

## DRAFTING TESTAMENTARY DOCUMENTS

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*WILL OF*  
**Moore Money**

Prepared in the offices of:  
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TABLE OF CONTENTS

<u>ARTICLE</u>		<u>PAGE</u>
<b>PART I</b>		
	PREAMBLE.....	I-1
I.	GENERAL OUTLINE OF TESTAMENTARY PLAN.....	I-1
II.	BACKGROUND INFORMATION AND IDENTIFICATION OF FAMILY.	I-2
III.	FIDUCIARY APPOINTMENTS.....	I-3
IV.	GIFTS OF PERSONAL PROPERTY .....	I-4
V.	GIFT OF REAL PROPERTY.....	I-6
VI.	RESIDUARY ESTATE.....	I-7
VII.	SPECIAL MISCELLANEOUS PROVISIONS RELATING TO THE ADMINISTRATION OF MY ESTATE .....	I-9
VIII.	PAYMENT OF DEBTS, EXPENSES, AND TAXES.....	I-10
<b>PART II</b>		
I.	DEFINITIONS.....	II-1
II.	PROVISIONS RELATING TO POWERS AND ADMINISTRATION.....	II-15
<b>PART III</b>		
I.	TESTIMONIUM CLAUSE .....	III-1
II.	ATTESTATION CLAUSE.....	III-1
III.	SELF-PROVING AFFIDAVIT.....	III-2

**Note to the reader.** Use these forms at your own risk. I do not warrant that they are suitable for anything other than as an example for discussion. The Will and Living Trust that follow are not typical. I have thrown in just about every possible clause and bell and whistle and power in my toolbox, which makes this instrument far longer than it ordinarily need be. I leave it to your judgment and discretion as to what may be safely shortened or eliminated, though I have indicated in footnotes a few of the more obvious candidates for red lining.

My comments are contained in footnotes and are not intended to be comprehensive. In reviewing the instrument, I simply jotted down the first hundred-and-fifty issues (I promised myself I would stop at 150) that popped into my mind as being of passing interest or in need of further illumination.

WILL OF  
MOORE MONEY

**(Probate Estate Pours Over Into Trust Created  
During Life)**

PART I  
PREAMBLE <sup>1</sup>

I, **Moore Money**, declare that this is my Will and I revoke any prior wills and codicils. This Will is divided into three main parts, identified as Parts I, II and III, respectively.

It is my intention by this Will to dispose of all of my separate property (if any) and my 1/2 interest in the community property of my Wife and myself that I may own at my death and that constitutes a part of my probate estate. I do not intend to dispose of my Wife's separate property (if any), nor do I intend to dispose of her 1/2 interest in the community property owned by us. I do not intend to make a probate disposition of any nonprobate assets unless those assets are specifically payable to my probate estate or to my executor as executor.

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<sup>1</sup>It is my almost invariable practice to set forth a general outline at the beginning of any complex estate planning document. I believe that the benefit of inserting a general outline in order to make a complex document more easily understood outweighs the facts that (a) it will make a long instrument a little longer, and (b) like a pension plan summary plan description, may be harder to draft than the instrument it describes.

ARTICLE I  
GENERAL OUTLINE OF TESTAMENTARY  
PLAN

**1.1 Specific Bequests, Followed by Gift of Personal and Household Effects (And Other Items of Tangible Personal Property) To My Wife Free of Trust.** First, I am making the following special gifts. If she should survive me, I give to my wife, in fee simple and free of trust, any or all of my interest in Touch of Grey Styling Salon, Inc., including any stock in this business. If he should survive me, I give my son, Cosmic Charlie, any Grateful Dead Tapes that are in the Vault in the cellar at the time of my death.<sup>2</sup>

Next, I am leaving all of the rest of my personal and household effects (and other items of tangible personal property, as defined)<sup>3</sup> to my Wife, free of

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<sup>2</sup>Presumably this is permissible under the doctrine of "facts of independent significance," but one can never be sure. See *Welch v. Trustees of the Robert A. Welch Foundation*, 463 S.W.2d 195, 202 Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.) and *Taylor v. Republic National Bank*, 452 S.W.2d 560, 563 (Tex. Civ. App. --Dallas 1970, writ ref'd n.r.e.). The traditional argument against this sort of disposition was that it allowed the testator to, in effect, change the will without attending to the statutory formalities. For example, consider the following bequest. "I have four boxes in my study, each with the name of a child on the top. I leave the contents of each box to the child whose name is on the top of the box." The idea is that the testator can simply move property from box to box without executing a codicil. In the example just given, it is doubtful that the boxes have any independent significance that is not testamentary; hence the attempt could fail. A gift to child "A" of the contents of a safety deposit box might work, however, since a safety deposit box is commonly (and predominantly) used for purposes that are not testamentary.

<sup>3</sup>Personal and household effects and tangible personal property are not synonymous terms. However, the former is in common parlance, whereas the latter (tangible personal property) is not in everyone's vernacular. Grouping the phrases together helps to overcome this problem without unintentionally limiting the scope of the gift.

But there is another problem with the term personal and household effects. Is a truck a personal effect? How about the old master painting hanging in the study or a \$300,000 stamp collection? This is a place where a definitions section helps.

trust,<sup>4</sup> if she survives me. (My Wife will, of course, retain her 1/2 interest in all of our community property and all of her separate property, if any.) I am also leaving my interest in our home to my Wife, free of trust, if she survives me. Any debt on the home is to be paid by my estate. Finally, I am leaving my Wife any interest I may have in any life insurance contracts that are on her life and in any annuity contracts that are in her name, and that are, in either case, over two years old.<sup>5</sup>

**1.2 Property To My Descendants Free of Trust.** If my Wife does not survive me, I am leaving all of my personal and household effects (and other items of tangible personal property, as defined), that would otherwise have passed to my Wife if she had survived me, to my descendants who survive me, by right of representation.<sup>6</sup>

**1.3 Remainder of My Property Passes to a Living Trust.** The rest of my estate is to pass to the Trustee, in trust, of The Lotta Moore Money Family Trust, in accordance with Texas Probate Code §58a or otherwise. This trust has a section similar to the one in this Will which sets forth an outline of my trust plan, and so I will not restate that plan here.

**1.4 The Details of My Testamentary Plan**

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<sup>4</sup>The reason that personal property is often given outright is because (a) it is often not a suitable trust investment, and (b) a distribution out of the residue carries out distributable net income, which, though it is often desirable, is not always so.

<sup>5</sup>This may or may not be advisable. One thing is certain: it certainly will ease administration, because it is often not easy, and is sometimes impossible, to split an insurance contract after death between the survivor and a trust. There are of course other possibilities, but they too are awkward. I happen to be of the school that says that life insurance is worth what it is worth. Many people think it is worth more than that. There are cases where it might be worth more than it appears (or, perhaps, more than its estate tax value), for reasons that are known only to the family. If that is the case, don't use this clause, or disclaim the insurance. I am simply skeptical about the notion that life insurance is some special species of property that will appreciate more rapidly than other assets of equal value.

<sup>6</sup>Both the terms "descendants," and "by right of representation" are defined. I prefer "by right of representation" over the common Latin equivalent, just as I prefer the term descendants over issue, in each case for the obvious reason that not all of my clients are lawyers.

**Are Set Forth Later.** The foregoing is but a general outline of my testamentary plan. The details are set forth below with particularity, are more specific than the above, and will control in the case of conflict.

## ARTICLE II BACKGROUND INFORMATION AND IDENTIFICATION OF FAMILY <sup>7</sup>

**2.1 Identification of Person Making Will.** I, **Moore Money** (Moore), named "Morris Edward Money" at birth, and also known as Mo Money and M.E. Money, am the person making this Will. Under this instrument I will sometimes be referred to as "Maker" or "Testator." I was born on Tuesday, October 1, 1929 in Desert City, Lion's Den County, Texas. My social security number is 009-999-9999.<sup>8</sup> I am presently a domiciliary and resident of Ripple County, Texas. My Texas domicile was established at birth. **I am a citizen of the United States.**<sup>9</sup>

**2.2 Identification of Spouse.** I am married to **Lotta Money** (Lotta), named "Lotta B. Goode" at birth, and also known as B. Goode, Mrs. Lotta Money and Mrs. Moore Money. All references in this Will to "my Wife" or to "my spouse" are to Lotta Money alone. My Wife and I were married on Sunday, January 1, 1950 in Shotgun Point, Terrapin Station County, Texas. My Wife, Lotta Money, was born on Tuesday, October 1, 1929 in Crazy Fingers, Dark Star County, California. My Wife is presently a domiciliary and resident of Ripple County, Texas. Her Texas domicile was established at birth. **My Wife is a citizen of the United States.** I have not

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<sup>7</sup>There are many instances when identifying the family, and supplying helpful information such as dates of birth and social security numbers will make it easier for title examiners, transfer agents, and, of course, the fiduciary, to carry out their respective jobs.

<sup>8</sup>I no longer list the social security number of a living person in a will, because of the opportunity for the unscrupulous to make untoward use of it; however, a deceased person's social security number is public record, and can be found on Lexis, along with anyone's (living or dead) date of birth. "Privacy is dead, deal with it." Hot Wired magazine.

<sup>9</sup>This is a matter that assumes increasing importance as time goes on. If the client is not a citizen, now is the time to find out. This provision forces the issue to be considered.

been previously married to any other person.<sup>10</sup>

**2.3 Identification of Children.** I have two children now living, identified below:

**E. C. Money (Cosmic Charlie)**

**Date of Birth: 1/2/1950**

**Faith N. Money (Faith)**

**Date of Birth: 1/2/1951**

I have 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 "my children," "my child" or a "child of mine," "Moore Money's children," "Maker's children," "Decedent'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 me, *and no others*. This Section is to be interpreted literally and strictly.<sup>11</sup>

**2.5 Identification of Descendants.** All references in this instrument to my descendants will include only my children (as defined above) and their descendants and no others. This provision is to be interpreted literally and strictly.

### ARTICLE III FIDUCIARY APPOINTMENTS

**3.1 Appointment of Independent Executor.** I appoint **Lotta Money** as my independent executor.<sup>12</sup> If Lotta Money fails or ceases to qualify, is incapacitated, or ceases to act, I appoint **Infidelity Trust** as my independent executor.

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<sup>10</sup>See my comments in the preceding footnote; however, here, the availability of the marital deduction is an additional concern.

<sup>11</sup>This provision, and the one that follows, offer a tactful and effective way to deal with the claims of illegitimates, both real and imagined, that the testator does not wish to benefit.

<sup>12</sup>This is often the first thing the probate judge wants to see; so, in a long instrument, it should be placed close to the front.

### **3.2 Additional Provisions Relating To Executorship.**

**(a) Independent Administration Without Bond.** If an administration is requested in a state other than Texas, the phrase "independent executor" may be construed simply as the word "executor." However, in any event, and except as otherwise specifically provided, I intend my executor to be *independent*, as that term is used and defined under Texas law, or as independent as other applicable law allows. If my estate under this Will is being administered in a state other than Texas, it is my further intent that any administration **not** be supervised and that it be **informal** (within the meaning of the Uniform Probate Code, if applicable).<sup>13</sup> **No bond will be required of an independent or dependent executor appointed under this Article.** To the extent permitted by law, no action will be had in any court exercising probate jurisdiction in relation to the settlement of my estate, other than the probating and recording of my will and the return of an inventory, appraisement and list of claims of my estate. However, anyone entitled to serve as independent executor above may decline to serve in that capacity, and may apply instead to serve as dependent executor or successor dependent executor, without bond, under the direction of the court, and I appoint such person to serve in such capacity in such event. Further, anyone serving as independent executor may resign and apply to have the independent administration converted to a dependent administration under the direction of the court, in which case I appoint such person as dependent executor to serve without bond.<sup>14</sup> Persons entitled to serve as independent executor will be entitled to serve as dependent executor in the same order of priority.

**(b) Ancillary Fiduciaries.** I appoint as ancillary fiduciary the person or corporation that my executor appoints in writing. Unless prohibited by applicable law or court rule, my executor may

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<sup>13</sup>Although Texas may have paved the way, it is no longer the only state that provides for administration subject to limited court control.

<sup>14</sup>There are times when this little provision could be very helpful. For instance, on occasion, the claims procedures applicable in a dependent administration can give the beneficiaries and the executor needed cover and protection not available in an independent administration.

appoint itself as ancillary fiduciary.

(c) **Executor/rix.** The term “executor” means “executrix” if the person appointed or serving as “executor” is a female.

ARTICLE IV  
GIFTS OF PERSONAL PROPERTY

**4.1 Gifts of Personal Property.**

(a) **Gifts of Personal Property Pass Free of Estate Tax.** The gifts described in this Section are specific gifts and will pass **free of estate tax.**

(b) **Gift of Personal and Household Effects (And Other Items of Tangible Personal Property) to Lotta Money If She Survives Me.** First, I am making the following special gifts: If she should survive me, I give to my wife, in fee simple and free of trust, any or all of my interest in Touch of Grey Styling Salon, Inc., including any stock in this business. If he should survive me, I give my son, Cosmic Charlie, any Grateful Dead Tapes that are in the Vault in the cellar at the time of my death. If she survives me, I give to my Wife, in fee simple, all of the rest of my personal and household effects (and other items of tangible personal property, as defined later on in Part II).

(c) **Gift of My Community Interest In Lotta Money's Retirement Plans to Lotta Money.** If my Wife survives me, and if she is a participant in a retirement plan, or a party to an IRA, at the date of my death, and if I have an interest in such plan or IRA solely by virtue of the community property laws, then, to the extent any such interest of mine has not been distributed under the plan or IRA and may be disposed of by will, I leave such interest to my Wife in fee simple, as a specific gift not in trust. If such interest may not be disposed of by will, but my estate would have equitable rights arising by virtue of such interest, then I waive such rights, effective as of the date of my death. (This Subsection does not apply to any retirement plan or IRA account to which I am the sole party.) My Wife may choose to disclaim this interest. Provisions regarding disclaimers are found

in Part II.<sup>15</sup>

**4.2 Gift of Personal and Household Effects (And Other Items of Tangible Personal Property) to My Descendants If My Wife Does Not Survive Me.**

(a) **Division Into Representational Shares.** If my Wife should not survive me, but any descendant of mine does, I give all of my personal and household effects (and other items of tangible personal property, as defined) owned by me at the time of my death, that would otherwise have passed to my Wife if she had survived me, to my descendants who survive me, by right of representation.<sup>16</sup>

(b) **Items Having No Value.** However, if my Wife should not survive me, any items of tangible personal property that my executor determines to be of no present or probable future use or value to my beneficiaries may be disposed of by my executor by gift to any charity or person, by destruction, or by abandonment.

(c) **Methods of Distribution.** If my Wife fails to survive me, my executor may divide, partition and distribute specific items of tangible personal property (including undivided interests in any such items) among the beneficiaries who are otherwise entitled to the property, or may sell all or any items and distribute the net proceeds of sale among the beneficiaries, or, alternatively, may add all or any of such proceeds to my residuary estate, provided the Primary Beneficiaries of my residuary estate (and their respective shares of or beneficial interests in the residuary estate) are the same as the beneficiaries who are otherwise entitled to the property under this Section.

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<sup>15</sup>It may be necessary to disclaim this interest in order to fully fund the bypass trust, but if not, then leaving the interest outright to the survivor is the cleanest way to handle the matter, absent a desire to protect the children. Of course, if the interest is in a plan subject to ERISA, this provision will be ineffectual if the disclaimer is in favor of anyone other than the participant spouse.

<sup>16</sup>Occasionally, I encounter the phrase “in equal shares per stirpes,” which can be, of course, a nonsequitur.

You may wish to restrict the gift of tangible personal property to surviving children, per capita, but if the estate is large this can operate unfairly in the case of the orphaned grandchildren.

(d) **Inclusion Directly In the Residuary Estate.** In the alternative or partial alternative (if my Wife fails to survive me), my executor may include any of such items of tangible personal property directly in my residuary estate.

(e) **Expenses of Delivery.** All expenses of packing, shipping, insuring and delivering any of the items disposed of in this Article to a beneficiary will be paid by my executor as an administration expense of my estate.<sup>17</sup>

**4.3 Gift Of Life Insurance Contracts.** If my Wife survives me, and I have an interest in any life insurance or contract(s) on her life or in any annuity contracts that are in her name, that, in either case, were initially purchased by one of us more than two years prior to my death, then I leave such interest to my Wife as a specific gift in fee simple and free of trust.<sup>18</sup>

**4.4 Lapsed Gifts.** Any gifts that lapse under this Article will become a part of my residuary estate.

**4.5 List of Specific Items.** I may leave a formal or informal writing or list expressing my intentions or preferences regarding who is to receive specific items of tangible personal property. If this list or other writing does not qualify as a legal codicil to this Will (which it probably won't unless it is entirely in my handwriting and dated, or is duly witnessed, and otherwise qualifies as a holographic codicil), I nevertheless request (though I cannot require) the beneficiaries to honor it, and to the extent I have the power to do so, I hereby grant the person then serving as my executor a special power of appointment to appoint the specific items of tangible personal property to the persons identified

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<sup>17</sup>Courtesy of Stanley's short course, attended many years ago.

<sup>18</sup>As presaged in a footnote in Article I (General Outline), this provision could simplify trust administration. For fear that an unscrupulous spouse might use community funds to purchase such a policy while the testator is on his death bed, I have restricted the application of this provision to older policies. This is not a provision to use in all cases. Again, a disclaimer may be called for in an appropriate case. The use of this clause may depend on one's attitude towards insurance in general. I tend to think insurance is really worth what it is valued for estate tax purposes. In some cases it may be worth more; in some cases less.

in the writing.<sup>19</sup>

## ARTICLE V GIFT OF REAL PROPERTY

**5.1 Gift of Residence.**<sup>20</sup> If she should survive me, I give to my Wife, in fee simple, **as a specific gift and free of estate tax**, any interest I may have in any real property that I own at the time of my death and that my Wife then uses as her principal residence, together with all buildings on and improvements to the property, all appurtenances to them and all policies of insurance relating to them.

(a) **Exonerated Gift.**<sup>21</sup>

(1) Any indebtedness on which I am liable that is (A) secured by a lien on the property described in the preceding provisions of this Section, and (B) expressly described in the instrument creating the lien, will be discharged from my residuary estate; provided, however, that under no circumstances is my executor required under this instrument to prepay such indebtedness.

(2) Further, if and to the extent that the discharge of my Wife's legal or equitable share of such indebtedness (if any) will qualify for either an IRC §2053 or §2056 deduction (or for any other estate tax deduction), I direct my executor to pay such indebtedness without contribution or reimbursement from my Wife, regardless of whether or not my Wife and I may be jointly or severally liable for same and regardless of whether such indebtedness exceeds the value of my interest in such property.<sup>22</sup>

(3) Alternatively, if such indebtedness is not

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<sup>19</sup>This is one way, not necessarily legally effective, for dealing with a common problem.

<sup>20</sup>The home is not a bad trust asset, but it is not ideal either: It is easy to manage and keep track of, is not easily squandered. It probably will not appreciate at the same rate as the stock market, however, and if it sold, there might be capital gains to pay that might otherwise have been covered by the surviving spouse's exclusion. In addition, ad valorem taxes might have to be paid at the non homestead rate.

<sup>21</sup>See *Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

<sup>22</sup>This may be an additional gift, so, once again, the effect on the size of the bypass trust may need to be considered.

prepaid by my executor in the regular course of administration, then, if and to the extent that my estate will be entitled to either an IRC §2053 or §2056 deduction (or for any other estate tax deduction), my executor, in its discretion, and in order to allow the closing of the estate, may pay my Wife a pecuniary amount equal to the value of the obligation of my estate under this Article to discharge such indebtedness, provided that my Wife deliver to my executor my Wife's agreement to assume and pay such indebtedness. Such agreement must be in a form judged suitable by my executor, and may be either secured by the residence or unsecured, in my executor's discretion. Such pecuniary amount may be satisfied in cash or in kind, or partly in each, at fair market value on the date of distribution.

(b) **Contiguous Property.** The term "residence" or "residences," as used in the preceding provisions of this Section, includes all real property that is actually contiguous (that is, in actual contact) with the property used as a residence.<sup>23</sup>

**5.2 Other Real Estate.** Any interests I may have in any other real property or real properties, not otherwise disposed of hereunder, that I own at the time of my death, together with all buildings and improvements on them and appurtenances to them and all policies of insurance relating to them, will be included as a part of my residuary estate, and will pass subject to the terms of the Article disposing of my residuary estate.

## ARTICLE VI RESIDUARY ESTATE

**6.1 Gift of Residuary Estate.** As permitted by Texas Probate Code §58a or otherwise, I give my residuary estate to my Trustee, in trust, of The Lotta Moore Money Family Trust (sometimes, depending on the context, simply referred to as the "Trust"). The Lotta Moore Money Family Trust is a revocable intervivos trust of which I am a Maker. This trust was signed, created and funded prior to the execution of this Will on the same day this Will was signed by me. (A photocopy of the first page and the signature pages of The Lotta Moore Money Family Trust is attached as an exhibit for identification purposes, immediately following the self-proving

affidavit.)

