then, notwithstanding anything else herein to the contrary, the disclaimant will not have such power, i.e., it will be void (unless such power is limited by an ascertainable standard in the manner permitted by Treasury Regulations under IRC §2518, including Treas. Reg. §25.2518-2(e)(1)(i)).

(6) **Distribution to Protected Trust.** It is provided, however, that any distribution that is the result of a disclaimer and that would otherwise be distributed in fee simple and free of trust to a person will instead be distributed to a Protected Trust for such person.

(7) **Release Of Trust Powers.** If a fiduciary deems it to be in the best interest of the beneficiaries, the fiduciary, by written instrument signed by such fiduciary, will have the power and authority to release, disclaim or restrict the scope of any power or discretion (but not a duty) granted to such fiduciary in this instrument or implied by law.

(8) **Further Disclaimer.** If, as a result of a

disclaimer, property would pass to or for the benefit of a person, the person may, in turn, disclaim the property that would otherwise have passed to or for the benefit of the person as a result of the first disclaimer. Further, if, as a result of a disclaimer by Maker's spouse, the property passes to or for the benefit of Maker's spouse, Maker's spouse may make a successive (subsequent or further) disclaimer of the same interest. Successive disclaimers may continue to be made by Maker's spouse, for so long as Maker's spouse still has any interest in the property passing as a result of the prior disclaimer(s).

(bb) Undistributed Net Income. Except as may otherwise be provided in this instrument, any net income of a trust that is neither (1) required to be distributed nor (2) actually or otherwise disposed of currently (that is, within the trust tax year in which it is received or so soon thereafter that it is regarded for tax purposes as having been distributed within the tax year in which received) will be added to principal unless specifically designated by the trustee as accumulated income.

(cc) Termination of Trust. A trust will terminate if all income and principal is paid out under mandatory or discretionary powers granted in such trust.

(dd) Headings. The headings, titles and captions above or preceding the various provisions of this instrument (or the headings with respect to such provisions) have been included only in order to make it easier to locate the subject covered by each provision. Any conflict between the titles, headings, captions and the text will be resolved in favor of the text.

(ee) Standard of Liability. The following provisions are expressly made *subject to the explicit limitations and restrictions on fiduciaries*, provided elsewhere in this instrument, which limitations and restrictions will govern in the case of conflict.

(1) The fiduciaries under this instrument have been given certain discretionary powers under this instrument and are authorized or required to make certain determinations and tax elections from time to time in the execution of their fiduciary duties. **The decisions of the fiduciaries with respect to such powers, elections and determinations will be made in a fiduciary capacity.** Therefore, notwithstanding anything else in this instrument to the contrary, the decisions of the fiduciaries will not necessarily be

conclusive, and the fiduciaries will be legally accountable therefor. It is provided, however, that to the extent consistent with the foregoing sentence,

(A) the decisions of a noncorporate fiduciary will be binding on all concerned unless made in bad faith or in wanton disregard of the circumstances,

(B) a noncorporate fiduciary will not be held liable for misconduct unless the actual default, if any, will constitute a clear and definite departure from the established legal standards of conduct, and

(C) no fiduciary will be liable for an honest mistake in the interpretation of this instrument or the law applicable to it if the mistake was reasonable under the circumstances and made in good faith.

(2) Nothing contained in this instrument will be construed to absolve any fiduciary from any liability for misconduct that is a result of bad faith, gross negligence or fraud.

(3) In assessing the propriety of any investment of the trust, the overall performance of the entire trust estate will be taken into account.

(4) Any act by or omission of a fiduciary will be presumptively valid, and this instrument will always be construed in the light most favorable to a finding in support of the validity of such act or omission.

(ff) Tax Elections.

(1) The IRC permits or requires a fiduciary to make certain tax elections as an incidental consequence of the discharge of its fiduciary duties, including at various times and in various contexts:

(A) whether to elect to file a joint return with a spouse under the provisions of §6013(a) of the IRC,

(A-1) whether and to what extent to make an election pursuant to §2056(b)(7)(B)(v) to qualify certain terminable interest property, if any, for the estate tax marital deduction,

(B) whether and to what extent to make an election under §643(e)(3) of the IRC,

(C) whether and where and to what extent to make an allocation of the Generation Skipping Tax (GST) exemption under §2631(a) of the IRC for purposes of determining the "inclusion ratio" described in Chapter 13 of Subtitle B of the IRC, and

(D) to elect a taxable year, which may be a fiscal or a calendar year, under the provisions of §441 of the IRC.