**6.2 Alternate Distribution.** If The Lotta Moore Money Family Trust does not exist at the time of my death, or is otherwise ineffective, then my residuary estate will be distributed as provided in the trust instrument that establishes or purports to establish The Lotta Moore Money Family Trust, as it exists at the time of the signing of this Will by me. In that event and to the extent necessary for that purpose, The Lotta Moore Money Family Trust is incorporated by reference.

**6.3 Trustee As Beneficiary.** The gift of my residuary estate to the Trustee of The Lotta Moore Money Family Trust means a gift to the trustee as a fiduciary of that trust. The property given to the Trustee will be added to the corpus of the Trust to be administered as a part of it and will be governed by the terms and provisions of the instrument establishing the Trust, including written amendments or modifications to it made after the signing of this Will and before my death. Any life insurance proceeds, or other Death Benefits, that are to be paid in accordance with a beneficiary designation to "the trustee named in my last Will" (or designation of similar import), means that the Death Benefits will be paid to the Trustee of The Lotta Moore Money Family Trust, as above provided, except that, notwithstanding anything else in this instrument to the contrary, such Death Benefits will never be or become part of my probate or testamentary estate.<sup>24</sup>

**6.4 The Trustee Will Direct My Executor Regarding Who Is To Receive My Residuary Estate Or Proceeds.** The Lotta Moore Money Family Trust may be composed of one or more Trusts or Subtrusts, so that a gift to the Trust may in actuality be a gift to more than one trust. Further, depending on the circumstances existing at the date of my death, the terms of the Trust may direct that a beneficiary's interest be distributed to the beneficiary in fee simple. In order to avoid any subsequent or unnecessary "division" of the gift and to dispense with the possible need for the execution of superfluous or redundant deeds, or for any other reason, my executor may transfer my residuary estate (and any other gift to the Trustee) directly to the

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<sup>23</sup>Although this may solve a construction problem, take care in using this clause, if, for instance, the house is in the middle of a 10,000 acre ranch.

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<sup>24</sup>For various reasons, creditor protection being one, and the recent 5th Circuit decision in *Street* being another, we would still prefer that life insurance proceeds not be a part of the probate estate.

person(s), trust(s) or entity(ies) entitled to it as determined and certified by the Trustee, or, otherwise and alternatively, directly to the Trustee.<sup>25</sup> Any such payment by my executor as certified by the Trustee, or directly to the Trustee, will<sup>26</sup> constitute a

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<sup>25</sup>I recently had occasion to invoke this clause when a real estate lawyer was insisting that a deed first be issued to the trustee of the family trust, followed by another deed from the trustee of the family trust to the trustee of the marital trust.

<sup>26</sup>**Grammar: Will or Shall?** “Will” constitute or “shall” constitute? Or under the preceding sentence, “will” transfer, or “shall” transfer? English usage regarding the conventional distinctions between should and would, and shall and will, depending on whether it is first person or second person usage, and whether the tense is colored future, conditional, plain future, imperative, etc., has deteriorated into a hopeless mess, outside the south English manor. (See Fowler.) “I shall, you will probably go for a walk,” but “I will, you shall go to work today no matter what.” “We should be delighted if you would come.” etc., etc. The mess has all but resolved itself in America where there is no longer any recognizable distinction, at least outside of legal documents. (See Mencken.)

**When should one use “will” and when “shall” in legal documents?** Here the distinction is not one of person (first person, second person, etc.), but of command versus expectation versus what the will of the contracting parties is. I do not know which term to use, but have more or less decided to use will instead of shall most of the time, because I think using shall indiscriminately sounds pretentious, and worse, if used invariably in place of will, it ceases to have any special force of command associated with it. Further, it just might imply that something ought to happen instead of that it will in fact happen, which may, ironically, imply an intention that is less firm instead of more. In other words, it may put the point more strongly to say that we agree (in a contract) that such-and-such “will” (emphatic usage) take place, than if we implied (by using shall) that it simply ought to take place (even though shall also has an imperative usage). I am no William Safire, so don’t rely on my analysis, which may be flawed. I do think, however, that it is safe to say that we tend to overuse the word “shall” in our legal documents; and that is my main point.

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**Grammar: Compound Prepositions.** While I am on the subject of grammar, consider the appalling usage of compound prepositions by lawyers: “as to,” “so as to,” “as to which,” “with respect to which,” “with regard to,” etc. If you will examine the way in which compound prepositions are used, you will find that not only are they frequently superfluous, but the usage is often wrong in fact, because the preposition and the object are not in agreement. This happens more often with compound prepositions connected to the object by the relative “which,” because the separation between the preposition and its object (signaled by the use of the relative) tends to obfuscate the error in construction.

Taking an example from a will I prepared many years ago, I wrote: “I leave all property interests in Black Acre *as to which* I am entitled.” What’s wrong with “to which I am entitled.” You will seldom hear a person say “I am entitled as to that property.” Adding the word *as*, just because it is separated and introduced by the relative “which” does not make it correct.

Another example from one of my wills: I wrote, that the executor would exercise its discretion using common sense, *so as to* achieve a just and equitable result. Is “so as” necessary at all? Or, “We defined the term so that there would be no dispute *as to* the meaning of word ‘descendants’.” “*About*” would have sufficed.

Worst of all, “the trustee shall consider other sources of support available to the Surviving Spouse, *as to which* the trustee has knowledge.” “Of” was the right word. No one would say “The trustee has knowledge *as to* that fact.” If the object of “as to” were not separated, the error would be more apparent.

**Grammar: “Which” or “that”?** Which and that are relative pronouns. “That” is almost always defining or restrictive. “Which” is used both in a nondefining (nonrestrictive, descriptive) and in a defining (restrictive) sense. However, sentences would be easier to read if we didn’t have to pause to figure out the sense in which the relative “which” is being used. If you will look at your instruments, and substitute “that” wherever it can be substituted for “which,” the meaning will be clearer. The substitution cannot always be made. The substitution cannot be made in those cases where “which” is being used in its nondefining sense. That is the point. “That” is almost never used in a nondefining sense.

full acquittance of my executor, and my executor is not permitted or required to determine the correctness of that payment or to see to the application of the proceeds so paid.

**6.5 Marital Deduction.** If my Wife survives me, the net gift of my residuary estate to The Lotta Moore Money Family Trust is designed to qualify for the estate tax marital deduction (at least in part) to the extent necessary to defer estate taxes, as more specifically set forth in the trust instrument.

(a) **Name of Gift.** The part of the gift intended to qualify for the estate tax marital deduction is sometimes referred to in The Lotta Moore Money Family Trust as "the Marital Deduction Gift." The Marital Deduction Gift is subject to the technical provisions described in the following Subsection.

(b) **Intent that Property Qualify for the Marital Deduction.** It is my intent that the Marital Deduction Gift qualify for the estate tax marital deduction, and all questions applicable to the Marital Deduction Gift will be resolved accordingly. In this regard, the powers and discretions of my fiduciaries with respect to administration of my estate and the Trust will not (cannot) be exercised or exercisable except in a manner consistent with my intent as expressed in this Subsection.<sup>27</sup> Therefore, notwithstanding anything in this Will to the contrary:

(1) In no event will anything contained in this Will be construed as granting my fiduciaries any power that would cause the loss of all or any part of the marital deduction for the Marital Deduction Gift needed to reduce the federal estate taxes payable by my estate, which marital deduction would otherwise

---

Consider the difference in meaning between "I leave my brother my shotgun, which has a hair trigger," and "I leave my brother my shotgun that has a hair trigger." The comma and the word "which" clue the reader quickly, in the first example, to the fact that there is probably only one shotgun, and that it has a hair trigger, so be careful with it. The second example suggests that the testator owns more than one shotgun, and is leaving his brother the one with the hair trigger, distinguishing it from any other shotguns he owns. The first example is nondefining (it is descriptive only); the second example defines the shotgun (in a manner that distinguishes it from others).

<sup>27</sup>Insurance, insurance. Note that there is no possible public policy issue (as in *King* and *Prospra*) in letting the court—and the IRS—know the testator's intent.

have been allowable to my estate for federal estate tax purposes; and to the extent any such power would (in the absence of this limiting provision) cause the loss of all or any part of such deduction, such power or powers will *ipso facto* be limited or eliminated (i.e., they will be void). However, the preceding sentence does not require that my fiduciaries exercise any tax election only in such manner as will result in a larger allowable estate tax marital deduction than would be obtained if a contrary election had been made, except as required by regulation, rule of law, or otherwise, as necessary to retain the option or right to utilize the marital deduction in whole or in part.

(2) It is expressly provided that in the exercise of discretion, my fiduciaries will not (cannot) make any determination inconsistent with the foregoing.

(3) In the construction of my Will, this Subsection will govern all others.

ARTICLE VII  
SPECIAL MISCELLANEOUS PROVISIONS  
RELATING TO THE ADMINISTRATION OF MY  
ESTATE

**7.1 Valuation For Funding and Distribution Purposes.** Except as may otherwise be specifically provided, distributions of property, including distributions in satisfaction or partial satisfaction of pecuniary legacies, will be valued and credited at the fair market value of the property determined as of the date or dates of distribution.<sup>28</sup>

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

**7.3 Pretermitted Beneficiaries.** I provide \$100 for any person born to or adopted by me who has not otherwise been adequately provided for in

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<sup>28</sup>Even if the distribution is a fractional share of the residue, as would be the case in a common residuary gift to children, it is necessary to know and credit the value of any distribution that is not simultaneously proportionate.

this Will.<sup>29</sup>

**7.4 References To Will.** All references in this Will to "this Will" or to "my Will" are to this instrument, including the Preamble and Parts II and III (except for the Self-Proving Affidavit, which is technically not a part of the Will) and any codicil to it. Unless otherwise apparent from the context, this Will speaks from the time of my death (the "effective date"), rather than from the time of the signing of this Will. (Part II does double duty in that it is identical to Part II of The Lotta Moore Money Family Trust.)

ARTICLE VIII  
PAYMENT OF DEBTS, EXPENSES, AND  
TAXES<sup>30</sup>

**8.1 Apportionment of Estate Taxes Under Texas Probate Code §322A.** I direct that all estate taxes on probate and nonprobate assets will be allocated to corpus and will be paid, charged and apportioned in accordance with Texas law as it exists at the time of my death, including Texas Probate Code §322A, except where I have specifically provided to the contrary in the following Sections or elsewhere in this Will. ("Estate tax," "estate taxes," "person" and other terms used in this Article will have the meaning given by Probate Code §322A, unless otherwise specifically indicated.)

At the time this Will is signed, Texas Probate Code §322A(b)(1) states that "the portion of each estate tax that is charged to each person interested in the estate must represent the same ratio as the taxable value of that person's interest in the estate included in determining the amount of the tax bears to the total taxable value of all the interests of all persons interested in the estate included in determining the amount of the tax."

I specifically provide that for tax apportionment purposes, the "taxable value" of an interest means the net value for purposes of the estate tax involved, after taking into account any deductions with respect to or chargeable against the interest that are allowed

in computing the tax.<sup>31</sup> For example, the taxable value of an interest for which a full estate tax marital deduction is allowed will be zero, both in the numerator and the denominators of the estate tax apportionment ratios. By way of further example, if a debt or expense, for which the estate receives an IRC §2053 deduction, is charged against a person's interest, the taxable value of that interest (in both the numerator and denominators of the ratios) should reflect the charge (by reducing the taxable value of the interest). This Section will generally be applied so that the sum of the ratios will equal one, taking the remainder of this Article into account.

I recognize that §322A is of necessity a complicated statute, that its meaning is not always clear, and that tax apportionment is an imperfect science. For these reasons, and since it is very difficult to imagine every variation of the tax apportionment problem, I specifically provide that §322A and this Article will be interpreted and applied by my executor, exercising discretion in a fiduciary capacity, using common sense to achieve a just and equitable result, and will not be applied in a manner that would result in a clearly anomalous or unjust apportionment.

**8.2 Recovery of Estate Taxes Under Federal Law.** If federal law (including IRC §2207A) allows for the recovery of estate taxes on nonprobate assets in an amount exceeding the amount otherwise apportionable under this Article, then, except as otherwise limited in this Article, my executor will recover such additional amount, unless it is clearly not in the best interest of the beneficiaries of my estate to do so, as determined in the sole discretion of my executor.<sup>32</sup> (The additional amount so recovered will reduce the estate tax otherwise to be apportioned under §322A and this Article.) My executor is authorized to demand that any amounts that are recoverable under this Section be paid to my executor before such taxes are actually paid, and to offset any benefits otherwise payable to a beneficiary who is responsible to provide such recovery by such

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<sup>29</sup>This is obviously not intended to prevent a contest, it is intended to prevent the application of a pretermitted heir statute.

<sup>30</sup>This is one of the most important Articles in the Will.

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<sup>31</sup>Are taxable value and net taxable value the same? How would you interpret the Texas statute standing alone? What is the taxable value of marital deduction property in the denominator?

<sup>32</sup>I have some concern that the existence of this discretion could have adverse estate tax consequences. I have tentatively concluded, however, that the risk is outweighed by the desirability of this clause, and if there is a risk, I believe it could be cured by fully utilizing the power.

amounts as are recoverable under this Section. If more than one federal law allows for recovery at the marginal tax rate, then each computation should be made independently, at the margin, unless federal law is clear that another method is required.

### **8.3 Property Includible in Gross Estate Under IRC §2041.**

If there is any property over which I have a general power of appointment, and if that property would be includible in my estate under IRC §2041 (meaning that the power was not created by me) if this Section did not exist, then notwithstanding anything else herein to the contrary, my estate will be entitled to recover from the person receiving or holding such property the amount by which the total estate tax that has been paid or is or will be owing exceeds the total estate tax that would have been payable if the value of such property had not been included in my gross estate. To the extent necessary to achieve this end, I now exercise such power of appointment.<sup>33</sup> Even though this instrument may direct that apportionment of other assets take place at the marginal estate tax rate (e.g., recovery under §2207A), I direct that the computation called for under this section be made independently and at the margin, in a manner allowing for the maximum recovery or reimbursement.<sup>34</sup>

### **8.4 Gifts Passing Free of Estate Tax Apportionment.**<sup>35</sup>

(a) **In General.** In determining the taxable value of a person's interest for apportionment purposes, gifts passing free of estate tax apportionment (whether by operation of law or under the specific terms of this instrument) will be ignored in both the numerator and the denominators of the estate tax apportionment ratios.

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<sup>33</sup>There is a danger in exercising powers of appointment when one does not know the nature or extent of the power. All I am saying here is that I don't want the estate to pay the tax on any property subject to a power I know nothing about. Further, I want the recovery to be at the margin.

<sup>34</sup>Charles King pointed out this problem to me. I am not sure whether this last sentence cures it. Again, I do not want my beneficiaries to be penalized as a result of an estate tax incurred as a result of a power of appointment created by someone else.

<sup>35</sup>This Section could be very important, depending upon the nature and composition of the estate assets.

(b) **Nonresiduary Gifts Pass Free of Estate Tax Apportionment.** Notwithstanding the general rule regarding estate tax apportionment, **all nonresiduary gifts** (whether specific, general or demonstrative) that pass either under this Will or under The Lotta Moore Money Family Trust **must pass free of estate tax apportionment to the extent possible**, unless I have provided expressly in the Article in which the gift is made that the gift will be subject to estate tax apportionment. A gift that by its express terms is made "free of estate tax," will pass free of estate tax apportionment within the meaning of this Section.

(c) **Reimbursement With Respect to QTIP Includible In My Gross Estate Under IRC §2044.** However, notwithstanding the foregoing provisions of this Article, my executor will **not** recover or seek apportionment or contribution for the benefit of my estate for any estate taxes attributed to the inclusion of any §2044 property in my estate (and such property will pass free of estate tax apportionment), *if* the beneficiaries of my estate and the beneficiaries of the §2044 property (and their interests in my estate and such property) are substantially the same, except and to the extent it would clearly be in the best interest of the beneficiaries of my estate to seek such recovery.<sup>36</sup>

(d) **Limitation On Right of Contribution and Reimbursement For Taxes On Nonprobate Assets.** Notwithstanding the preceding provisions of this Article, I specifically provide that nonprobate assets (other than (a) §2044(a) assets and (b) proceeds payable to the Trustee of The Lotta Moore Money Family Trust, as provided later on in this Will) will pass free of estate tax apportionment, *to the extent that* the combined estate taxes that would otherwise be apportioned to the particular recipient of the nonprobate assets are less than \$10,000. The recipient means the "person interested in the estate," as that phrase is used in Texas Probate Code §322A. In determining the combined estate taxes that would otherwise be apportioned to the recipient, account will be taken of all assets passing to the recipient that are includible in my estate for federal estate tax

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<sup>36</sup>Query: Does the existence of this discretion pose an estate tax risk? Again, I think that if it does, it is negligible and outweighed by the benefits. It is, nevertheless, still an issue worth considering.

purposes, including probate assets.<sup>37</sup>

**(e) Effect of Right of Contribution or Reimbursement on Marital Deduction Gift.**

Notwithstanding the above, no charge, contribution or reimbursement will be made with respect to property for which an estate or gift tax marital deduction was, will, or could otherwise, be taken. However, since the Marital Deduction Gift is a **net** gift of the residuary trust estate of The Lotta Moore Money Family Trust, the **gross** residuary trust estate may be liable for contribution or reimbursement for debts and expenses, as well as for a share of estate taxes on such portion of the residue (if any) that does not qualify for the marital deduction (as a result of disclaimer or otherwise). (The size of the Marital Deduction Gift is computed under a formula that takes charges against the gross residue into account.)

**8.5 Residuary Estate Is Primary Source of Payment of Debts and Expenses Other than Taxes<sup>38</sup>/Allocation of Expenses Between Income and Principal.**

**(a) In General.** In accordance with Texas Probate Code §378B, and except where I have specifically provided to the contrary elsewhere in this Will, I direct that **all expenses incurred in connection with the settlement of my estate**, including debts, funeral expenses, estate taxes, interest and penalties relating to estate taxes, and family allowances, **will be charged against the principal** of the residuary estate. **Notwithstanding the preceding sentence**, fees and expenses of an attorney, accountant, or other professional advisor, commissions and expenses of a personal representative, court costs, and all other similar fees or **expenses relating to the administration of my estate will be allocated between the income and principal of the residuary estate as my fiduciary determines in its discretion to be just and**

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<sup>37</sup>Since it is difficult to be sure that the estate tax attributable to nonprobate assets can be paid by the residuary estate without disrupting the estate plan, it is usually best, since we now have reapportionment statute, to simply provide that the recipients of nonprobate assets will pay their share of any estate tax. However, if the gift is small, say, under \$10,000 with respect to any one recipient, it may be more expeditious to pay the tax out of the residue.

<sup>38</sup>Distinguish between taxes and debts. Whereas it may be better to apportion taxes, it may be more appropriate to have the debts paid solely out of the residue.

**equitable.**<sup>39</sup>

**(b) Expenses Attributable to Specific Property.**

Notwithstanding the foregoing, expenses (other than *general* administration expenses and estate taxes) that are directly attributable to a specific gift (such as, but not limited to, property taxes, environmental cleanup costs, insurance, preservation costs and upkeep), that is not a part of my residuary estate, will be charged to the beneficiary of such gift.<sup>40</sup> (My executor's right to elect whether administration expenses will be deducted as an income tax deduction or as an estate tax deduction will not be affected by the manner in which such expenses are charged between income and corpus for fiduciary accounting purposes.)<sup>41</sup> Notwithstanding the foregoing, my executor will not pay debts and expenses out of assets that are otherwise exempt from creditor claims, unless the nonexempt assets are clearly sufficient for this purpose and my estate is otherwise solvent. For other abatement rules, see Part II.<sup>42</sup>

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<sup>39</sup>This is a fairly conservative approach, but one, which, within limits, allows the executor, consistent with Texas law, to take advantage of the opportunity of taking, *in effect*, a double deduction for certain estate administration expenses, by deducting those expenses on the Form 1041 estate or trust income tax return, without necessarily commensurately reducing the marital deduction, violating, perhaps, the spirit, but not the letter of IRC 642(g). See *Estate of Otis C. Hubert, Commissioner of Internal Revenue vs. Otis C. Hubert, Deceased, C&S Sovaran Trust Company (Georgia) N.A., Co-Executor*, U.S. Supreme Court, Docket No. 95-1402, 1997 U.S. LEXIS 1920; 65 U.S.L.W. 4183; 97-1 U.S. Tax Cases, (CCH) ¶60,261; 79 A.F.T.R.2d (P-H) 1394; Decided 3/18/97, affirming *Estate of Otis C. Hubert*, 101 TC 314 and *Estate of Hubert*, 63 F.3d 1083 (11th Cir 1995).