(2) The fiduciaries are specifically given the discretion to make all tax elections, including those enumerated above. Such elections will be made in a fiduciary capacity, after considering the income and estate tax consequences to it and the intent expressed in this instrument. However, a fiduciary will not be liable to anyone for any adverse tax consequence occasioned by the exercise or nonexercise of such election, unless made in bad faith.

(3) An allocation of receipts and expenditures between income and corpus for fiduciary accounting purposes need not follow the allocation for tax reporting purposes. However, a fiduciary may, but need not, make compensating adjustments between income or principal or in the amount of any gift under this instrument as a result of a tax election.

(4) In addition, **no liability will be incurred by the mere fact that the exercise or nonexercise of a tax election benefits Maker's spouse**, it being intended to provide for Maker's spouse during such spouse's lifetime.

(gg) **Investment in Residence.** The trustee may invest in a residence for the support and maintenance of any Primary Beneficiary if the trustee could make distributions of income or principal for the support or maintenance of the beneficiary, and such a beneficiary may live rent free, in the trustee's discretion, whether or not others benefit incidentally from this investment.

(hh) **Certification of Facts.** Any fiduciary will have the power to certify in writing to the identity of the qualified and acting trustee or to any other fact material to any trust at any time. Certification may be accepted by all third parties as conclusive of the matters stated therein, without further inquiry.

(Iii) **Priorities.**

(1) It is realized that due to certain tax elections and decisions in the course of the administration of any trust hereunder, certain conflicts of interest may develop between Maker's spouse and Maker's descendants, between the various classes of beneficiaries, and between the fiduciaries and the beneficiaries. In the resolution of any conflict of interest, the fiduciary is directed first to make a

reasonable effort to determine the overall effect of the conflict in the administration of the estate and of the trusts and then to make reasonable efforts to resolve the conflict by mutual agreement of the respective beneficiaries.

(2) In the event that mutual agreement cannot be reached after such reasonable efforts, then the fiduciaries may resolve that conflict in their sole discretion based on the following priorities:

(A) Maker's spouse will be favored at the expense of Maker's descendants.

(B) Among Maker's descendants, Maker's children will be favored at the expense of more remote descendants.

(C) Life tenants will be favored at the expense of remaindermen of whatever class. Primary Beneficiaries will be favored over Secondary Beneficiaries.

(D) As between the fiduciary and the beneficiaries of whatever class, the beneficiaries will be favored at the expense of the fiduciary.

(jj) **Right to Seek Discharge.** The fiduciary will have the absolute and unqualified right to seek a release or discharge from any personal liability for taxes or otherwise, including a release under IRC §2204 and §6905, and may also make a request for prompt assessment, under IRC §6501 or otherwise.

2.4 Miscellaneous Trust Distribution Provisions.

(a) **Final Alternate Distribution.** The final alternate distribution of any trust under this instrument, that is to be made under the provisions of this Subsection (in default of appointment) in the event neither the Surviving Spouse nor any of the Maker's descendants are living at the relevant time, will be made as follows:

1/2 to the heirs-at-law of Lotta Money and 1/2 to the heirs-at-law of Moore Money, all of these heirs-at-law being determined under the laws of descent and distribution of the state of Texas as if each had died intestate and single at the "relevant time."

For purposes of this Subsection, the "**relevant time**" means the time of termination of a trust, in the case of a distribution from a trust. These distributions will be in fee simple, except as otherwise limited in

this instrument.

(b) **Augmentation of Trusts.** Any portion of the final distribution (in default of appointment) of a Protected Trust, that would otherwise be distributed in fee simple and free of trust to a beneficiary (or to a Protected Trust for the benefit of a beneficiary) for whom a Protected Trust is then in existence, will instead be distributed to the trustee of that existing trust, in trust, as an addition to the principal of the trust estate of the existing trust.

(c) **Special Instructions Incident To A Contribution.** Every provision of this instrument, even those which state that they apply notwithstanding anything else in this instrument to the contrary, will be modified as respects a contribution or addition to the trust estate, to the extent otherwise provided by special written instructions incident to the contribution or addition to the trust estate (including the making of a contribution subject to a withdrawal right), if the trustee accepts such contribution or addition subject to such instructions. In case of such conflict, the special written instructions incident to the contribution or addition to the trust estate will govern in place of a contrary provision in this Instrument; provided, however, such instructions will pertain to the particular contribution only and will not affect the other assets in the trust estate or their administration in the slightest, and, if necessary to achieve this end, will be treated as a separate trust. The trustee will have the right to decline to accept a contribution subject to special written instructions.⁵⁹