<sup>40</sup>What if the will leaves all of the testator's rental real estate to son, as a specific devise, and the residue (equal in value) to daughter? Ordinarily, would the son be entitled to claim the gross rentals, claiming that all expenses in connection with the rental business were "administration expenses" to be charged to the residue?

<sup>41</sup>Note this, and consider the implications.

<sup>42</sup>Consider the addition of this clause:

As between community and separate property in the residuary estate, community property shall be used to pay community obligations first. (By community property, I mean property that was community property at the date of my death.)

(c) **Overriding Limitation In The Case of Marital Deduction Property.** Notwithstanding the above or anything else in this Will to the contrary, I specifically provide, however, that no charge or charges may be made against income if or to the extent such charge or charges would result in a “material limitation” upon the right of my spouse to the income from the Marital Deduction Gift. For this purpose, the phrase “material limitation” will be given the same meaning as that used in §20.2056(b)-4(a), and consistent with my manifest intent not to cause the loss or reduction of the right to take such marital deduction as is necessary to reduce estate taxes in my estate.<sup>43</sup>

**8.6 Contribution From The Lotta Moore Money Family Trust.**<sup>44</sup> As used in this Article, the term “residuary estate” will include the residuary trust estate of The Lotta Moore Money Family Trust, but only to the extent expressly permitted by the trust instrument.<sup>45</sup> However, no contribution to or reimbursement of my probate estate will be made for any estate taxes out of or attributable to property that was not includible in my gross estate for federal estate tax purposes, and no contribution to or reimbursement of my probate estate for debts will be made out of or with respect to property that would not have been liable (whether primarily or ultimately) for such debts in the absence of this Article. If my residuary estate or The Lotta Moore Money Family Trust consists of an Exempt Residuary Share and a Nonexempt Residuary Share (for GST purposes), I direct that the Nonexempt Residuary Share be charged first, and that the Exempt Residuary Share not bear any debts, expenses or taxes as long as the Nonexempt Residuary Share is available for such purposes. Notwithstanding the preceding sentence, if it is clear, under the laws, decisions, regulations, Revenue Rulings, etc., that the foregoing order of payment will result in a constructive addition (for GST purposes) to the Exempt Residuary Share, then, in order to avoid such constructive addition, each

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<sup>43</sup>The meaning of the *Hubert* case, cited above, is anything but clear, and regulations may shortly change the game rules. This clause is intended as insurance.

<sup>44</sup>It is absolutely critical to coordinate the payment of debts and expenses between the probate estate and the living trust.

<sup>45</sup>Permission will be granted.

share will be charged proportionately.<sup>46</sup>

**8.7 Preventing Ademption In Trust Estate.** If The Lotta Moore Money Family Trust makes a disposition of property upon my death in the form of a specific gift of property, and if that property is a part of my residuary probate estate that is to pass to The Lotta Moore Money Family Trust, my executor will treat such property for purposes of estate tax apportionment and payment of debts and expenses as if it were a specific gift under this Will, in accordance with any provisions regarding estate tax apportionment and payment of debts and expenses as I may have otherwise made with respect to that property.<sup>47</sup>

**8.8 Renewal and Extensions of Indebtedness.** My executor is specifically given the right to renew and extend, in any form that it considers best, any secured or unsecured debt or charge existing at the time of my death. Under no circumstances will my executor be required to prepay any debts of mine.

**8.9 Joint Liability.** Unless and except where I may have explicitly provided to the contrary elsewhere in this Will, the provisions of this instrument directing my executor to pay all of my legally enforceable debts, expenses of administration, etc., will not be construed as a gift, or as an enlargement or contraction of a gift, to my Wife or anyone else, and will not be construed as a release of any liability of my Wife or anyone else to share or contribute to such debts or expenses, and my executor will seek contribution and (or) reimbursement (or recover by way of offset) for any such person’s share of any debts or expenses paid or to be paid by my executor and for which my executor would have otherwise been entitled in law or in equity to receive reimbursement or contribution.<sup>48</sup>

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<sup>46</sup>Generation skipping considerations are found throughout this Article.

<sup>47</sup>Making specific gifts to particular beneficiaries under the Will may be unavailing if everything is transferred to the living trust prior to death. This clause addresses a part of that problem.

<sup>48</sup>I have been waiting for the case where the spouse has the audacity to claim that the “pay all debts” clause really means pay debts for which both spouses are liable under the community property laws, with no right of reimbursement. However, I want the case to be someone else’s.

**8.10 Insurance Policy Loans.** No policy loan against a policy of life insurance owned by me will be treated as a debt to be paid out of my residuary estate; rather, any such policy loan against a policy of life insurance owned by me will be paid out of the proceeds of the policy, and any policy of life insurance owned by me will be distributed to the beneficiary entitled to it subject to any such policy loan.

**8.11 Right of Offset.** My executor is expressly authorized to offset any gifts under this instrument to a beneficiary by the amount of reimbursement or contribution otherwise owing.<sup>49</sup>

**8.12 Generation Skipping Tax and Recapture Tax Under IRC §2032A.** Any recapture of estate taxes under §2032A of the IRC will be paid by the qualified heir in accordance with §2032A, and will not be paid by my probate estate. Unless otherwise specifically directed in this Will by specific reference to the generation skipping tax (and not to estate taxes generally), any generation skipping taxes under Chapter 13 of the IRC or under the generation skipping tax of any state will be charged against the property with respect to which the generation skipping tax was incurred, and will not be paid by my residuary estate, except to the extent the property is a part of my residuary estate, in which case the GST tax will be charged solely against that portion of the residuary estate that the property represents.<sup>50</sup>

**[END OF PAGE, END OF ARTICLE VIII AND  
END OF PART I OF MY WILL]**

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<sup>49</sup>This could be a highly useful little provision, in my opinion.

<sup>50</sup>This section is worth noting.

## The Lotta Moore Money Family Trust

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The Lotta Moore Money Family Trust  
Cindy Please Fixxxxxsdfsdfg By Hand

TABLE OF CONTENTS

<u>ARTICLE</u>	<u>PAGE</u>
<b>PART I</b>	
PREAMBLE	I-1
I. GENERAL OUTLINE OF TRUST PLAN .....	I-1
II. BACKGROUND INFORMATION AND IDENTIFICATION OF MAKER AND BENEFICIARIES I-xxx	
III. FIDUCIARY APPOINTMENTS .....	I-xxx
IV. IDENTIFICATION OF TRUST ESTATE AND PRIMARY BENEFICIARIES .....	I-xxx
V. DISTRIBUTIONS DURING PRIMARY TERM OF TRUST .....	I-xxx
V-A. DIVISION OF TRUST ESTATE UPON DEATH OF MAKER INTO A SURVIVOR’S SHARE AND A FIRST DECEDENT’S SHARE.....	I-xxx
VI. SPECIFIC GIFTS FROM TRUST ON DEATH OF EITHER MAKER VII.TAX SHELTER GIFTIN TRUSTMADE BY THE FIRST DECEDENT .....	I-xxx
VIII. MARITAL DEDUCTION TRUST FOR SURVIVING SPOUSE.....	I-xxx
IX. THE SECOND DECEDENT’S RESIDUARY TRUST ESTATE Creation of GST Exempt and Nonexempt Trusts.....	I-xxx
X. PROVISIONS GOVERNING PROTECTED TRUSTS .....	I-xxx
XI. MISCELLANEOUS TRUST PROVISIONS .....	I-xxx
<b>PART II</b>	
I. DEFINITIONS .....	II-1
II. PROVISIONS RELATING TO POWERS AND ADMINISTRATION .....	II-xxx
<b>PART III</b>	
I. SIGNATURE PROVISIONS .....	III-1
II. ATTESTATION OF TRUST BY WITNESSES.....	III-1
III. NOTARIZATION .....	III-2

THE LOTTA MOORE MONEY FAMILY TRUST

Multi-Generational Extended Trusts
Trust May Be Included in Maker's Gross Estate for
Federal Estate Tax Purposes
Married Makers, Residuary Marital Deduction Gift
is in a QTIP Trust
Formula Pecuniary Tax Shelter Gift is in a Trust
Trust is Revocable During Lifetime of Makers but is
Irrevocable Thereafter
Makers are Beneficiaries<sup>51</sup>

PART I
PREAMBLE

This is a Trust Agreement entered into by and
between the Makers of the trust, Moore Money and
Lotta Money (the "Makers" or "Maker"),<sup>52</sup> and
the trustees of the trust, Moore Money and Lotta
Money (initial "Trustee" or "Trustees"). This trust
instrument is divided into three main parts,
identified as Parts I, II and III, respectively.

ARTICLE I
GENERAL OUTLINE OF TRUST PLAN

1.1 General Outline of Trust Plan During
Joint Lifetime of Both Makers.

(a) Trust is to be Administered For Benefit
of Moore Money and Lotta Money (the Makers).

This trust is generally to be administered for the
benefit of Moore Money and Lotta Money (the
Makers) during their joint lifetimes.

(b) Trust is Amendable and Revocable. This
trust is amendable and is revocable during Makers'
joint lifetimes.

<sup>51</sup>I believe that it is helpful to let the reader know, up
front, just what the instrument is basically all about.

<sup>52</sup>Note at the outset that we have one trust instrument, not
two. I think that this is appropriate for several reasons.
Since we may presume that at least some joint
management community property will be contributed to
the trust, it makes sense to come up with a common
scheme to manage it. It also saves paper. As you will see,
sole management community and separate property can be
accounted for in separate shares or subtrusts described in
one instrument and subject to a common administration,
without the need for having five trust documents.

\* \* \* \*

1.2 General Outline of Trust Plan After
Death of a Maker.<sup>53</sup>

(a) Division of Trust Estate Upon Death of
First Maker to Die Into First Decedent's Share
and Survivor's Share.

The first Maker to die is
sometimes referred to as the Predeceased Spouse or
simply as the First Decedent. The Maker who lives
the longest is sometimes referred to as the Second
Decedent, the First Decedent's Spouse, the Surviving
Spouse, the Surviving Maker, or simply as the
Survivor. Either Maker may sometimes be referred
to as the Decedent, in which case the meaning of the
term "Decedent" will depend upon the context.

Upon the death of the first Maker to die, the trust
estate will be divided into a "First Decedent's Share"
and a "Survivor's Share." The First Decedent's
Share consists of (and means) the First Decedent's
fractional community and separate property interest
in the trust, together with any property payable to the
trust under the terms of the First Decedent's will,
and any other property (including life insurance and
other Death Benefits), to the extent of the First
Decedent's interest in it, that is payable to the trust
upon or as a result of the death of the Predeceased
Spouse. The Survivor's Share will consist of (and
means) everything else, i.e., the Survivor's fractional
community and separate property interest in the
trust, together with any property payable to the trust
under the terms of the Second Decedent's will, and
any other property (including life insurance and
other Death Benefits), to the extent of the Second
Decedent's interest in it, that is payable to the trust
upon or as a result of the death of the Surviving
Spouse.

(b) Administration of Survivor's Share.

(1) Administration of Survivor's Share
During Life of Surviving Spouse.

Following the
death of the First Decedent (the first Maker to die),
the Survivor's Share (i.e., the community and
separate property trust interest of the Surviving
Spouse) will be held as a separate and distinct

<sup>53</sup>Again, the procedure of setting forth a general outline at
the beginning of the instrument is one I highly recommend
particularly in complex instruments such as this one, even
if the general outline in fact makes a long instrument a
little longer.

revocable and amendable trust to be known as the Survivor's Trust. The Survivor's Trust is to be administered for the benefit of the Surviving Spouse (i.e., the Maker who lives the longest, sometimes referred to as the Second Decedent), for the remainder of the Surviving Spouse's lifetime, under terms and conditions similar to those applicable during the lifetime of both Makers.

(2) **Administration of Survivor's Share At Death of Surviving Spouse.** Upon the death of the Surviving Spouse (the Second Decedent), the Survivor's Trust will terminate. (For this purpose, the term "terminate" will include a redesignation or merger.) Following the termination of Survivor's Trust, the remaining trust estate will be distributed (after satisfaction of any specific gifts that this instrument or the Second Decedent's Will requires to be made out of the Second Decedent's Share) for the benefit of the descendants, by right of representation, of the Second Decedent, who are living at the Second Decedent's death. Such distribution will be made on a representational basis, either outright or in trust, as set forth elsewhere herein.

(c) **Administration of First Decedent's Share.** Upon the death of the First Decedent (the first Maker to die), and after satisfaction of any specific gifts that this instrument or First Decedent's Will requires to be made out of First Decedent's Share, the remainder of the First Decedent's interest will be held in further trust or otherwise disposed of as follows:

(1) **First Decedent's Share Ceases to be Amendable or Revocable Upon Death.** Upon and after the First Decedent's death, the First Decedent's Share will no longer be subject to amendment or revocation, except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust. The First Decedent's Share will be distributed or held in further trust as set forth below.

(2) **Division of First Decedent's Share of the Trust Into Two Parts If the First Decedent is Survived by the Surviving Spouse (A Dollar Amount and the Remainder) At Death of First Maker to Die.** Upon the death of the first Maker to die (the "First Decedent"), the First Decedent's Share of the trust will be divided into two parts. The first part is a gift of a dollar amount expressed as a formula, and the second part is what remains thereafter (i.e., the residuary trust estate).

(A) **Gift of the Dollar Amount-Tax Shelter Gift.** The dollar amount will be **the largest amount that can pass without increasing the estate taxes** payable by the First Decedent's estate. Ideally, this dollar amount could equal as much as the exemption equivalent (approximately \$625,000 now, though it is recognized that this figure will probably change), if the First Decedent's estate is large enough. (If the First Decedent has made substantial taxable gifts during lifetime, the \$625,000 figure will be reduced commensurately.) The gift of a dollar amount will be held in a trust, known as **The Tax Shelter Trust.**

(B) **Gift of the Remainder-Marital Deduction Gift.** The remainder of the First Decedent's Share (the "residuary estate") will be held in a residuary trust, which will be known as **The Marital Deduction Trust.**

(3) **Essential Characteristics of The Marital Deduction Trust.**

(A) **Spouse is Entitled to All of the Income of The Marital Deduction Trust.** The Marital Deduction Trust is for the exclusive benefit of the Surviving Spouse during the Surviving Spouse's lifetime. The Surviving Spouse is entitled to all of the net income from The Marital Deduction Trust for as long as the spouse is living.

(B) **Principal Distributions From The Marital Deduction Trust.** **Principal distributions from The Marital Deduction Trust may also be made by the trustee in order to provide for the Surviving Spouse's health, education, maintenance, and support in reasonable comfort in the manner of living to which the spouse has become accustomed at the date of the First Decedent's death.**

(C) **Consideration of Other Sources of Support.** In making principal distributions from The Marital Deduction Trust, if any, the trustee **may, but need not, consider other sources of support** available to the Surviving Spouse, of which the trustee has knowledge.

(D) **Estate Taxation Provisions of The Marital Deduction Trust.** The Marital Deduction Trust, because it is intended to qualify for the federal estate tax marital deduction, contains quite a few technical provisions designed to address many of the statutory requirements of marital deduction trusts. It is intended that the property in this trust will escape taxation in the First Decedent's estate, if the marital

deduction is elected by his or her executor. (Of course, the trust estate on hand at the death of the Surviving Spouse will probably be taxable in the Surviving Spouse's estate, but the estate taxes due thereon will be payable out of the trust, at the Surviving Spouse's option. That is the price of the marital deduction.)

**(E) Termination of The Marital Deduction Trust.** On the death of the Surviving Spouse, The Marital Deduction Trust will terminate. (For this purpose, the term "terminate" will include a redesignation or merger.) Following the termination of The Marital Deduction Trust, the remaining trust estate will be distributed for the benefit of the descendants by right of representation of the First Decedent who are living at the time of termination, subject to the exercise of the Nongeneral Testamentary Power of Appointment, described below. Such distribution will be either in fee simple or in further trust, as provided below.

**(4) Essential Characteristics of The Tax Shelter Trust.**

**(A) The Tax Shelter Trust is To Be Operated For the Benefit of the Surviving Spouse.** The Tax Shelter Trust is to be administered for the benefit of the Surviving Spouse if the spouse survives the First Decedent.

**(B) Distributions From the Tax Shelter Trust.** The trustee **may distribute** to the Surviving Spouse for life, at whatever intervals the trustee determines, so much of the trust estate of The Tax Shelter Trust as will reasonably provide for the spouse's **health, education, maintenance and support** in reasonable comfort in the manner of living to which Surviving Spouse has become accustomed at the date of the First Decedent's death.

**(C) Consideration of Other Sources of Support.** In making distributions from The Tax Shelter Trust, the trustee **may, but need not, consider other sources of support** available to the Surviving Spouse.

**(D) Estate Taxation of the Tax Shelter Trust.** It is hoped that the assets in The Tax Shelter Trust will not be subject to estate taxation in the Surviving Spouse's estate. Of course, this cannot be absolutely guaranteed, because the interpretation and permanence of the tax laws is not always certain.

**(E) Termination of the Tax Shelter Trust.**

On the death of the Surviving Spouse, The Tax Shelter Trust will terminate. (For this purpose, the term "terminate" will include a redesignation or merger.) Following the termination of The Tax Shelter Trust, the trust estate will be distributed for the benefit of the descendants by right of representation of the First Decedent who are living at the time of termination, subject to the exercise of the Nongeneral Testamentary Power of Appointment, described below. Such distribution will be either in fee simple or in further trust, as provided below.

**(d) Termination Distributions/Protected Trusts.** A termination distribution that is to be made to or for the benefit of a person, will, as a rule, not be paid directly to such person, but will instead be paid to the trustee of a **Protected Trust** for that person. The administration and terms of Protected Trusts are described in detail later on.

**(e) Termination of Protected Trusts/Trusts Last For Life of Child.** If a beneficiary has received his share of the estate in trust, that trust will generally **not terminate** until it is required to terminate by law or by a similar period under the Maximum Duration Rule described in detail in Part II of the Trust.<sup>54</sup>

**(e-1) The Primary Beneficiary of a Protected Trust May Appoint A New Trustee Upon Reaching 35 Years of Age.** A person for whom 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.<sup>55</sup>

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<sup>54</sup>Is this a provision you would want in only large estates. I hardly think so. A beneficiary of say, \$200,000, who has little other property, is perhaps going to be more concerned to protect that nest egg against the claims of creditors and ex-spouses than is someone who is independently wealthy. It is like the widow who put her penny in the poor box. \$200,000 may be all the beneficiary will ever have. So much the more reason for protecting it.

<sup>55</sup>This should make the dynasty trust arrangement considerably more palatable to the beneficiary. If the beneficiary can be his or her own trustee and has a testamentary power of appointment to boot, the beneficiary ordinarily ought not to be too terribly bothered by the fact that the property is not owned outright. There may be occasions when outright ownership is preferred, but I would think it the exception, rather than the rule.

**(f) Powers of Appointment.**

**(1) Certain Beneficiaries Have Powers of Appointment.** Certain beneficiaries of the trusts established under this instrument have been given powers of appointment over the trust.

**(1-A) 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 a person's 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 so as 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 such a power would be to cause estate tax inclusion in the power holder's estate, which, in turn, would cause the power holder to be treated as the transferor for generation skipping transfer 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 grantor, the granting of the power will not be a generation skipping transfer. 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.<sup>56</sup>

**(2) Surviving Spouse Will Have a Nongeneral Power of Appointment Over Trusts.** This instrument grants the Surviving Spouse a Nongeneral Testamentary Power of Appointment over The Tax Shelter Trust and The Marital Deduction Trust. Under this power, the Surviving Spouse may designate by Will who among the designated class of permissible appointees will receive an interest in the remainder of these trusts, and in what proportions and in what manner. In the absence of the exercise of this Nongeneral

Testamentary Power of Appointment, the remainder of these trusts, existing at the time of termination, will generally pass for the benefit of the First Decedent's then living descendants by right of representation. The persons comprising the designated class of permissible appointees under this Nongeneral Testamentary Power of Appointment are **the descendants of a grandparent of a Maker or a spouse of such descendant.**

**(g) Generation Skipping Trusts.** Provision has been made in this instrument for the various trusts described above to be further divided at death into generation skipping tax exempt trusts and nonexempt trusts, in order that each Maker's full generation skipping exclusion (approximately \$1 million) can be utilized to save estate taxes in Maker's descendants' estates.

**(h) 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  
BENEFICIARIES

**2.1 Identification of Makers.** **Moore Money** (Moore) and **Lotta Money** (Lotta), sometimes referred to collectively either as "Makers" or as "Maker," are the persons establishing this trust with an initial contribution of property. Makers presently reside at 2525 West L.A. Freeway, New Minglewood, TX 76999, (817) 999-9999. **The term "Maker," even though in the singular, may usually safely be interpreted as meaning either or both Moore Money and Lotta Money, unless the context clearly indicates otherwise.** The term "Maker" or "Makers" or "Maker's Spouse" refers only to Moore Money and (or) Lotta Money. On death a Maker is sometimes referred to in this document as the Decedent.