2.5 Collection and Allocation of Insurance and Other Death Benefits By Trustee.

(a) **Collection of Death Benefits.**

(1) **Trustee May Be Named Beneficiary of Life Insurance Proceeds.** The trustee, in trust, may be named as the direct beneficiary of the proceeds of one or more life insurance policies or IRAs and (or) as the direct beneficiary of benefits from one or more

⁵⁹How do you make an irrevocable Crummey Trust revocable? One way is to fund it with term life insurance. Another way is to attach new conditions to new contributions. Of course, the important point for tax purposes is that no future instructions or contributions can be allowed to have any effect upon the contributions already made; so with respect to those contributions, the trust really is irrevocable.

deferred compensation or retirement plans or of other nonprobate assets payable by reason of death (sometimes referred to as “Death Benefits”).

(2) **Duty of Trustee To Cause The Payment of Death Benefits or to Collect Them.** As soon as possible after the death of the insured, the trustee will take possession of all policies and other written instruments necessary to collect the Death Benefits. The trustee will then cause the payment of, or collect (by whatever means necessary, including the prosecution and maintenance of litigation) such sums of money or other properties (the Death Benefits) as will be due under the terms of any policies of insurance (including multiple indemnity benefits) or under the terms of any retirement plans (less any amounts required to pay or provide for the payment of any liabilities or obligations to the issuing insurance company, retirement plan trustee or custodian, or other remitter with respect to any policy or plan). It is provided, however, that the trustee need not incur any substantial expense in collecting these payments until it holds funds under this instrument sufficient to pay these substantial expenses or is otherwise indemnified.

The trustee is authorized to compromise and adjust claims arising out of the insurance policies or retirement plans upon such terms and conditions as the trustee considers just, and the decision of the trustee will be binding upon all persons interested in it.

(3) **Trustee May Leave Death Benefits With Issuing Company.** Subject to the limitations provided elsewhere in this instrument, in the case of any individual trustee who is a trust beneficiary of a trust he is administering, the trustee may, however, in its discretion, leave any or all Death Benefits with the issuing insurance company or other remitter under any option of settlement available under the terms of any policy or plan or the practice of any company.

(4) **The Insurance Company or Other Payor May Pay Death Benefits Either to the Trustee or to Such Persons as the Trustee Directs.** The payor of Death Benefits pursuant to the beneficiary designation will pay the Death Benefits to the trustee, or, alternatively, directly to the person(s), trust(s) or entity(ies) entitled to them under the terms of this instrument (later on sometimes referred to as the “one or ones”), as determined and certified by the trustee. Any such payment by that payor, as certified by the trustee, or directly to the trustee, will constitute a full acquittance of that payor, who will

not be permitted or required to determine the correctness of that payment or to see to the application of the Death Benefits so paid.

END OF PART II]

(b) Allocation of Death Benefits After Receipt By Trustee.

(1) Reserved.

(2) Death Benefits Are To Be Added To Trust Estate. All Death Benefits described in this Article that are payable to the one or ones certified by the trustee, or that alternatively are payable directly to the trustee, will be allocated and distributed as a part of the residuary trust estate.

(3) Trustee of Specific Trust Named As Beneficiary. If the trustee of a special trust is designated (as such) to receive Death Benefits, then the trustee will receive or distribute or certify the payment of such Death Benefits to that trust or to the beneficiaries of that trust (but only in accordance with its terms).

(4) Death Benefits Are Not Part of Probate Estate. Notwithstanding anything else in this instrument to the contrary, Death Benefits payable to the trustee will never be or become part of Maker's probate or testamentary estate.

2.6 Limitation on Right of Contribution or Reimbursement. Notwithstanding the above or anything else herein to the contrary, property that is not otherwise includible in Maker's gross estate for federal estate tax purposes will not be used to benefit Maker's probate estate, and, specifically, will not be liable for or contributed for the purpose of paying any taxes, liabilities, debts, expenses or charges, of or against Maker's probate estate.

Except for expenses of administration and estate taxes that are otherwise specifically made apportionable hereunder, nothing in this instrument will subject exempt property to liability for debts, death taxes or other taxes, to which the property would not otherwise be subject. Accordingly, notwithstanding anything herein to the contrary, if the nonexempt property in the estate is not sufficient to discharge all debts, then exempt property will not be used to pay such debts and may not be contributed for the purpose of paying or used to reimburse the payment of any debts for which the property would not otherwise have been liable.

[END OF PAGE, END OF ARTICLE II, AND