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 Tuesday, October 1, 1929 in Desert City, Lion's Den County, Texas. His social security number is 009-999-9999. He 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.

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<sup>56</sup>Although I did not do so here, I frequently make use of IRC §2041(a)(3) and 2514(d) (the Delaware Tax Trap) as the sole means of triggering estate tax inclusion in order to avoid the imposition of the generation skipping tax in a nonexempt trust. I call attention to the problem in the General Outline in order to bring the point home.

Lotta Money was named "Lotta B. Goode" at birth. Lotta Money is also known as B. Goode, Mrs. Lotta Money and Mrs. Moore Money. Lotta Money was born on Tuesday, October 1, 1929 in Crazy Fingers, Dark Star County, California. Her social security number is 007-999-9999. Lotta Money is presently a domiciliary and resident of Ripple County, Texas. Her Texas domicile was established at birth. Lotta Money is a citizen of the United States.

**2.1A Identification of First Decedent and Surviving Spouse.** The term "Surviving Spouse" or "Survivor," means either Moore Money or Lotta Money, whoever lives the longest. Contrariwise, the term "Predeceased Spouse" means either Moore Money or Lotta Money, whoever dies first. The Predeceased Spouse (the first Maker to die) will sometimes be specifically referred to as the "**the First Decedent.**" The Surviving Spouse (the second Maker to die) will sometimes be specifically referred to as the "**the Second Decedent**" or the "First Decedent's Spouse." Either Maker may sometimes be referred to generically, simply as the "Decedent" or the "Deceased Maker," upon and after his or her death; and if both Makers are then deceased, the terms will refer to either Moore Money or Lotta Money, as the context indicates.

**2.2 Marital Status of Makers.** Makers are husband and wife. Moore Money and Lotta Money were married on Sunday, January 1, 1950 in Shotgun Point, Terrapin Station County, Texas. Any reference in this instrument to a "Maker's Spouse" or "Surviving Spouse" is either to Moore Money or Lotta Money, as the case may be and as the context may indicate. Moore Money may sometimes be referred to in this instrument as "Husband" and Lotta Money may sometimes be referred to as "Wife." The "Surviving Spouse" means either Moore Money or Lotta Money, depending upon who lives the longest, and cannot be applied until the death of the first to die of either Husband or Wife.

**2.3 Identification of Children.** Moore Money and Lotta Money have the following two children now living, and no child now deceased leaving descendants 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**

**2.4 Definition of the Word "Children" / Children Born or Adopted After Signing of Instrument.** With respect to each Maker considered separately, all references in this instrument to "Maker's children," "Decedent's children," "First Decedent's children," "Maker's child," a "child of Maker," or similar designation, include only the children identified as such by name above, and any child or children hereafter born to or adopted by that 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.

**2.6 Each Maker's Children and Descendants Are Considered Separately.** Any reference to Maker's children or descendants or even to Makers' children or descendants will be construed separately with respect to each Maker. For example, unless otherwise specified, any amount passing out of the First Decedent's share to or for the benefit of "Maker's descendants" would pass to or for the benefit of the First Decedent's descendants only, and any amount passing out of the Survivor's share (the Second Decedent's share) to or for the benefit of "Maker's descendants" would pass to or for the benefit of the Survivor's descendants only.

### ARTICLE III

#### FIDUCIARY APPOINTMENTS

**3.1 Appointment of Trustee.** Moore Money and Lotta Money are appointed as the co-trustees (sometimes referred to collectively as the trustee). If both Moore Money and Lotta Money fail or cease to qualify, are incapacitated, or cease to act, **Infidelity Trust** 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.<sup>57</sup>

### **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 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.**<sup>58</sup>

(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.<sup>59</sup>

(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.<sup>60</sup>

(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

<sup>57</sup>Whether or not a co-trustee, acting unilaterally, actually has the power to do so, is another matter, addressed elsewhere.

<sup>58</sup>I consider this a very important section. It is not an easy section to draft, however, if ambiguity and conflict are to be avoided.

<sup>59</sup>After a while, estate planning lawyers tend to find §2042 lurking behind every bush and tree. Incipient paranoia is an occupational hazard.

<sup>60</sup>I have used this to relieve a corporate trustee's concerns, where, for example, a family, having achieved a needed step-up in basis at the death of the first spouse which would not have been available had a family partnership discount applied, now wants to form a partnership between the surviving spouse and the QTIP trust.

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) there are objective tax benefits for exercising the power (e.g., the trust has an inclusion ratio for GST tax purposes of greater than zero or the beneficiary will not have a taxable estate), (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 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.<sup>61</sup>

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

**(1) The Primary Beneficiary of a Protected Trust, who has attained 35 years of age or more, will be the Trust Protector of that person's Protected Trust, following the death of Makers.**<sup>62</sup>

**(2) Moore Money and Lotta Money will serve as joint Trust Protectors.** If both Moore Money and Lotta 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.**

**(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.

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.<sup>63</sup>

**(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**

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<sup>61</sup>I always like to leave a way out, in case, for instance, my generation skipping planning failed on a technicality. I am still just a little leery of this clause, but with the three restrictions on its exercise (i-iii), I think I am covered.

<sup>62</sup>This provision allows each child to serve as trustee of his or her own trust, which makes a lifetime trust, with all its other benefits, more attractive still.

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<sup>63</sup>If you want a shorter instrument, this could be one of the first clauses to go. Its purpose is to facilitate a disclaimer by a parent who, despite the disclaimer, wants to be in a position to oversee matters. I seldom use it in its full form, unless called for.

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.

**3.6 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 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).<sup>64</sup>

ARTICLE IV  
IDENTIFICATION OF TRUST ESTATE AND  
PRIMARY BENEFICIARIES<sup>65</sup>

**4.1 Effective Date.** This agreement will be effective on the date it has been signed by all of the Makers named above (the “effective date”).

**4.2 Name of Trust.** The trust initially established by this instrument (including Parts I, II and III and any schedules) will sometimes be known as **The Lotta Moore 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.

**4.3 Transfer in Trust.**

**(a) Schedule A is a Document of Conveyance.** 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 and a declaration of trust**, effective immediately.

**(b) Other Property to Be Transferred.**

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<sup>64</sup>I make liberal use of savings clauses. True, the instrument could be made shorter without them, but if the added length is the only cost of the insurance I am inclined to make the purchase.

<sup>65</sup>I think that every clause in this Article is useful, but most could be dispensed with if a shorter instrument is desired. I recommend that the reader consider each clause carefully.

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.<sup>66</sup>

**(c) Self Declaration of Trust.** Between the time this trust is signed by all of the Makers named above and the time it is signed by the trustee (if not signed simultaneously), all of the Makers named above will act in the capacity of special temporary trustees under a self declaration of trust. If Maker or Maker’s agent or attorney ever has possession or custody of any portion of the trust estate for a purpose other than to make gifts, such possession will be presumed to be on behalf of the trustee (including a trustee under a self declaration of trust) and not on behalf of Maker individually or as beneficiary, unless a contrary intention is very clear from the circumstances.

**(d) Initial Funding.** Moore Money has previously made a gift of and delivered to Lotta Money all of his interest, whether community or separate or other, in that one certain ten dollar bill identified by serial number 999777999. This ten dollar bill thereby became the sole and separate property of Lotta Money. Lotta Money has freely and voluntarily conveyed this ten dollar bill to the trustee in trust of The Lotta Moore Money Family Trust by attaching it to Schedule A. This ten dollar bill now constitutes all or a portion of Lotta Money’s separate trust estate. Notwithstanding the distribution standards otherwise applicable, this ten dollar bill or its proceeds may not be expended during Lotta Money’s lifetime; it may, however, be alienated so long as it is replaced with property of equivalent value. To this extent, this trust is irrevocable and not amendable, notwithstanding anything else in this instrument to the contrary.

Lotta Money has previously made a gift of and delivered to Moore Money all of her interest, whether community or separate or other, in that one certain ten dollar bill identified by serial number 777999777. This ten dollar bill thereby became the

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<sup>66</sup>I don’t know about you, but my clients invariably ask me, “How do I transfer property into the trust?”, so I decided to write in some instructions.

sole and separate property of Moore Money. Moore Money has freely and voluntarily conveyed this ten dollar bill to the trustee in trust of The Lotta Moore Money Family Trust by attaching it to Schedule A. This ten dollar bill now constitutes all or a portion of Moore Money's separate trust estate. Notwithstanding the distribution standards otherwise applicable, this ten dollar bill or its proceeds may not be expended during Moore Money's lifetime; it may, however, be alienated so long as it is replaced with property of equivalent value. To this extent, this trust is irrevocable and not amendable, notwithstanding anything else in this instrument to the contrary.

**4.4 Agreement About The Characterization of Property Transferred to Trust Being Community or Separate or Being Sole or Joint Management Community.**<sup>67</sup>

**(a) Character of Property Described in Document of Conveyance.** It is contemplated that the separate or community property character of the property transferred to the trust, or the characterization of community property as sole or joint management property, and the identity of the transferor and owner of the property immediately prior to this conveyance, will be identified in Schedule A and will be similarly identified in any future transfers. **If such property is not identified, the trustee may presume that the property is community property, if the property is transferred by a married Maker.**

**(b) Belief and Intent of Maker About the Characterization of Property.** The characterization of property contributed or to be contributed to The Lotta Moore Money Family Trust by Maker (whether under Schedule A or otherwise) as being or having been either community or separate reflects (or will reflect) the belief and intent of the Maker making the transfer and any spouse whose signature is on the schedule or other document of transfer. However, if for some reason it is determined that a Maker or spouse was mistaken in this characterization, the transfer will not be affected and all transactions with the Trust estate will be made as if the property were of the character as described; except that if property is described as

having been separate, when it was, in fact, community, the transferring spouse does not intend by this Subsection to make a gift of the income or property which may arise from that property, unless otherwise provided.

**(c) Separate Property Acquired By Gift.** If property described in Schedule A (or described in any other instrument of conveyance to the trust signed by both Makers) is characterized as the separate property of one spouse when (immediately before the transfer) the other spouse had a community or separate property interest in it, then the other spouse has made a gift of his or her interest in the property to the spouse to whom the schedule (or other document) reflects it then belongs. To the extent necessary to carry out this agreement and conveyance, this schedule (or any other instrument of conveyance to the trust signed by both Makers) operates as a partition and exchange of the property.

**(d) Management Rights in Community Property Transferred in Trust.** The characterization of the property described in Schedule A (or described in any other instrument of conveyance to the trust signed by both Makers) as being joint or sole management community property constitutes an agreement between Makers under §5.22 of the Texas Family Code providing for the management, control and disposition of the property in the manner characterized. This management agreement may only be revoked by both Makers jointly and will survive the distribution of the property upon revocation of the trust or otherwise.<sup>68</sup>

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<sup>68</sup>Can spouses simply agree as to whether community property is joint or sole management? I think they can. How does such an agreement affect the rights of creditors? The Family Code says that if the property is sole management community of one spouse, it is not liable for the contractual debts of the other spouse. Absent fraud, the Family Code does not appear to apply a different rule of contractual liability, depending on whether the property is sole management because of an agreement.

§3.102(c) of the Family Code provides:

(c) Except as provided in Subsection (a) [the section defining what is sole management community property], the community property is subject to the joint management, control, and disposition of the husband and wife, *unless the spouses provide otherwise by power of attorney in writing or other agreement.* [Emphasis added.]

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<sup>67</sup>Since there are five species of marital property that might go into this trust, we may need as many as five subtrusts, if we are interested in preserving the character of each.

(e) **Failure to Specify Management Rights.** If community property is not clearly specified in Schedule A or other document of transfer (whether presently made or transferred in the future) as being sole or joint management, the trustee may presume that the property is joint management community property and will be fully protected in doing so.

(f) **Concept of Control and Management.** Control and management, as treated above in this Section, is a state law concept that is concerned with the control and management of the property *as between spouses* and will not affect the powers of the trustee or trustees to control and manage the property in a fiduciary capacity as trustee, which powers have been granted by and are derived from the spouse or spouses having the power of control and management under state law.

(g) **Retention of Property Rights in Subtrusts.** Any community property added to or becoming a part of the trust estate will be held in a community property Subtrust, described below, and will remain community property during the joint lifetime of the Makers. Any separate property added to the trust estate by Moore Money will be held in a separate property Subtrust, described below, and will remain the separate property of Moore Money. Any separate property added to the trust estate by Lotta Money will be held in a separate property Subtrust, described below, and will remain the separate property of Lotta Money.

**4.5 Identification of Primary Beneficiaries and Secondary Beneficiaries (Life Tenant and Remaindermen).** The initial Primary Beneficiaries of The Lotta Moore Money Family Trust are Makers, during the lifetime of Maker.

The initial Secondary Beneficiaries, who will become Primary Beneficiaries following the lifetime of both Makers, are Makers' descendants on a representational basis, if then living.

**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. The trustee will account for joint management community property separately from sole management community property. If any portion of the trust estate (including the income from it) ever consists of joint management community property, then the trustee will not commingle the joint management community property with the sole management community property in a way that changes the character of the property as joint or sole management community property, or in such a way that the joint or sole management character becomes difficult to distinguish or to account for. Separate or community property of whatever character may be maintained in separate Subtrusts.

ARTICLE V  
DISTRIBUTIONS AND AMENDMENT DURING  
JOINT LIFETIME OF MAKERS

**5.1 Distributions During Lifetime of Makers.**

(a) **Distributions for Health, Maintenance and Support.** So long as both Moore Money and Lotta Money are alive, the trustee **will** distribute to or for the benefit of either or both of them so much of the trust estate as the trustee determines in its discretion to be necessary or appropriate to provide for their health, maintenance and support in the manner of living to which they have become accustomed at the date of the distribution, subject to the following restrictions: No distribution will be made to or for the benefit of one Maker out of the other Maker's separate property or sole management community property Subtrust without the consent of the other Maker, unless the other Maker is incapacitated. If a distribution is made to or for the benefit of one Maker out of the joint community property Subtrust, both Makers will be immediately notified of it.

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I believe that the italicized clause modifies the entire sentence, not just the immediately preceding clause, and that a husband and wife may agree that what would otherwise be the sole management community property of one spouse or the joint management property of both, is to be the sole management community property of either. The cases establish not only that spouses may alter the management rights in community property by oral agreement, but that the rules of marital property liability will be applied in accordance with the agreement. *LeBlanc v. Waller*, 603 S.W.2d 265 (Tex. Civ. App.—Houston 1980, no writ), *Owen v. Porter*, 796 S.W.2d 265 (Tex. App.—San Antonio 1990, no writ) and *Muller v. Evans*, 516 S.W.2d 923 (Tex. 1974).

**(b) Ad Valorem Taxation of Residence Homestead.** If the trustee of any trust under this instrument in which Maker is both a beneficiary and a trustor ever holds, as all or a part of such trust estate, residential property that would qualify as a residence homestead if owned by such Maker, that Maker will have the right to use and occupy as Maker's principal residence such residential property rent free and without charge except for taxes and other costs and expenses specified in this instrument, for life. Further, any such property will be acquired by an instrument of title that describes the property with sufficient certainty to identify it and the interest acquired, and the instrument will be recorded in the real property records of the county in which the property is located, executed by such Maker or the personal representative of such Maker. This Subsection will be construed in accordance with such Maker's intention to qualify such property as Maker's residential homestead for ad valorem taxation purposes by causing this trust to be a "qualifying trust" as defined and described in §11.13(j) of the Texas Tax Code. This intention will be overriding and will control if in conflict with the literal language of this Subsection.

Moreover, if a residence of Maker's is ever transferred to this trust, Maker intends to transfer only such rights as are not inconsistent with the retention of Maker's homestead, and Maker expressly reserves from such transfer all homestead interests guaranteed or granted by the Texas Constitution and the laws of the state of Texas. The trustee is not empowered to accept the transfer of Maker's homestead rights.

**(c) Demand Rights.** In addition, so long as both Makers are alive, there will be distributed to either Maker or for either Maker's benefit **so much of the trust estate as they from time to time direct in writing.** However, a demand for distribution under the preceding sentence from the joint management community property Subtrust must be made jointly. A distribution from a Maker's separate property or sole management community property Subtrust will be made on the unilateral demand of that Maker alone. In order to facilitate the exercise of this right, Maker may be named as a signatory on the trust bank or savings accounts (including checking accounts), in which case Maker may exercise Maker's withdrawal rights by writing a check to Maker or for Maker's own benefit.

**(d) Other Sources of Support.** In making

discretionary distributions, the trustee may, but need not, consider other sources of support, except that in making distributions to a Maker out of the other Maker's separate property Subtrust or sole management community property Subtrust while the other Maker is incapacitated, the trustee will consider other sources of support reasonably available to the Maker.<sup>69</sup> In making distributions to or for a Maker, it is suggested, but not required, that the trustee will exhaust the joint management community Subtrust first, the Maker's sole management community Subtrust next, the other Maker's sole management community Subtrust next, the Maker's separate property Subtrust next, and the other Maker's separate property Subtrust last.

**(e) Certain Distributions Prohibited.** No distributions may be made under this Section to or for the benefit of a judgment creditor of either Maker or to a trustee in bankruptcy.<sup>70</sup>

**5.2 Power of Revocation During Lifetime of Both Makers.**<sup>71</sup> So long as Moore Money and Lotta Money are both living, the trusts created under this instrument may be revoked (in whole or in part) as follows and only as follows:

**(a) A spouse's separate property Subtrust** may be revoked by that spouse alone.

**(b) A joint management community property Subtrust** may be revoked by either spouse acting alone. **(c) A spouse's sole management community property Subtrust** may be revoked by that spouse alone.

**5.3 Distribution Upon Revocation During Lifetime of Both Makers.**

**(a) On revocation of a spouse's sole management community Subtrust,** in whole or in part, the trustee will deliver the property constituting the spouse's sole management community Subtrust (or the revoked portion) to that spouse as that spouse's sole management community property.

<sup>69</sup>A reasonable restriction, it seems to me.

<sup>70</sup>While perhaps not ultimately effective, this clause could be of some potential use.

<sup>71</sup>Revocation and amendment are both tricky and important, especially in the case of a living trust established jointly by husband and wife.

(b) **On revocation of a joint management community Subtrust**, in whole or in part, the trustee will deliver the property constituting the joint management community Subtrust (or the revoked portion) to both spouses as the spouses' joint management community property.

(c) **On revocation of a spouse's separate property Subtrust**, in whole or in part, the trustee will deliver the property constituting the spouse's separate property Subtrust (or the revoked portion) to that spouse as that spouse's separate property.

**5.4 Amendment While Both Makers Are Living.** So long as both Moore Money and Lotta Money are living, the terms of this trust may be amended as follows and only as follows:

(a) **A joint management community property Subtrust** may be amended by both spouses acting jointly.

(b) **A spouse's sole management community property Subtrust** may be amended by that spouse alone.

(c) **A spouse's separate property Subtrust** may be amended by that spouse alone.

(d) Notwithstanding the foregoing, either spouse, acting alone, may amend that portion of this trust that will become that spouse's share of the trust at the death of amending spouse (i.e., the Decedent's share of the trust where the amending spouse is the Decedent). Such amendment will apply, however, only to the Decedent's share of the trust on and after the death of the amending spouse (the Decedent), and will not apply to the Survivor's Share of the trust.

(e) It is provided, however, that no community property Subtrust may be amended to deprive a spouse of the power to control, consume and dispose of his or her community one-half interest in the trust estate remaining at the death of the first spouse to die, or to allow distributions during the joint lifetime of Makers to or for the benefit of someone other than a Maker or a descendant of both Makers, without the consent of both spouses.

**5.5 Revocation or Amendment After The Death of One Maker.** After the death of the first Maker to die, the Surviving Spouse may, in whole or in part, revoke or amend the **Survivor's Trust**

(described later on); but no person or persons may revoke or amend any trust established with the Decedent's Share, described later on, except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust.

**5.6 Revocation or Amendment After The Death of Both Makers.** After the death of both Makers, no trust established by this agreement may be revoked or amended, except as may be authorized by a power of appointment or power of withdrawal expressly conferred by the terms of the trust.

**5.7 Retention Of Assets By Trustee Upon Revocation To Secure Payment Of Pre-existing Liabilities.** If this instrument or any trust or Subtrust under it is revoked with respect to all or a major portion of the assets subject to this instrument, the trustee will be entitled to retain sufficient assets reasonable to secure payment of liabilities the trustee has lawfully incurred in administering the trust, including trustee's fees that have been earned, unless the revoking Maker indemnifies the trustee against loss or expense.

**5.8 Power To Revoke Or Amend Is Personal To The Makers.** All of the Makers' powers to revoke or amend or to demand distribution are personal to them and may not be exercised by a guardian or attorney in fact or by any other fiduciary, *except that* a Maker's or Surviving Spouse's power to revoke or amend may be exercised by the holder of a durable power of attorney for the purpose of making gifts or taking other actions that are authorized by express provision to that effect in the durable power specifically referring to this trust. The incapacity of one Maker will not prevent the exercise by the other Maker of his or her power of revocation with respect to a community property Subtrust.

**5.9 Method of Revocation Or Amendment.** In order for a revocation or amendment to be effective it **must** be manifested by a notarized written statement to that effect signed by the revoking or amending Maker(s) and delivered to the trustee. **The trustee is under a duty to deliver a copy of the statement to the nonrevoking or nonamending Maker, if any.** Further, if there is a nonrevoking or nonamending Maker who is living and not disabled at the time of an amendment or revocation, the amendment or revocation will not be effective unless a copy of the notarized written statement is delivered to the nonrevoking or nonamending Maker, if

reasonably possible. Any third party may rely absolutely upon a Maker's certification that such delivery has been made, without need for reasonable inquiry or further verification.<sup>72</sup>

**5.10 Gifts Made Pursuant To Direction of Maker.** If the Maker, pursuant to a power of revocation, amendment or withdrawal, expressly granted under this instrument, directs the trustee to transfer trust assets to a third party as a gift, the trustee will not make or treat such transfer as a transfer from the trust to the third party, because this is expressly hereby made impermissible. However, the trustee, acting on Maker's behalf, as Maker's agent and not as trustee of the trust, is empowered to make the gift directly to the third party, at Maker's direction. Such a transaction should be treated in substance as a distribution to Maker followed by a distribution from Maker to the third party. For convenience, it is not necessary that the trust assets be physically placed or titled in Maker first, so long as Maker controls and is treated as having controlled the transfer.<sup>73</sup>

**5.11 Delivery.** All written instruments required to be "delivered" under the terms of this agreement, must be delivered **either personally or by certified mail** in order for delivery to be considered effective.

**5.12 Investment Direction.** **Makers reserve the right to direct the investment of the trust estate.** Therefore, notwithstanding anything else herein to the contrary, the trustee will follow the written or oral investment directions of Maker, whether respecting specific investments or philosophy or strategy, to the extent the trustee, in the exercise of its discretion, determines to be feasible, without regard, however, to any fiduciary obligations that otherwise might affect the trustee's judgment in such matters. If the property with respect to which the direction is made is either the sole management community property of a particular Maker or that Maker's separate property, then that Maker may make an investment direction

unilaterally. In the case of joint management property, an investment direction must be made jointly, unless one Maker delegates that power to the other.

ARTICLE V-A  
DIVISION OF TRUST ESTATE UPON DEATH OF  
MAKER  
INTO A SURVIVOR'S SHARE AND A FIRST  
DECEDENT'S SHARE

**5A.1 Retention of General Testamentary Power of Appointment Over the Trust.** Each Maker retains a General Testamentary Power of Appointment over that Maker's Share of the trust estate existing at his or her death. All other provisions of this instrument governing distributions following Maker's death will be subject to the potential exercise of this Power.

**5A.2 Identification of First and Second Decedent After Death of a Maker.** The Maker who dies first will sometimes be referred to in this instrument as "the Predeceased Maker," "**the First Decedent,**" or "the Predeceased Spouse." The Maker who lives the longest will sometimes be referred to in this instrument as "the Surviving Maker," "**the Second Decedent,**" "the Surviving Spouse," or simply as the "Survivor." Either Maker may be simply referred to as the "**Decedent,**" in which case the identity may be determined by the context. Thus, if Moore Money predeceases Lotta Money, Moore Money will sometimes be referred to as the "First Decedent." If Moore Money outlives Lotta Money, Moore Money will sometimes be referred to as the "Second Decedent." Contrariwise, if Lotta Money predeceases Moore Money, Lotta Money will sometimes be referred to as the "First Decedent." If Lotta Money outlives Moore Money, Lotta Money will also sometimes be referred to as the "Second Decedent."

**5A.3 Division Of Trust Estate On the Death Of First Maker To Die Into a First Decedent's Share and a Survivor's Share.** On the death of the first Maker to die (the "First Decedent"), The Lotta Moore Money Family Trust will be partitioned and divided into a **Survivor's Share** (sometimes referred to as the "Second Decedent's Share"), and a Decedent's Share (sometimes referred to as the

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<sup>72</sup>Amendment should not be so simple that we are left in doubt as to whether an amendment was really intended. Further, each spouse is entitled to know if the other spouse has made a change in the plan, even if that change is restricted to the other spouse's separate or sole management community property.

<sup>73</sup>This should solve a §2038 problem that has been the subject of much tax litigation of late.

“**First Decedent's Share**”),<sup>74</sup> as follows:

(a) **The Survivor's Share and The Survivor's Trust.** The “Survivor's Share” (also known as the “Second Decedent's Share”) will consist of (and means) the Surviving Spouse's fractional community and separate property interest in the trust (half of all community property Subtrusts and all of the Surviving Spouse's separate property Subtrusts, if any), any property payable to the trust under the terms of the Second Decedent's will, and any other property (including life insurance and other Death Benefits), to the extent of the Second Decedent's interest in it, that is payable to the trust upon or as a result of the death of the Surviving Spouse. This share will be set aside in a “**Survivor's Trust**” (also known as the “Second Decedent's Trust”). By law, the Survivor's trust will become the sole and separate property of the Surviving Spouse upon the death of the First Decedent. The Survivor's Trust will be held, administered and distributed as set forth later, and may be revoked or amended as provided above in this Section.

(b) **The First Decedent's Share.** The “**First Decedent's Share**” will consist of the remainder of The Lotta Moore Money Family Trust not set aside in the Survivor's Trust, together with any property payable to the trust under the terms of the First Decedent's will, and any other property, to the extent of the First Decedent's interest in it, that is payable to the trust upon or as a result of the First Decedent's death. The First Decedent's Share will be held, administered and distributed as set forth later, and may not be revoked or amended except by power of appointment or withdrawal specifically provided. A “Maker's Share” means the First Decedent's Share, if the Maker is the Predeceased Spouse (the First Decedent), or the Survivor's Share, if the Maker is the Surviving Spouse (the Second Decedent).

**5A.4 Administration of and Distributions From the Survivor's Trust During the Lifetime of the Surviving Maker.** Following the death of the first Maker to die (the “First Decedent”), there will be distributed to the Surviving Spouse (the “Surviving Maker”), or for his or her benefit, so much of the

Survivor's Trust estate (described later on) as the trustee will determine in its discretion to be necessary or appropriate to provide for the spouse's health, maintenance and support in the manner of living to which he or she has become accustomed at the date of the distribution. In making distributions under this Section, the trustee may, but need not, consider other sources of support. In addition, following the death of the first Maker to die, there will be distributed to the Surviving Spouse, or for his or her benefit, **so much of the trust estate of the Survivor's Trust as the Surviving Spouse from time to time directs in writing.** With respect to the Survivor's Trust, the Surviving Maker will retain the withdrawal, amendment, revocation, demand and investment direction rights applicable to a spouse's separate property Subtrust described in the preceding Article.

**5A.5 Division Of Survivor's Trust On the Death Of the Survivor.** Upon the death of the Second Decedent (the Surviving Spouse/Maker and the last Maker to die), the Survivor's Trust will terminate (or be redesignated or merged) and will be distributed as provided in the following Articles. Where called for by the context, the Surviving Spouse's share will be treated as a Decedent's Share, and the Surviving Spouse will (at death) be treated as the Decedent.

#### ARTICLE VI

#### SPECIFIC GIFTS FROM TRUST ON DEATH OF EITHER MAKER

**6.1 Ademption In Probate Estate.** If a Maker's executor is unable to satisfy (1) a gift made under the Maker's Will of specifically identifiable property (not described by class alone) because the property is owned by the trustee at the date of Maker's death, or (2) a nonformula pecuniary legacy (whether or not in trust) because the assets of Maker's probate estate are insufficient for these purposes, then the trustee will satisfy these gift(s) out of the deceased Maker's Share, as if the gift(s) were made under this instrument. The following Section will be subject to this Section.

**6.2 Personal and Household Effects (And Other Items of Tangible Personal Property) in the Trust.**

(a) **Gift of Personal and Household Effects (And Other Items of Tangible Personal Property) On Death of First Decedent To Spouse's Share of the Trust.** If one Maker (the First Decedent) is

<sup>74</sup>After one spouse has died, it becomes necessary to identify who is being referred to under any particular phrase in the governing instrument that references a settlor. Establishing a workable nomenclature to be used in a jointly established living trust is very important, but not easy.

survived by the other (the Surviving Spouse), all of the personal and household effects (and other items of tangible personal property, as defined) then belonging to the First Decedent's Share of the trust estate at the First Decedent's death, if any, will become part of the Second Decedent's Share.

**(b) Division Of Tangible Personal Property Into Representational Shares On Death of Second Decedent.**

If the Decedent is the last Maker to die (the Second Decedent), the trustee will give all of the tangible personal property then belonging to the Second Decedent's Share of the trust estate at the Second Decedent's death, if any, to the Second Decedent's surviving descendants by right of representation, if any, in fee simple and free of trust.

**(c) Items Having No Value.** It is provided, however, that if the Decedent is the last Maker to die (the Second Decedent), any items of tangible personal property that the trustee determines to be of no present or probable future use or value to the beneficiaries may be disposed of by the trustee by gift to any charity or person, by destruction, or by abandonment.

**(d) Methods of Distribution.** If the Decedent is the last Maker to die (the Second Decedent), the trustee may divide, partition and distribute specific items of tangible personal property (including undivided interests in any of these items) among the beneficiaries who are otherwise entitled to the property, or may sell all or any items and distribute the net proceeds of sale among the beneficiaries, or may alternatively add all or any of these proceeds to the residuary trust estate.

**(e) Inclusion Directly In the Residuary Estate.** In the alternative or partial alternative, if the Decedent is the last Maker to die (the Second Decedent), the trustee may include any of these items of tangible personal property directly in the residuary trust estate.

**(f) Expenses of Delivery.** All expenses of packing, shipping, insuring and delivering any of the items disposed of in this Article to a beneficiary will be paid by the trustee as an administration expense of the trust estate.

**6.3 Adding Fee Simple Gifts to Survivor's Trust.** If the Surviving Spouse is the beneficiary of a fee simple gift under this instrument (a gift otherwise free of trust), as a result of ademption of a specific gift made under First Decedent's Will or

otherwise, the Spouse may elect the functional equivalent of a fee simple gift by directing the trustee to simply add all or any portion of the property to the Survivor's Trust.

ARTICLE VII  
TAX SHELTER GIFT  
IN TRUST  
Made By The First Decedent

**7.1 Formula Pecuniary Tax Shelter Gift in Trust.** If the Decedent (the First Decedent) is survived by the Surviving Spouse, there will be distributed to the trustee, in trust, of The Tax Shelter Trust (out of the First Decedent's Share), (a) all available property not otherwise specifically disposed of in this instrument that does **not** constitute Eligible Marital Deduction Property, and (b) (after taking (a) into account) a **pecuniary legacy**, equal in value to **"the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death."**<sup>75</sup> (The Tax Shelter Trust is a designation that may be used to describe two trusts, the Nonexempt Tax Shelter Trust and the Exempt Tax Shelter Trust, described below.)

**7.2 Formula Gift Revoked If Residuary Gift Will Do.** Notwithstanding the preceding provisions of this Section, if the Decedent (the First Decedent) is survived by the Surviving Spouse, if under all contingencies existing at the First Decedent's death, there would be no federal estate tax payable by the First Decedent's estate in the absence of any estate tax marital deduction, then the formula gift otherwise described under this Article is revoked and The Marital Deduction Trust, described below, is revoked, and the First Decedent simply leaves the entire net residuary estate to the trustee, in trust, of The Tax Shelter Trust if the First Decedent's Spouse is then living. Likewise, if the Decedent is not survived by the Surviving Spouse, this gift will lapse and become a part of the Decedent's residuary

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<sup>75</sup>I confess to being sorely tempted to leave the definition as no more than this. However, it just won't do, and that is the reason that guidance is offered under the "Technical Provisions" set forth in 6A.3 below. For example, is the "largest amount" to be determined before or after (and depending upon whether) the QTIP election is made? Is the "largest amount" to be determined before or after (and depending upon whether) the spouse makes a disclaimer?

estate.<sup>76</sup>

**7.3 Name of Gift.** The gift in trust referred to above will sometimes be referred to as “**the Tax Shelter Gift**” or “**the Pecuniary Tax Shelter Gift.**” This trust will be known as “**The Tax Shelter Trust.**” The Tax Shelter Gift and this trust are to be subject to the technical provisions described in the following Section.

**7.4 TECHNICAL PROVISIONS.**

(a) If there would be federal estate tax paid by the First Decedent's estate in the absence of the Tax Shelter Gift, because the First Decedent has used up all available estate tax credits as a result of making lifetime gifts, or testamentary gifts, or other specific gifts under this instrument, the Tax Shelter Gift will be zero.

(b) In making the computations necessary to determine “**the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death,**” the following will be taken into account:

(1) Values as finally determined for federal estate tax purposes will be used.

(2) Any disclaimer will be disregarded.<sup>77</sup>

(3) The amount computed will be determined as if the First Decedent's executor elected, to the fullest extent allowable, any right it may have to take an estate tax marital deduction with respect to all or any part of The Marital Deduction Trust, pursuant to §2056(b)(7) of the IRC.

(4) Account will be taken of debts, taxes, expenses or other charges that are not allowed as deductions in computing the First Decedent's federal

estate tax (and the Tax Shelter Gift will be reduced if and as appropriate).

(5) Estate taxes that will accrue or arise, if at all, after the due date, including extensions, of the First Decedent's federal estate tax return (such as IRC §2032A taxes) will not be considered.

(6) The federal credit for state death taxes will be considered only to the extent that a state death tax would be payable to the state regardless of the federal credit.

(7) Notwithstanding the foregoing, to the extent needed to reduce estate taxes, no consideration will be given to any factor, tax deduction, or tax credit, if this will result in the disqualification of all or any part of the Marital Deduction Gift from eligibility for the estate tax marital deduction, as a consequence of the operation of the “terminable interest” rules described in §2056(b)(1) of the IRC, or otherwise.

(8) In computing the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death, account will first be taken of (a) the gift under this Article of all available property not otherwise specifically disposed of in this instrument that does not constitute Eligible Marital Deduction Property, (b) gifts made under the First Decedent's Will, (c) gifts made under the preceding Articles of this instrument (if any), and (d) gifts of nonprobate assets that are specifically payable to the trustee (as such) of The Tax Shelter Trustor the Marital Deduction Trust, and the amount computed will be reduced or increased as appropriate, under the principles described below.

(9) The values of all property includible in the First Decedent's gross estate for federal estate tax purposes (including nonprobate assets) will be taken into account. As an illustration: (a) To the extent property (other than by virtue of the amount being computed) passes or has passed to a beneficiary in a manner not qualifying for the federal estate tax marital or charitable deduction, the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death will be reduced to the extent necessary to carry out the First Decedent's obvious intent, subject to Paragraph (10), below. (b) To the extent other property qualifies for the federal estate tax marital or charitable deduction, the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by

<sup>76</sup>If the estate is under \$600,000, then I know that I do not want or need a *pecuniary* credit shelter trust; rather, I would prefer that the residue performed this office.

<sup>77</sup>If the gift is determined under a formula, it is necessary to let the fiduciary know whether a disclaimer is considered before the formula is applied. If you don't want to chase your tail, you should consider carefully the nature of the problem involved and come up with a way to handle it. I suggest that in most cases ignoring the disclaimer will produce the result you want.

reason of the First Decedent's death will be increased to the extent necessary to carry out the First Decedent's obvious intent, subject to Paragraph (10), below.

(10) The gift under this Article uses a formula based upon estate tax rates. It is possible that a gift under the First Decedent's Will, or under another trust includible in the First Decedent's gross estate for estate tax purposes, will also use a formula based upon estate tax rates. In that case, it is incumbent to specify which is the primary source of payment to be considered first. In general, nonprobate assets not passing under this instrument and disposed of under a formula will be the primary source of payment and will be computed first, unless the underlying instrument otherwise provides. Next, property passing under this instrument will be considered. The formula, if any, under the First Decedent's Will will be applied last.

(11) Account will be taken of any adjusted taxable gifts (and any reduction in them pursuant to Treas. Reg. §25.2701-5) made during the First Decedent's lifetime (and the Tax Shelter Gift will be decreased as appropriate).

(12) Account will be taken of the following federal estate tax credits:

(A) the **applicable credit amount under IRC §2010(c)**, the credit for state death taxes (but only to the extent that a state death tax would be payable to the state regardless of the federal credit), and, if appropriate,

(B) the **IRC §2013 credit** for tax on prior transfers, and perhaps,

(C) the **IRC §2014** credit for foreign death taxes, in a rare situation.

**In computing the IRC §2013 credit** under the manner suggested by the preceding sentence, the amount of this formula pecuniary legacy would first be computed without making an adjustment for the §2013 credit, if any, and would then be increased (if possible) to the largest amount that would still result in no federal estate taxes being payable by the First Decedent's estate after application of the maximum available §2013 credit, if any, so that the §2013 credit will then equal the maximum estate tax that would otherwise be imposed on the First Decedent's estate without regard to §2013. **It is provided, however, that in no event will the §2013 credit be**

**applied unless the transferor of the property with respect to which the credit was computed has predeceased the First Decedent within two years.**

(13) The items listed in the numbered paragraphs above are included for illustration and clarification purposes only and are not intended as an exclusive list of all the items to be taken into account in determining the largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death.

(14) "The largest amount, if any, that can pass under this Article without increasing the federal estate taxes payable by reason of the First Decedent's death," as used in this Article of this instrument, will be arrived at by the First Decedent's fiduciary in a reasonable manner consistent with the First Decedent's obvious intent, including the First Decedent's intent that this gift not cause estate taxes to have to be paid out of this Trust or out of Maker's probate estate. This rule is overriding.<sup>78</sup>

(c) **Effect of Elections.** It is realized that the amount to be computed under this instrument may be affected by the action of the fiduciaries in making certain tax elections.

(d) **Effect of Unexercised Power of Appointment.** Notwithstanding the above, if and to the extent that any property over which Maker had an *unexercised* General Power of Appointment is includible in Maker's estate under IRC §2041 (meaning that the power was not created by Maker), then that property will be ignored in computing this formula gift, and the estate taxes that would not otherwise have been owing but for the existence of that power will be paid at the margin by the recipient of the property or out of the property that was subject to the power.<sup>79</sup>

(e) **Funding the Tax Shelter Gift.** To the extent that the Tax Shelter Gift is not a specific gift, then the following funding rules will apply:

(1) The fiduciary may satisfy this gift in cash or in kind or partly in each (without regard to whether the property is real, personal or mixed), which need

<sup>78</sup>Insurance, just in case we goofed, which is easy to do here.

<sup>79</sup>A thorny problem is addressed here.

not be pro rata, and need not be in undivided interests, subject to the following provisions of this Subsection.

(2) In distributing assets in satisfaction of this gift (as opposed to calculating the amount of the gift), the trustee will **value the assets as of the date of their respective distribution.**

(3) In satisfying the Tax Shelter Gift, the fiduciary will (to the extent of the gift) first utilize property that is subject to death taxation by a foreign country and for which a credit for foreign death taxes is allowable.

**7.4A Creation of Trust Equal in Value to Generation Skipping Tax (GST) Exemption/Allocation of the GST Exemption.**<sup>80</sup>

(a) **Creation of Trust Equal in Value to Generation Skipping Tax (GST) Exemption.** If there is no available GST exemption at the date of the First Decedent's death, there will be only one Tax Shelter Trust, a **Nonexempt Tax Shelter Trust**. If there is some available GST exemption at the date of the First Decedent's death, and its value for GST purposes is greater than the value for GST purposes of the Tax Shelter Gift, there will be only one Tax Shelter Trust, an **Exempt Tax Shelter Trust**.

If, however, (a) there is any available GST exemption at the date of the First Decedent's death, and (b) the available GST exemption is less than the value of the Tax Shelter Gift for GST purposes, then the Tax Shelter Gift (prior to funding) will be composed of two trusts: an **Exempt Tax Shelter Trust**, and a **Nonexempt Tax Shelter Trust**. In this case, the creation of the two trusts will be effective on the date of the First Decedent's death. The Tax Shelter Gift will be apportioned among the two trusts described in this Subsection as follows:

(1) The Exempt Tax Shelter Trust will be entitled to a *pecuniary amount*, payable out of the assets otherwise allocable to the Tax Shelter Gift, equal in value to the available GST exemption. The Nonexempt Tax Shelter Trust will be entitled to the remaining pecuniary amount to which the Tax Shelter Gift is entitled under the terms of this

instrument.<sup>81</sup>

(2) This Subsection will be interpreted as necessary to carry out Maker's manifest intent that, when funded with all to which it is entitled under this instrument, the Exempt Tax Shelter Trust be able to have an inclusion ratio of zero, and that the Nonexempt Tax Shelter Trust have an inclusion ratio of one, within the meaning of §2642 of the IRC (if the First Decedent's executor makes the proper allocation election), and the provisions of this Section and the rest of this instrument will in all respects be construed accordingly. The provisions of this Paragraph (2) will control in case of conflict with any other provisions (other than those provisions necessary to preserve the availability of the full marital deduction).

(3) It is Maker's expectation (but Maker does not require) that the First Decedent's available GST exemption will be allocated to the Exempt Tax Shelter Trust, to the full extent of its value.

(4) Notwithstanding anything else herein to the contrary, the Exempt and Nonexempt Tax Shelter Trusts will never (cannot) be held together as separate shares of one trust, but the Exempt Tax Shelter Trust will always be held in a trust or trusts that are separate and distinct from any trust or trusts that comprise the Nonexempt Tax Shelter Trust.

(b) **The Tax Shelter Trust Is Not Necessarily Just One Trust.** As indicated above in this Section, The Tax Shelter Trust is not necessarily just one trust, but rather, is a term of convenience used to designate the trusts composing the Tax Shelter Gift, if more than one. Except as specifically and explicitly otherwise provided, each trust composing the Tax Shelter Gift will be subject to all of the same terms and conditions provided for The Tax Shelter Trust, and for this reason all references to The Tax Shelter Trust or to any gift thereunder will be construed as equally and proportionally applicable to both the Exempt Tax Shelter Trust and the Nonexempt Tax Shelter Trust. (This does not mean, however, that distributions must be made from each trust proportionately.) All references to The Tax Shelter Trust will be interpreted with this in mind and consistently with the foregoing.

<sup>80</sup>The GST provisions add considerable and unavoidable complexity.

<sup>81</sup>I am always slightly disconcerted by the notion of a pecuniary gift made out of a prior pecuniary gift, with the residue of the pecuniary gift passing elsewhere. I fear that the situation is all but unavoidable in this context.

## 7.5 Distributions.

(a) **Standard For Making Distributions To the Surviving Spouse During the Surviving Spouse's Life.** The trustee **may** distribute to the Surviving Spouse for life, at the intervals the trustee determines in its sole and uncontrolled discretion, so much of the trust estate of The Tax Shelter Trust as will reasonably provide for the Surviving Spouse's **health, education, maintenance and support in reasonable comfort in the manner of living to which the Surviving Spouse has become accustomed** at the date of the Decedent's death.

(b) **Consideration of Other Sources of Support.** In making distributions from The Tax Shelter Trust, the trustee **may, but need not,** consider all other sources of support.

(b-1) **Consideration of The Marital Deduction Trust.** The Decedent strongly suggests, but does not require, that the trustee make no distributions from The Tax Shelter Trust to the Surviving Spouse unless all of the corpus, if any, of The Marital Deduction Trust has first been exhausted.

(b-2) **No Distributions To Descendants During The Lifetime of the Surviving Spouse.** No distributions may be made to or for the benefit of anyone other than the Surviving Spouse during the Surviving Spouse's lifetime, in the absence of a disclaimer by the Surviving Spouse.

## 7.6 Termination.

(a) **Time of Termination.** When the Surviving Spouse has died, **The Tax Shelter Trust will terminate.** (For this purpose, the term "terminate" will include a redesignation or merger.)

(b) **Termination Distributions.** Upon termination, the remaining trust estate will then be distributed for the benefit of the descendants, by right of representation, of the First Decedent who are living at the time of termination, **expressly subject first, however, to the Surviving Spouse's Nongeneral Testamentary Power of Appointment described below.**

(c) **No Descendants Living.** If there are no such descendants living at the time of termination, the trust estate of The Tax Shelter Trust will be distributed as provided in the Subsection in Part II entitled "Final Alternate Distribution," subject to the

Surviving Spouse's Nongeneral Testamentary Power of Appointment described below.

(d) **Vesting.** Subject to the Surviving Spouse's Nongeneral Testamentary Power of Appointment described below, all present interests will vest on the date of termination; however, an interest will not necessarily vest *in possession*, since it may be subject to the Protected Trust provisions described later on in this Article.

(e) **Surviving Spouse Will Have a Nongeneral Testamentary Power of Appointment Over Tax Shelter Trust.** Notwithstanding the preceding Subsection, the Surviving Spouse will have a Nongeneral Testamentary Power of Appointment over all of the assets and property constituting the trust estate of the Tax Shelter Trust. The Nongeneral Testamentary Power of Appointment will have the meaning given to the term in Part II hereof, except that it may only be exercised in favor of **the descendants of a grandparent of a Maker or a spouse of such descendant**, but may otherwise be exercised in the amounts and proportions (which need not be equal) and on the terms and conditions, either outright or in trust, as the Surviving Spouse appoints, as in the case of any other Nongeneral Testamentary Power of Appointment. If the Surviving Spouse fails to make a valid disposition of all or any portion of the trust estate of the Tax Shelter Trust, all or the portion of the trust estate not so disposed of will be distributed by the trustee as if the power had never been granted.

7.7 **Form of Termination Distribution.** A descendant's representational share, if any, will be distributed and allocated to a Protected Trust for that descendant.

7.8 **Distribution Out of GST Trusts.** A distribution out of The Exempt Tax Shelter Trust that is to be made to a Protected Trust will be made to an Exempt Protected Trust, and a distribution out of the Nonexempt Tax Shelter Trust that is to be made to a Protected Trust will be made to a Nonexempt Protected Trust. (It is Maker's expectation that, to the extent possible, any trust that is a part of the Tax Shelter Gift and that has a zero inclusion ratio for GST purposes will not be merged with a trust having an inclusion ratio that is greater than zero.)

ARTICLE VIII  
MARITAL DEDUCTION  
TRUST FOR SURVIVING SPOUSE

**8.1 Residuary Marital Deduction Gift If Spouse Survives.** If the First Decedent's Spouse survives the First Decedent, then the First Decedent gives the First Decedent's **net**<sup>82</sup> residuary estate (after payment of all debts, estate taxes, expenses, etc.) to the trustee, **in trust**, to have, hold and administer under the terms and conditions under this instrument of **"The Marital Deduction Trust"** described below. If the First Decedent's Spouse does not survive the First Decedent, the net residuary estate will be distributed as provided in Article VII.

**8.2 Name of Gift.** The gift in trust described above in this Article will sometimes be referred to as **"the Marital Deduction Gift,"** or **"the Residuary Marital Deduction Gift."** This trust will be known as The Marital Deduction Trust. The Marital Deduction Gift and this trust are subject to the technical provisions described in the following Section. (The Marital Deduction Trust is a designation that may be used to describe two or more trusts, the Qualified Exempt Marital Trust, the Qualified Nonexempt Marital Trust, the Nonqualified Nonexempt Marital Trust, or the Nonqualified Exempt Marital Trust, described below.)

**8.3 TECHNICAL PROVISIONS.**

**(a) Intent that Property Qualify for the Marital Deduction.** It is Maker's intent that the Marital Deduction Gift, if any, qualify for the federal estate tax marital deduction (or would qualify if an appropriate election is made by the First Decedent's executor), and all questions applicable to the Marital Deduction Gift will be resolved accordingly as if such election had been made. In this regard, the powers and discretions of the First Decedent's fiduciaries with respect to administration will not be exercised or exercisable except in a

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<sup>82</sup>It bears emphasizing that the marital deduction is limited by the **net** amount passing to or for the benefit of the spouse. Where formula clauses are used, it does not bother me that the marital share will bear a proportion of debts, expenses and taxes, so long as it is clear that the amount to be determined under the formula takes this into account, grossing up, if necessary, the size of the residuary estate.

manner consistent with Maker's intent as expressed in this Section. Therefore, notwithstanding anything in this instrument to the contrary:

(1) The fiduciaries will not satisfy the Marital Deduction Gift with any property ("unidentified assets") that is not "Eligible Marital Deduction Property" if there is any other alternative available to the fiduciary. To the extent necessary to fully fund the Marital Deduction Gift, such unidentified assets will be sold and the proceeds used to satisfy the Marital Deduction Gift, provided that the proceeds are Eligible Marital Deduction Property.

(2) In no event will anything contained in this instrument be construed as granting the First Decedent's fiduciaries any power that would cause the loss of all or any part of the marital deduction needed to reduce the federal estate taxes payable by the First Decedent's estate, which marital deduction would otherwise have been allowable to the First Decedent's estate for federal estate tax purposes; and to the extent any power would (in the absence of this limiting provision) cause the loss of all or any part of such deduction, the power or powers will *ipso facto* be limited or eliminated (i.e., they will be void). However, the preceding sentence does not require that the First Decedent's fiduciaries exercise any tax election only in a manner as will result in a larger allowable estate tax marital deduction than would be obtained if a contrary election had been made, except as required by regulation, rule of law, or otherwise, as necessary to retain the option or right to utilize the marital deduction in whole or in part.

(3) It is expressly provided that in the exercise of discretion the First Decedent's fiduciaries will not make any determination inconsistent with the foregoing.

(4) The Surviving Spouse will have a "qualifying income interest for life" in the trust estate of the Marital Deduction Trust within the meaning of IRC §2056 and as set forth in the definitions section of Part II.

(5) In the construction of this instrument, this Subsection governs all others.

**(b) Effect of Disclaimer of All or Any Portion of Marital Deduction Gift.** Notwithstanding any other provision in this instrument to the contrary, it is specifically provided that if the Surviving Spouse disclaims **all** of the Surviving Spouse's interest in all (or any portion) of the Marital Deduction Gift, the

Surviving Spouse will not be considered as having predeceased the First Decedent; instead, the disclaimed portion will become part of the Tax Shelter Gift.<sup>83</sup>

(c) **QTIP Election.**

(1) The First Decedent's executor is specifically given the power (to the maximum extent allowable by law, including IRC §2056(b)(7)) to elect (or to decline to elect), on the return of tax imposed by §2001 of the IRC, an estate tax marital deduction with respect to all or a portion of the subject matter of the Marital Deduction Gift (the QTIP election). In determining whether or not or the extent to which to make the election, First Decedent's executor may consider the tax consequences (income, GST, transfer or other) to Surviving Spouse, Surviving Spouse's estate, the beneficiaries of The Tax Shelter Trust, and others, as well as the tax to be imposed on First Decedent's estate. The executor will have uncontrolled and sole discretion in arriving at the decision and will not be held liable for any adverse tax or other consequences for making or failing to make the election, unless made in manifest bad faith or in wanton disregard for the consequences.

(2) Any partial election must be made with respect to a **fractional or percentile share** of the property so that the elective portion reflects its proportionate share of the increase or decrease in the value of the entire property for purposes of applying §§ 2044 or 2519 of the IRC. The fraction or percentage may be defined by means of a formula.

(3) If a partial QTIP election has been or will be made as above provided, separate trusts are and will be created to reflect the partial election. Any such division must be accomplished no later than the end of the period of estate administration. If, at the time of the filing of the estate tax return, the trust has not yet been divided, the intent to divide the trust must be unequivocally signified on the estate tax return.

(4) The division of the trust must be done on a fractional or percentage basis to reflect the partial election. However, the separate trusts do not have to be funded with a pro rata portion of each asset held by the undivided trust. Any division will be on the

basis of the fair market value of the assets of the trust at the time of the division.

(5) If a partial QTIP election has been or will be made as above provided, The Marital Deduction Trust will be a term that actually describes two or more trusts, a "**Qualified Marital Trust**" with respect to which the QTIP election is or will be made, and a "**Nonqualified Marital Trust**" with respect to which the QTIP election is not or will not be made. (Further, the Qualified Marital Trust may be a term that describes the Qualified Exempt Marital Trust and the Qualified Nonexempt Marital Trust, and the Nonqualified Marital Trust may be a term that describes the Nonqualified Exempt Marital Trust and the Nonqualified Nonexempt Marital Trust, each of which may be required to be created as described below, prior to funding and as of date of death.) It is provided that the creation of these separate trusts will only be made in a manner that will not adversely affect the QTIP election or jeopardize the availability of the marital deduction with respect to the elected part; otherwise, these special trusts will not be created at all. Each trust will be subject to all of the same terms and conditions provided in this instrument for the Marital Deduction Gift, and for this reason all references in this instrument to The Marital Deduction Trust or the Marital Deduction Gift will be construed as equally applicable to both the Nonqualified and the Qualified Marital Trusts. Any division will be made effective on the date of the First Decedent's death. (If the QTIP election is made with respect to the entire Marital Deduction Gift, then The Marital Deduction Trust may sometimes be referred to as the **Qualified Marital Trust**. Contrariwise, if the QTIP election is not made with respect to any portion of the Marital Deduction Gift, then the entire Marital Deduction Trust may sometimes be referred to as the Nonqualified Marital Trust.)

(6) Because the Marital Deduction Gift is a net gift, a partial election will ordinarily be made with reference to the net residuary estate remaining after payment of the estate taxes resulting from the partial election, so that, for example, a QTIP election with respect to 50% of the Marital Deduction Gift, will result in the Nonqualified and the Qualified Marital Trusts being equal (after taking into account the effect of the increase in the estate and inheritance tax), unless otherwise indicated by the form of the election.

(d) **Creation of Trust Equal in Value to Excess Generation Skipping Tax (GST)**

<sup>83</sup>This is what we usually want. A further disclaimer out of the Tax Shelter Gift could shuttle the property to the children, if that is what is desired.

**Exemption/Allocation of GST Exemption.**<sup>84</sup> As presaged above, the Marital Deduction Gift will be composed of at least one, and as many as four separate trusts, each created prior to funding effective as of date of death: a **Qualified Nonexempt Marital Trust**, a **Nonqualified Nonexempt Marital Trust**, a **Qualified Exempt Marital Trust**, and a **Nonqualified Exempt Marital Trust**.

(1) **Nonexempt Trusts Only.** If there is no excess GST exemption at the date of the First Decedent's death, there will be only one Qualified Marital Trust (if any at all), a **Qualified Nonexempt Marital Trust**, and there will be only one Nonqualified Marital Trust (if any at all), a **Nonqualified Nonexempt Marital Trust**.

(2) **Exempt Trusts Only.** If there is some excess GST exemption at the date of the First Decedent's death, and it is more than the value of the Marital Deduction Gift for GST purposes, there will be only one Qualified Marital Trust (if any at all), a **Qualified Exempt Marital Trust**, and there will be only one Nonqualified Marital Trust (if any at all), a **Nonqualified Exempt Marital Trust**.

(3) **Exempt and Nonexempt Trusts.** If, however, (a) there is any excess GST exemption at the date of the First Decedent's death, and (b) the excess GST exemption is less than the value of the Marital Deduction Gift for GST purposes, then the Marital Deduction Gift (prior to funding) will be composed of two or more trusts, as follows:

(4) **Qualified and Nonqualified Trusts/Exempt and Nonexempt Trusts.** In order to be able to allocate the excess GST exemption in a manner that may result in a zero inclusion ratio for any trust that is a part of the Marital Deduction Gift, the Qualified Marital Trust, if any, will be a term used to describe two separate trusts which will be created prior to funding effective as of date of death and which may be designated as the "**Qualified Exempt Marital Trust**" and the "**Qualified Nonexempt Marital Trust**." Likewise, the Nonqualified Marital Trust, if any, will be a term used to describe two separate trusts which will be

created prior to funding effective as of date of death and which may be designated as the "**Nonqualified Exempt Marital Trust**" and the "**Nonqualified Nonexempt Marital Trust**."

(5) For convenience, any reference to the **Nonqualified Marital Trust** will be construed to mean the Nonqualified Exempt Marital Trust and the Nonqualified Nonexempt Marital Trust, and any reference to the **Qualified Marital Trust** will be construed to mean the Qualified Exempt Marital Trust and the Qualified Nonexempt Marital Trust. Likewise, and for convenience, any reference to the **Exempt Marital Trust** will be construed to mean the Nonqualified Exempt Marital Trust and the Qualified Exempt Marital Trust, and any reference to the **Nonexempt Marital Trust** will be construed to mean the Qualified Nonexempt Marital Trust and the Nonqualified Nonexempt Marital Trust.

(6) This Subsection will be interpreted as necessary to carry out Maker's manifest intent that the Exempt Marital Trusts have an inclusion ratio of zero, and that the Nonexempt Marital Trusts have an inclusion ratio of one, within the meaning of §2642 of the IRC (provided only that the First Decedent's executor makes the proper allocation election), and the provisions of this Section will in all respects be construed accordingly. The provisions of this Paragraph will control in case of conflict with any other provision (other than those provisions necessary to preserve the availability of the full marital deduction).

(7) If (a) there is any excess GST exemption at the date of the First Decedent's death, and (b) the excess GST exemption is less than the value of the Marital Deduction Gift for GST purposes, then the Marital Deduction Gift will be apportioned among the trusts described in this Subsection as follows:

(A) The assets payable to the *Nonqualified Marital Trust* (if any) will be apportioned as follows: The **Nonqualified Exempt Marital Trust** will be entitled to a **pecuniary amount** payable out of the assets otherwise allocable to the Nonqualified Marital Trust, equal in value to the lesser of (i) the excess GST exemption, or (ii) the **net** value of the Nonqualified Marital Trust available for distribution. The **Nonqualified Nonexempt Marital Trust** will be entitled to what is left, if anything, of the assets otherwise allocable to the Nonqualified Marital Trust.

(B) Next, the assets payable to the *Qualified*

<sup>84</sup>Again, the GST provisions add considerable and unavoidable complexity. See "Drafting For The Funding of Marital Deduction QTIP Trusts" by Max Gutierrez, Jr., SWLF 28th Wills & Trust Institute 1989, at pp D-228 or p. 22 et seq.

*Marital Trust* (if any) will be apportioned as follows: The **Qualified Exempt Marital Trust** will be entitled to a **pecuniary amount** payable out of the assets otherwise allocable to the Qualified Marital Trust, equal in value to the lesser of (i) the excess GST exemption remaining, if any, after the allocation described in Subparagraph (A) above, or (ii) the **net** value of the Qualified Marital Trust available for distribution. The **Qualified Nonexempt Marital Trust** will be entitled to what is left, if anything, of the assets otherwise allocable to the Qualified Marital Trust.

(C) Despite the general rule that pecuniary gifts are to be funded at date of distribution values, it is specifically provided that if property other than cash is used to satisfy the pecuniary gift (if any) to either the Nonqualified Exempt Marital Trust or the Qualified Exempt Marital Trust, payment must be made with property on the basis of the value of the property on the date used for determining basis for federal income tax purposes; provided, however, that the pecuniary payment must be satisfied on a basis that *fairly reflects net appreciation and depreciation* (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made. The First Decedent believes that for this purpose the value of property included in the First Decedent's gross estate is its value for purposes of chapter 11 of the IRC, but that if the property was not included in the First Decedent's gross estate (e.g., the property is the sales proceeds of property included in the estate), the value of the property will, presumably, be its federal income tax value (adjusted basis). Notwithstanding the foregoing, this valuation funding provision will be implemented, interpreted, or modified by the First Decedent's fiduciary as and if necessary to comply with any final treasury regulations governing Chapter 13 of the IRC at the date of distribution, in order that the denominator of the "applicable fraction" (for GST purposes with respect to the First Decedent's Exempt Residuary Share) will equal in value to the available GST exemption, consistent with Maker's manifest intent elsewhere expressed.

It is anticipated that the pecuniary (or remainder) amount allocated to one or more of the trusts described above may be zero. For example, if the QTIP election is made with respect to the entire Marital Deduction Gift, and if the excess GST exemption is greater than the value of the Marital Deduction Gift, then there will be only one trust under this Section: a Qualified Exempt Marital Trust, also known as the Qualified Marital Trust or

The Marital Deduction Trust. Further, if the excess GST exemption is greater than the value of the Nonqualified Marital Trust, there will be no allocation to the Nonqualified Nonexempt Marital Trust.

(8) It is Maker's expectation (but it is not required) that First Decedent's excess GST exemption will be allocated to the Nonqualified Exempt Marital Trust and the Qualified Exempt Marital Trust, and that the First Decedent's Executor will exercise the special election provided by §2652(a)(3) of the IRC with respect to the Qualified Exempt Marital Trust.

(9) It is provided that the creation of the separate trusts will only be made in a manner that will not adversely affect the GST allocation or the QTIP election, or jeopardize the availability of the marital deduction with respect to the elected part; otherwise, they will not be created. (10) Except as specifically and explicitly otherwise provided, each trust composing the Marital Deduction Gift will be subject to all of the same terms and conditions provided in this instrument for The Marital Deduction Trust, and for this reason all references to The Marital Deduction Trust or to any gift thereunder will be construed as equally and proportionally applicable to the Qualified Exempt Marital Trust, the Qualified Nonexempt Marital Trust, the Nonqualified Exempt Marital Trust, and the Nonqualified Nonexempt Marital Trust. (This does not mean, however, that distributions of principal must be made from each trust proportionately.) All references to The Marital Deduction Trust will be interpreted with this in mind and consistently with the foregoing. (11)

Notwithstanding anything else herein to the contrary, the Exempt and Nonexempt Marital Trusts will never be held together as separate shares of one trust, but the Exempt Marital Trusts will always be held in a trust or trusts that are separate and distinct from any trust or trusts that comprise the Nonexempt Marital Trusts.

**8.4** The trustee will hold, manage, invest and reinvest the principal of The Marital Deduction Trust, including any additions, and will hold and dispose of the principal and net income from it as provided later on.

#### **8.5 Distributions.**

(a) **Surviving Spouse Will Have Qualifying Income Interest For Life.** The Surviving Spouse

will have a “qualifying income interest for life” in the trust estate of the Marital Deduction Trust. Basically, this means that the Surviving Spouse is entitled for life to all the income from the trust estate, payable annually. The phrase qualifying income interest for life is further defined in detail in Part II, but in any event, the phrase will be interpreted consistently with IRC §2056 and the regulations under it, in order to ensure the availability of a marital deduction with respect to the trust estate of The Marital Deduction Trust.

**(b) Distributions Out of Principal.** The trustee **may**, in its sole and uncontrolled discretion, additionally distribute to the Surviving Spouse so much of the remaining trust estate as is necessary or reasonable to provide for the Surviving Spouse's **health, education, maintenance, and support in reasonable comfort in the manner of living to which the Surviving Spouse has become accustomed** at the date of the First Decedent's death, if and to the extent that the income distributed from the trust is insufficient for these purposes.

**(c) Consideration of Other Sources of Support.** In making the additional distributions of principal, if any, the trustee **may, but need not**, consider other sources of income, principal and support available to the Surviving Spouse, of which the trustee has knowledge. It is provided, however, that no distributions of principal will be made to or for the benefit of a judgment creditor of the Surviving Spouse or to a trustee in bankruptcy. This provision will not be construed as a limitation on the spouse's qualifying income interest for life.

**(b-1) “Five and Five” Power.**<sup>85</sup>

**(1) General Rule.** If the First Decedent's Spouse is living on the last day of the calendar year, the First Decedent's Spouse (the “powerholder”) will have **the absolute right to withdraw** from the principal of the Marital Deduction Trust an amount or amounts not exceeding the greater of (a) \$5000 or (b) 5% of the aggregate value of the trust estate, determined at the end of the last day of the calendar year, reduced by all prior lapses with respect to that withdrawal powerholder during the same calendar year. The limit on the withdrawal right may sometimes be referred to as the **5 & 5 limit**. The

power itself may be referred to as the “Marital Deduction 5 & 5 Power.”

**(2) Power Not Cumulative.** To the extent a withdrawal power accruing during a calendar year is not exercised during that year, it will lapse at the end of the last day of the calendar year.

**(3) Maker's Intent.** 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 powerholder will not be considered a release under IRC §2514(e) or §2041(b)(2).

**(4) Method of Exercise of Power.** The right of withdrawal must be exercised, if at all, by a **written instrument** delivered to the fiduciary **not later than thirty (30) days prior to the last day of the taxable year** for which the right is exercised. Subject only to the preceding sentence, this right may be exercised in advance, or immediately, or upon any future contingency specified. Thus, the powerholder may exercise the power in one written revocable instrument, to be automatically applicable, unless countermanded by the powerholder, for all future years in which the power exists.

**(5) Trustee's Commissions.** Any commissions payable to the trustee as a result of the foregoing payments will be charged entirely to the property withdrawn.

**(6) Time of Payment.** Payment will be made to the powerholder within 30 days after the close of the calendar year for which the right is exercised.

**(7) Withdrawal Rights Over Property Prior to Funding.** It is Maker's intention that the withdrawal rights described in this Section will be exercisable only over property actually held in the Marital Deduction Trust, subsequent to funding, and the amount subject to the power will be determined by reference only to property actually in the trust, and not to property that the trust may thereafter receive as a distribution.

**8.6 Termination.**

**(a) Time of Termination.** When the Surviving Spouse has died, The Marital Deduction Trust will terminate. (For this purpose, the term “terminate” will include a redesignation or merger.)

**(b) Termination Distributions.** Upon

<sup>85</sup>This is a bell, or if you prefer, a whistle. I don't employ this clause often, but it is occasionally highly useful to have it in the toolbox.

termination, any undistributed income will be distributed to the Surviving Spouse's estate. The remaining trust estate will then be distributed for the benefit of the descendants, by right of representation, of the First Decedent who are living at the time of termination, **expressly subject** first, *however*, to the Surviving Spouse's **Nongeneral Testamentary Power of Appointment described below**.

(c) **No Descendants Living.** If there are no such descendants living at the time of termination, the trust estate of The Marital Deduction Trust will be distributed as provided in the Subsection in Part II entitled "Final Alternate Distribution," subject to the Surviving Spouse's Nongeneral Testamentary Power of Appointment described below.

(d) **Vesting.** Subject to the Surviving Spouse's Nongeneral Testamentary Power of Appointment described below, all present interests will vest on the date of termination; however, an interest will not necessarily vest *in possession*, since it may be subject to the Protected Trust provisions described later on in this Article.

(e) **Surviving Spouse Will Have a Nongeneral Testamentary Power of Appointment Over Remainder of Marital Deduction Trust.**

Notwithstanding the preceding provisions of this Section, the Surviving Spouse will have a Nongeneral Testamentary Power of Appointment over the then remaining trust estate of The Marital Deduction Trust existing at the spouse's death that would otherwise be available for distribution to the remaindermen. The Nongeneral Testamentary Power of Appointment will have the meaning given to the term in Part II hereof, except that it may only be exercised in favor of **the descendants of a grandparent of a Maker or a spouse of such descendant**, but may otherwise be exercised in the amounts and proportions (which need not be equal) and on the terms and conditions, either outright or in trust, as the Surviving Spouse will appoint, as in the case of any other Nongeneral Testamentary Power of Appointment. If the Surviving Spouse fails to make a valid disposition of all or any portion of the trust estate, all or the portion of the trust estate not so disposed of will be distributed by the trustee as provided above, as if the spouse had not been granted this Nongeneral Testamentary Power of Appointment.<sup>86</sup>

**8.7 Form of Termination Distribution.** A descendant's representational share, if any, will be distributed and allocated to a Protected Trust for that descendant subject, however, to the Surviving Spouse's Nongeneral Testamentary Power of Appointment described above.

**8.8 Distribution Out of GST Trusts.** A distribution out of the Exempt Marital Trust that is to be made to a Protected Trust will be made to an Exempt Protected Trust, and a distribution out of the Nonexempt Marital Trust that is to be made to a Protected Trust will be made to a Nonexempt Protected Trust. (It is Maker's expectation that, to the extent possible, any trust that is a part of the Marital Deduction Gift and that has a zero inclusion ratio for GST purposes will not be merged with a trust having an inclusion ratio that is greater than zero.)

**8.9 Payment of Surviving Spouse's Estate Taxes Attributable to Marital Deduction Gift.** Unless the Surviving Spouse specifically provides by

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<sup>86</sup>See Prop. Treas. Reg. §20.2207A(1)(a).

will that the Surviving Spouse's executor will not seek reimbursement for any estate taxes attributable to the assets remaining in The Marital Deduction Trust at its termination, or unless the Surviving Spouse otherwise directs by will, the trustee of The Marital Deduction Trust will pay from the principal of the trust estate the amount by which the total tax imposed on the Surviving Spouse's estate under Chapter 11 of the IRC (i.e., federal estate taxes) exceeds the total tax under Chapter 11 that would have been payable if the value of The Marital Deduction Trust were not taken into account in determining the taxes. The total amount will be paid in the following order of priority: First, by the Qualified Nonexempt Marital Trust; second, by the Nonqualified Nonexempt Marital Trust; third, by the Qualified Exempt Marital Trust; and last, by the Nonqualified Exempt Marital Trust. Each trust will be exhausted before proceeding to the next trust. E.g., the Exempt Marital Trusts will not be used to pay the taxes described in this Subsection as long as either of the Nonexempt Marital Trusts exists. Notwithstanding the foregoing, if it is clear, under the laws, decisions, regulations, Revenue Rulings, etc., in effect at that time, that the foregoing order of payment will result in a constructive addition (for GST purposes) to the Exempt Marital Trust(s), then each trust will pay the tax attributable to the trust that the Surviving Spouse's estate is entitled to recover under §2207A of the IRC.<sup>87</sup>

ARTICLE IX  
THE SECOND DECEDENT'S RESIDUARY  
TRUST ESTATE  
Creation of GST Exempt and Nonexempt Trusts

The terms "residuary estate" or "residuary trust estate" are defined in Part II. The terms generally are used interchangeably to refer to the remainder of the Decedent's Share of the trust (following the Decedent's death) not disposed of above by general or specific gift. Most references in this Article to the "Decedent" are to the last Maker to die (the Second Decedent), unless the context clearly indicates otherwise. The residuary dispositions of the first Maker to die (the First Decedent) are described in other Articles.

**9.1 Division of Residuary Estate Into Representational Shares At Death of Second Decedent.**

(a) **In General.** Upon the Second Decedent's death, **the Second Decedent's undistributed net residuary estate will be distributed for the benefit of the Second Decedent's descendants, by right of representation**, living at the time of the Second Decedent's death, subject to the following provisions of this Section. A descendant's representational share, if any, will be distributed and allocated to a Protected Trust for that descendant. A distribution out of the Exempt Residuary Share that is to be made to a Protected Trust will be made to an Exempt Protected Trust, and a distribution out of the Nonexempt Residuary Share that is to be made to a Protected Trust will be made to a Nonexempt Protected Trust, created below.

(b) **Time of Vesting of Interest.** The interest in the Second Decedent's residuary estate (if any) of a beneficiary who survives the Second Decedent will vest immediately upon the Second Decedent's death, whether or not the beneficiary survives the distribution of his interest. The interest, however, will not necessarily vest *in possession*, since it will be subject to the Protected Trust provisions of this instrument, and if so, the power of the beneficiary to dispose of the undistributed trust estate upon the beneficiary's death will be exercisable only by power of appointment as particularly specified in this instrument.

**9.2 Division of Estate Into Exempt and Nonexempt Portions On Death of The Second Decedent.**<sup>88</sup>

(a) **Allocation of the GST Exemption.** The Second Decedent's executor may have the right under §2631(a) of the IRC to make an allocation of the available Generation Skipping Tax (GST) exemption for purposes of determining the "inclusion ratio" described in Chapter 13 of Subtitle B of the IRC with respect to the property that passes in trust under this instrument or by will or otherwise. The Second Decedent's executor is specifically authorized to exercise the right to make the GST

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<sup>87</sup>See Prop. Treas. Reg. §20.2207A(1)(a).

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<sup>88</sup>Once again, GST provisions add length and complexity to the document, and this is exacerbated by the fact that the exemption equivalent and the GSTT exemption are not the same amounts.

exemption allocation with respect to all or a portion of the trust estate of any trust under this instrument. It is Maker's expectation that every trust created under this instrument will have an inclusion ratio of either zero or one, within the meaning of §2642 of the IRC (or as close to zero as possible), and the provisions of this Section will in all respects be construed accordingly. To achieve this end, the following trusts are established, effective at the Second Decedent's death.

**(b) Creation of Exempt and Nonexempt Portions of Residuary Trust Estate At the Death of the Second Decedent.** The following provisions of this Subsection will apply upon the death of the Second Decedent:

**(1)** If the available GST exemption at the date of the Second Decedent's death is greater than the value of the Second Decedent's net residuary estate, as determined for GST purposes, then the Second Decedent's entire net residuary estate will be referred to as the Exempt Residuary Share, in which case Maker suggests but does not require that the GST exemption be allocated in part to the entire residuary estate.

**(2)** If there is no available GST exemption at the date of the Second Decedent's death, then the entire residuary estate will be referred to as the Nonexempt Residuary Share.

**(3)** If there is any available GST exemption at the date of the Second Decedent's death, and if the available GST exemption is less than the value of the Second Decedent's net residuary estate as determined for GST purposes, then there will be created out of the Second Decedent's **net** residuary estate two substantially separate shares: an **Exempt Residuary Share**, sometimes referred to as the Second Decedent's Exempt Residuary Estate, and a **Nonexempt Residuary Share**, sometimes referred to as the Second Decedent's Nonexempt Residuary Estate.

**(A)** The Exempt Residuary Share will be a pecuniary amount payable out of the Second Decedent's net residuary estate, equal in value to the available GST exemption.

**(B)** The Nonexempt Residuary Share will be the remainder (what is left) of the Second Decedent's net residuary estate. This remainder is not a pecuniary amount.

**(C)** Despite the general rule that pecuniary gifts are to be funded at date of distribution values, it is specifically provided that if property other than cash is used to satisfy the pecuniary gift (if any) to the Exempt Residuary Share, payment must be made with property on the basis of the value of the property on the date used for determining basis for federal income tax purposes; provided, however, that the pecuniary payment must be satisfied on a basis that *fairly reflects net appreciation and depreciation* (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made.<sup>89</sup> The Second Decedent believes that for this purpose the value of property included in the Second Decedent's gross estate is its value for purposes of chapter 11 of the IRC, but that if the property was not included in the Second Decedent's gross estate (e.g., the property is the sales proceeds of property included in the estate), the value of the property will, presumably, be its federal income tax value (adjusted basis). Notwithstanding the foregoing, this valuation funding provision will be implemented, interpreted, or modified by the Second Decedent's fiduciary as and if necessary to comply with any final treasury regulations governing Chapter 13 of the IRC at the date of distribution, in order that the denominator of the "applicable fraction" (for GST purposes with respect to the Second Decedent's Exempt Residuary Share) will equal in value to the available GST exemption, consistent with Maker's manifest intent elsewhere expressed.

**(4)** This Subsection will be interpreted as necessary to carry out Maker's manifest intent that the Exempt Residuary Share be able to have an inclusion ratio of zero, and that the Nonexempt Residuary Share have an inclusion ratio of one, within the meaning of §2642 of the IRC (provided only that the Second Decedent's executor makes the proper allocation election), and the provisions of this Section will in all respects be construed accordingly.

**(5)** Except as specifically and explicitly otherwise provided, each such share will be subject to all of the same terms and conditions provided for the residuary estate, and for this reason all references

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<sup>89</sup>By using a fairly representative clause here, I am avoiding gain on funding. This can get a little weird, if you think about it, since the original division between credit shelter, marital and residuary, may have been pursuant to a different valuation method.

to the residuary estate or to any gift thereunder will be construed as equally and proportionally applicable to both the Exempt Residuary Share and the Nonexempt Residuary Share.

(6) Notwithstanding anything else herein to the contrary, the Exempt and Nonexempt Residuary Shares will never be held together as separate shares of one trust, but the Exempt Residuary Share, if held in trust, will always be held in a trust or trusts that are separate and distinct from any trust or trusts that comprise the Nonexempt Share, in whole or in part.

**9.3 Alternate Distribution.** If the Decedent's Spouse fails to survive the Second Decedent, and if the Decedent has no living descendants at the time of the Second Decedent's death, the Second Decedent's residuary estate will be distributed as provided in the Subsection in Part II entitled "Final Alternate Distribution."

ARTICLE X  
PROVISIONS GOVERNING  
PROTECTED TRUSTS

**10.1 In General.** A distribution to or for the benefit of a beneficiary, under the circumstances described below, will not be made in fee simple, but will instead be distributed to the trustee, in trust, of a Protected Trust created for the benefit of that person. The person for whom a Protected Trust is so created will be the Primary Beneficiary of the trust.

**10.2 Protected Trusts.**

(a) **Conditions For 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 (other than a facts and circumstances distribution, but including a distribution in default of the exercise of a power of appointment) 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. A distribution to a Protected Trust will be to either an Exempt Protected Trust or to a Nonexempt Protected Trust, as set forth below.

(b) **Allocation of GST Exemption To Protected Trusts.** It is the Maker's intent that each Protected Trust (described later) will have an inclusion ratio for GST purposes of either zero or

one (within the meaning of §2642 of the IRC), that an Exempt Protected Trust will have an inclusion ratio of zero (or as close to zero as possible) and will be held as a separate and distinct trust, and that a Nonexempt Protected Trust will have an inclusion ratio of one and will be held as a separate and distinct trust. The fiduciaries will fund trusts as necessary to preserve and achieve this objective. To this end, Exempt Protected Trusts and Nonexempt Protected Trusts are created. An **Exempt Protected Trust** will be funded exclusively out of the Exempt Residuary Share, in the case of a distribution out of the Second Decedent's residuary estate, out of The Exempt Tax Shelter Trust, if any, upon its termination, out of the Exempt Marital Trust(s) upon its termination, and out of any other property with respect to which the GST exemption has been or will be allocated. A **Nonexempt Protected Trust** will be funded exclusively out of other assets. For convenience, any reference to a Protected Trust will be construed to be equally applicable to a Nonexempt Protected Trust or to an Exempt Protected Trust, unless otherwise indicated.

(b-1) **Administration of Exempt and Nonexempt Protected Trusts.** Exempt and Nonexempt Protected Trusts will be subject to the same terms and conditions except where otherwise specifically provided. For convenience, any reference to a Protected Trust will be construed to be equally applicable to a Nonexempt Protected Trust or to an Exempt Protected Trust, unless otherwise indicated.

(c) **Distributions from Protected Trusts.** During the term of each Protected Trust, the trustee **may** distribute to or for the benefit of the beneficiary for whom the trust was created 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.<sup>90</sup> Except as may be

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<sup>90</sup>It is absolutely necessary to tell the trustee which way to go on this issue, else we must guess. Is a gift of support like a gift of a watch, meaning you don't ask whether the beneficiary already has one? See *State v. Rubion* 308 S.W.4 (Tex '57) and *First Nat'l Bk v. Howard* 229 S.W.781 (Tex '50).

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 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.

**(c-1) Distributions from Protected Trust to Surviving Spouse.** Notwithstanding the above, if the Surviving Spouse should become a beneficiary of a Protected Trust (a Spousal Protected Trust), the Surviving Spouse will have the immediate and unqualified right to use and withdraw so much of the trust estate as the Surviving Spouse determines, in the Surviving Spouse's sole and unrestricted discretion, and will be entitled to demand and receive an immediate distribution of all or any part of the entire trust estate of the trust. This right 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, the undistributed trust estate of a Spousal Protected Trust will be distributed to the Spouse's estate. Further, notwithstanding anything else herein to the contrary, no portion of the trust estate of a Spousal Protected Trust may be expended or appointed for the benefit of anyone other than the Surviving Spouse or the Surviving Spouse's estate.

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See Treas. Reg. §20.2041-1(c)(2), last sentence— “In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.”

**(d) Primary Beneficiary of Protected Trust Will Have A Power of Appointment.**

**(1) Testamentary Powers of Appointment Over Nonexempt Trust.** A Primary Beneficiary for whom a **Nonexempt** Protected Trust has been created (the “powerholder”) will have a **General Testamentary Power of Appointment over any “GSTT Property”** in such trust, if such trust, immediately prior to the beneficiary's death, has an inclusion ratio for Federal Generation Skipping Transfer Tax purposes that is greater than three-fourths.<sup>91</sup> **The Primary Beneficiary of a Nonexempt Protected Trust will have a Nongeneral Testamentary Power of Appointment over all other property in such trust.**

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<sup>91</sup>A formula alternative might read:

A Primary Beneficiary for whom a **Nonexempt** Protected Trust has been created (the “powerholder”) shall have a **General Testamentary Power of Appointment** over the largest fractional share of the net trust estate of his Nonexempt Protected Trust existing at the Primary Beneficiary's death that will not increase the federal estate taxes to be paid by the Primary Beneficiary's executor, using values as finally determined for federal estate tax purposes, taking into account (of course) all other property includible in the Primary Beneficiary's gross estate for federal estate tax purposes, disregarding, however, the marital and charitable deductions, but taking into account all other federal estate tax deductions and credits taken. The items listed above to be taken into account are included for illustration and clarification purposes only and are not intended as an exclusive list of all the items to be taken into account in determining the largest fractional share that will not increase the federal estate taxes to be paid by the Primary Beneficiary's executor. The foregoing provision is intended to avoid the application of the Generation Skipping Transfer Tax to the extent it can be done without incurring additional estate tax in the Primary Beneficiary's estate (without employing the marital or charitable deduction for that end), and shall be interpreted using common sense to achieve this end.

I have been asked why I use “greater than three-fourths” as the test. My answer is that nobody would want to put an asset in the powerholder's estate, simply because the inclusion ratio was only slightly greater than zero; whereas, in most cases one would want to avoid a GST tax if the inclusion ratio were only slightly less than one. In between zero and one, it depends. Three-fourths is not a magic number. In my own mind, I am thinking that if at least 25% of the asset is exempt from both GST and estate taxes, I probably want to preserve the complete exemption on the 25%, even if I have to pay a GST tax on the other 75%.

(2) **Definition of GSTT Property.** The term “GSTT Property”<sup>92</sup> means property remaining in a trust at the date of death of the Primary Beneficiary of the trust, 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 beneficiary’s death) with respect to such property — under the provisions of Part II identifying the takers in default of the exercise of a power of appointment— if the beneficiary had died holding only an *unexercised* Nongeneral Testamentary Power of Appointment over the property.

(3) **Lower Generation Beneficiary Has No Discretion.** Notwithstanding anything else herein to the contrary, if the person who is entitled to make the 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 is a “Lower Generation Beneficiary” of a Nonexempt Protected Trust, that fiduciary will have no discretion whether or not to make or not make the allocation with respect to that trust, and must make the allocation (or allow the allocation to be made by operation of law) if such allocation is either (a) required by ordinary fiduciary principals or (b) would be in accordance with Maker’s express intent or expectation as set forth in this instrument, even if the person who is entitled to make the allocation would

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<sup>92</sup>Barney Jones of Houston gave me the idea of simply defining property that is going to attract a GST tax under the power of appointment default gift over provisions, and then to give someone a GTPO over it. One advantage that the Delaware tax trap has over this approach is that there might be cases where a powerholder is in such a low estate tax bracket that it makes sense to put the property in the powerholder’s estate even though there would be no GST tax. The Delaware Tax Trap is still an option that can be used to cure this problem, and the problem could alternatively be cured under the provision giving a third party the power to convert a nongeneral power to a general power. But what if the best option would be to exercise a **nongeneral** power to postpone or avoid the GST tax, rather than attracting a GST tax under the gift over in default provisions. In that case, this clause is not so helpful, because this clause forces the property into the estate of the power holder, merely because it would have attracted a GST tax if the power of appointment had not been exercised, thus precluding the conscious exercise of the power to avoid the GST tax. Well, we do our best to juggle competing interests, and sometimes something has to give.

not otherwise be required to honor such intent or expectation under all circumstances. It is Maker’s expectation, elsewhere reiterated, that every trust created under this instrument will have an inclusion ratio of either zero or one, within the meaning of §2642 of the IRC (or as close to zero as possible) and that the “available GST exemption” will be fully allocated to transfers to or for the benefit of Maker’s descendants.<sup>93</sup>

(4) **Definition of Lower Generation Beneficiary.** A beneficiary of a trust who is neither the transferor with respect to that trust nor a natural person assigned to the same or higher generation as the person who is treated as the transferor of that trust (as those terms are used and defined in Chapter 13 of the IRC), is sometimes referred to in this instrument as a “**Lower Generation Beneficiary.**”

(5) **Nongeneral Testamentary Power of Appointment Over Exempt Trust.** A Primary Beneficiary for whom an **Exempt** Protected Trust has been created (the “powerholder”) will have a **Nongeneral Testamentary Power of Appointment** over the remainder of such trust existing at his death.

(e) **Termination of Trust/Default in Exercise of Power of Appointment.** If the beneficiary 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, as of the beneficiary’s death, to or for the benefit of the person or persons who are designated in Part II as the takers in default.

## ARTICLE XI MISCELLANEOUS TRUST PROVISIONS

**11.1 Payment of Estate Taxes, Debts and Expenses of Probate Administration.**<sup>94</sup> Subject to

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<sup>93</sup>There are traps everywhere. If we are going to vary a power of appointment depending on whether the property subject to it is GST tax exempt or not, we had better be careful that the powerholder is not the one that made the decision whether or not the property would be GST exempt, because the exercise of that decision just might be considered to be the exercise or a lapse of a general power of appointment.

<sup>94</sup>It is both difficult and extremely important to coordinate with the probate estate with regard to the payment of debts, taxes and expenses. See P.C. §322A.

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, and *subject to the explicit restrictions and limitations on fiduciaries with respect to the distribution and administration of property qualifying for the marital deduction*, 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. 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. 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.

(b) **Effect of Right of Contribution or Reimbursement on Marital Deduction Gift.** Notwithstanding the above, no contribution or reimbursement will be made with respect to property for which an estate or gift tax marital deduction was or will be taken. However, since the Marital Deduction Gift is a **net** gift of the residuary estate,<sup>95</sup> the **gross** residuary estate may be liable for contribution or reimbursement for debts and expenses, as well as for a share of estate taxes on

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<sup>95</sup>You will often hear it said that debts, expenses and taxes should never be paid out of the marital share, and indeed, this is technically correct. But if your marital gift is out of the residuary estate, your formula should take into account the fact that the residuary estate is paying debts, expenses, and its share of taxes, so that the "net" residuary share is really your marital share, and it is, because of the formula, the optimum size.

such portion of the residue (if any) that does not qualify for the marital deduction (as a result of disclaimer or otherwise). (The size of the Marital Deduction Gift is computed under a formula that takes such charges against the gross residue into account.)

(c) **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. To the extent consistent with the preceding provisions of this Subsection, any contribution or reimbursement will be made by resort to property in the Nonexempt Trusts first, and out of the Exempt Trusts last.

**11.2 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, and *subject to the explicit restrictions and limitations on fiduciaries with respect to the distribution and administration of property qualifying for the marital deduction*, 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, including distributions in satisfaction or partial satisfaction of pecuniary legacies, 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.**<sup>96</sup>

(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

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<sup>96</sup>Because our fiduciaries are also beneficiaries, a clause like this could come in handy in an otherwise doubtful situation. You may delete it in order to shorten the instrument. However, I, for one, want the insurance.

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. This paragraph does not apply to a distribution (if otherwise permissible) to a Maker's spouse.

(5) This Subsection governs in the event of conflict with any other provision of this instrument or any trust under this instrument, other than the Article disposing of the Marital Deduction Gift. This Subsection in no way limits a spouse's qualifying income interest for life.

(6) This Subsection does not apply to Maker, nor does it 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.**<sup>97</sup> 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 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. The preceding sentence does apply to restrict a Maker's spouse's qualifying income interest for life in The Marital Deduction Trust. This Subsection governs in case of conflict with any other provision of this instrument, other than the Article disposing of the Marital Deduction Gift.

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

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<sup>97</sup>Another fail safe to address one of the Service's favorite modes of attack. However, I don't want to go overboard here, which is the reason for the extra language.

PART II\*

Married Maker, Marital Deduction Gift is in a QTIP  
Trust

Note: This Part II does double duty. One identical copy is a part of Maker's Will and another identical copy is a part of The Lotta Moore Money Family Trust. This is for convenience, and does not make The Lotta Moore Money Family Trust a part of Maker's probate estate.

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 "ancillary fiduciary" always refers to any representative of an estate necessary to administer the estate in any jurisdiction other than the jurisdiction in which the fiduciary or decedent is domiciled at his or her death. 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 Lotta Moore 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, executor 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.<sup>98</sup>

Upon and after death, a 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 a Maker. (If the word "Decedent" is capitalized, it will usually refer only to a Maker.) After the death of the first Maker to die, the term Maker will apply to the Surviving Spouse when construing provisions dealing with the Surviving Spouse's share. However, the Surviving Spouse will not be considered a Maker with respect to the Decedent's share. Except in the case of Maker's Will, and unless otherwise specified, the term Maker ordinarily means both Makers with respect to matters transpiring while both Makers are alive. This is for convenience. However (except in the case of Maker's Will), since there is more than one Maker, a reference in this instrument to a Maker, or a Maker's Will, a Maker's spouse, etc., will have to be construed using common sense, considering 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.

<sup>98</sup>What I am looking for is a term that can be used interchangeably, and which is easily understood (even if not commonly used). I tried using "Creator" once, but it struck me as mildly blasphemous. I would welcome any suggestions for a more useful term.

context.

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.<sup>99</sup>

(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 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<sup>100</sup> one or more of the members survived**, and for this purpose, a disclaimant will be treated as if he survived.<sup>101</sup> 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.

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<sup>100</sup>This language is intended to cure the problem illustrated by *Maud v. Catherwood*, 67 Cal. App.2d 636, 644, 155 P2d 111, where the decedent was survived only by his nephews and nieces. The question was whether they took the share their parent would have taken if living, or whether, since they were all in the same degree of relationship, an equal distribution was called for.

Alternatively, one can say:

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 decedent **whether or not** one or more of the members survived **(i.e., strict per stirpes)** . . . .

<sup>101</sup>Think about what can happen if a disclaimant is treated as not surviving if a strict per stirpes approach is not taken. For instance, consider a situation where the sole surviving child has three brothers, each of whom have predeceased him leaving, in each case, one child surviving. The surviving child, who has seven children, disclaims. If the surviving child had died, his children would receive 70% of the estate instead of one-fourth, unless a strict per stirpes approach was mandated.

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<sup>99</sup>Consider this provision carefully.

**1.4 Residuary Estate.**

**(a) General Definition.**

(1) **Residuary Trust Estate.** In the case of The Lotta Moore Money Family Trust, and except as otherwise expressly limited, the term “**residuary estate**” generally means “residuary trust estate” and vice-versa. Either term refers to the Decedent’s share of any property that is disposable under The Lotta Moore Money Family Trust and that, other than by the gift of the residuary estate, has not been disposed of under it.

(2) **Property Disposable Under The Lotta Moore Money Family Trust.** Property that is disposable under The Lotta Moore Money Family Trust means property that is or becomes a part of the trust estate of a trust (including a Subtrust) established under the trust instrument, including property payable to the trust under the terms of a will or as a result of the Maker’s death or otherwise. It is specifically provided, however, that the term does not generally include a surviving spouse’s community or separate property interest in the trust, if any.

(3) **Residuary Probate Estate.** In the case of Maker’s Will, and except as may otherwise be provided in such Will, the term “**residuary estate**” as applied to such Will will mean all **probate property** that, other than by the gift of the residuary estate, has not been disposed of by such Will.

(b) **Residuary Gifts and Nonresiduary Gifts.** 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.

(c) **Lapsed Residuary Gifts Added to 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.

(d) **Power of Appointment Not Generally Exercised By Gift of Residuary Estate.** Any power of appointment (as such) will not be exercised by a gift of the residuary estate, unless such power is specifically referred to and specifically exercised by the gift.

**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.**<sup>102</sup> Notwithstanding the above, or

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<sup>102</sup>Treas. Reg. §1.663-1 provides:

(a) If a single trust has more than one beneficiary, and if different beneficiaries have substantially separate and independent shares, their shares are treated as separate trusts for the sole purpose of determining the amount of distributable net income allocable to the respective beneficiaries under sections 661 and 662. Application of this rule will be significant in, for example, situations in which income is accumulated for beneficiary A but a distribution is made to beneficiary B of both income and corpus in an amount exceeding the share of income that would be distributable to B had there been separate trusts. In the absence of a separate share rule B would be taxed on income which is accumulated for A. The division of distributable net income into separate shares will limit the tax liability of B. Section 663(c) does not affect the principles of applicable law in situations in which a single trust instrument creates not one but several separate trusts, as opposed to separate shares in the same trust within the meaning of this section.

anything else herein to the contrary, any otherwise separate share that is described herein by the word "Exempt" or "GST," or which is clearly intended to have an inclusion ratio or either zero (or as close thereto as possible), or which is intended to be exempt from the Generation Skipping Transfer Tax, will be held as a separate and distinct trust (rather than as a separate share) from any other trust that is described herein by the word "Nonexempt," or which is clearly intended to have an inclusion ratio of one, or which is not intended to be exempt from the Generation Skipping Transfer Tax.

**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

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(b) The separate share rule does not permit the treatment of separate shares as separate trusts for any purpose other than the application of distributable net income. It does not, for instance, permit the treatment of separate shares as separate trusts for purposes of:

- (1) The filing of returns and payment of tax,
- (2) The exclusion of dividends under section 116,
- (3) The deduction of personal exemption under section 642(b), and
- (4) The allowance to beneficiaries succeeding to the trust property of excess deductions and unused net operating loss and capital loss carryovers on termination of the trust under section 642(h).

(c) The separate share rule may be applicable even though separate and independent accounts are not maintained and are not required to be maintained for each share on the books of account of the trust, and even though no physical segregation of assets is made or required.

(d) **Separate share treatment is not elective.** Thus, if [and after??] a trust is properly treated as having separate and independent shares, such treatment must prevail in all taxable years of the trust unless an event occurs as a result of which the terms of the trust instrument and the requirements of proper administration require different treatment.

[Subsection (d) is a little troubling.]

Page II-56

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.**<sup>103</sup> 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 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

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<sup>103</sup>This Section can definitely be shortened. The only reason it is so comprehensive is that the trusts under this particular instrument last for the duration of the rule against perpetuities, and because each generation has been given powers of appointment.

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 determines. 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 presently 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

Page II-57

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) Limitations on the Exercise of Certain Nongeneral Powers of Appointment.** Notwithstanding anything else herein to the contrary, in the case of a trust that has been denominated in this instrument by the word "Exempt" (and only in such case), the holder of a Nongeneral Power of Appointment may not exercise the power over any policy of insurance on the life of the powerholder. This limitation would apply, for example, to the holder of a Nongeneral Power of Appointment over an Exempt Protected Trust, but would not apply to the holder of a Nongeneral Power of Appointment over a Nonexempt Protected Trust.

**(e) 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 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. (Obviously, Makers have provided to the contrary with respect to Makers' retained General Testamentary Power of

Appointment.)

(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 Decedent.

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

(4) But if the Decedent 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."

(6) Notwithstanding the foregoing, if a Protected Trust is established for a Maker's Surviving Spouse, then in default of the exercise of a power of appointment by the Maker's Surviving Spouse, the undistributed trust estate of the trust (with respect to which the power was not effectively exercised) will be distributed in fee simple to the Surviving Spouse's estate.

**(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** Maker's "**Spouse**" is the person so identified in the provisions of Part I identifying Maker's family. For all purposes of this instrument, such person will be treated as legally married to Maker notwithstanding any defect in the marriage ceremony or otherwise, subject, however, to the Divorced Spouse Rule.

A "**Divorced Spouse**"<sup>104</sup> 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

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<sup>104</sup>One must be both tactful and thorough here. This was a very difficult clause to draft. There are many issues to consider. Could we safely eliminate this clause to save space? Probably, in most cases.

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 include a legal or equitable action for, or decree or order of, annulment, divorce, separation, or separate maintenance, between the spouse and the descendant, or if, at the death of the descendant, there was pending, or in effect, a legal or equitable action for, or decree or order of, annulment, divorce, separation, or separate maintenance. An action that is followed by remarriage between the spouse and the descendant is not a divorce action.

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. Nothing in this Section will have the effect of affecting a Maker's interest in his or her separate or community property interest in the trust estate, or of divesting a Maker of his or her separate or community property interest in the trust estate.

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" or "spouse" as applied to a Maker does not include anyone other than the person identified as Maker's Spouse in the provisions of 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,<sup>105</sup> 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,

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<sup>105</sup>Is a child born years after death as a result of artificial insemination a descendant of the deceased parent? Not under this instrument.

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** Except in the case of Maker's Will, 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, **and any amendment** to it.

*In the case of Maker's Will,* the term **"this instrument,"** or **"this agreement"** will refer to all Parts of such Will, and any codicil to it, including the Preamble and this Part II (as it existed on the date such Will or codicil was signed). Unless otherwise apparent from the context, a will speaks from the time of Maker's death, rather than from the time of the signing of this instrument. All references to a will include any codicil to it.

**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 “**2044(a) property**” means property in which a “**qualifying income interest for life**” is held (as that term is presently used in §2044(a) of the IRC), and that, as a result, is subject to federal estate tax.

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

**1.34** The term “**sources of support**” includes all sources of earnings, independent resources, earning ability,<sup>106</sup> income, principal or support, including a legal obligation of support and including governmental (whether state, federal, county or other)<sup>107</sup> and nongovernmental sources of aid, if known by the trustee to be reasonably available to the beneficiary.

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

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<sup>106</sup>Note this.

<sup>107</sup>And this.

**1.36** 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.

**1.37** 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.<sup>108</sup>

**1.38** Definition of Tangible Personal Property.

As used in this instrument, the term “**tangible personal property**” includes, but is not limited to, personal and household goods and effects, china, jewelry, silverware, heirlooms, **coins, works of art, and collections**, and also includes any property insurance policies on any tangible personal property, and the proceeds of such policies. (For purposes of gifts of tangible personal property to Maker's spouse, the term will also be considered to include any club memberships.)

But the term “**tangible personal property**” does not include cash, stocks, bonds, notes, nor any other items of intangible personal property other than property insurance, even if represented by tangible documentation of ownership, and **does not include tangible personal property used in a trade, business or profession, or** (unless specifically itemized in the first sentence of this Section) **property held as an investment**, unless other provisions of this instrument specifically provide to the contrary. An item or collection will be treated as if held for investment if it has a date of death value

for federal estate tax purposes of over \$50,000.<sup>109</sup>

An “**heirloom**” is any item of tangible personal property that has been owned by Maker or by a member of Maker’s family for over 25 years.<sup>110</sup>

**1.39** 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.

**1.40** 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

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<sup>108</sup>Note this.

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<sup>109</sup>A good definition of tangible personal property avoids the problems associated with terms such as personal and household effects, and whether or not the gift was meant to include the \$.5 million coin collection and the Renoir in the living room.

<sup>110</sup>This definition can be handily used in the case of a second marriage, where the testator wants to leave tangible personal property that has been in the family for a while to his children by a previous marriage.

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.**<sup>111</sup>

**1.41** 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.

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

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

**1.44** "**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.

**1.45** "**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.

**1.46** 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.

**1.47** 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.<sup>112</sup>

**1.48** A gift is a "**specific gift**," if the gift is not a residuary gift and if the gift can only be satisfied with property (rather than the proceeds of property) existing on the date of Maker's death, such that the gift will adeem if not part of the estate at that time. A gift is also a specific gift if it is referred to as a specific gift. A gift may be a specific gift even though described in general terms.

A specific gift may be of an individual nature (an individual specific gift) or of a general nature (a generic specific gift). The property comprising a **specific gift of a general nature** cannot be identified with certainty until the date of Maker's

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<sup>111</sup>I worked long and hard on this definition. Eliminating it would, however, save almost a page.

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<sup>112</sup>This is an important term.

death; whereas an individual specific gift is property that exists at the time of the signing of this instrument. Examples of a specific gift of a general nature (a generic specific gift) include a gift of all of Maker's tangible personal property, or all real estate used as a residence by Maker at the time of death, or all automobiles or all accounts in banks. Examples of a specific gift of an individual nature (an individual specific gift) include a gift of all of a piece of property described by metes and bounds, or a gift of an automobile presently in existence described by make and model, or a gift of a specific bank account identified by account number.<sup>113</sup>

**1.49** A gift is a "general gift" if the gift is not a residuary gift or a specific gift and if the gift can be satisfied with the proceeds of property in the estate, such that, for example, the gift would not adeem if not part of the estate at death. A pecuniary legacy is an example of a general gift. A direction to purchase 100 shares of IBM stock and distribute the stock to a beneficiary is another example of a general gift. A gift is also a general gift if it is referred to as a general gift. (The class of general bequests will include demonstrative gifts in excess of the fund or property with respect to which such gift was primarily charged.)

**1.50** 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.

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<sup>113</sup>I suppose that a bank account has "independent significance," and I am unaware of any challenge that such a gift allows the testator to amend the will without the usual formalities and prerequisites. This issue aside, it may be important to determine, for abatement purposes, whether a gift of all my real estate, all of my personal property or all of my bank accounts, is a specific or a general gift, or a hybrid: hence, the definition. These definitions could be safely eliminated in most cases. I have only had the issue be of significance twice in my career. Of course, each time the amounts involved were in the hundreds of thousands of dollars, and the attorney fees expended in determining the issue were large. In each case, the existence of a clause such as the one suggested would have eliminated the issue.

**1.51** The "available GST exemption"<sup>114</sup> means an amount, not less than zero, equal to the GST exemption, minus (1) such GST exemption as was effectively allocated (for purposes of Chapter 13 of the IRC) by Maker (or allocated by operation of law) to property transferred (for purposes of Chapter 12 of the IRC) by Maker during Maker's lifetime, and (2) any GST exemption that could have been allocated by Maker's executor to any direct skip, occurring as a result of a transfer at death (for purposes of Chapter 11 of the IRC), by Maker, of a gift made primarily to or for the benefit of Maker's lineal descendants that does not qualify for any other exemption or exclusion from the federal generation-skipping transfer tax.

For the purpose of clause (1) above, if Maker has died without filing a gift tax return that is required to be filed and that has a due date (including extensions) that is after Maker's death, then Maker will be considered to have allocated Maker's GST exemption to all the property with respect to which Maker is the transferor (as defined in §2652(a) of the IRC) that (i) may at some time be subject to the federal generation-skipping transfer tax, (ii) is required to be reported on such gift tax return, (iii) is transferred primarily to or for the benefit of Maker's lineal descendants, and (iv) does not qualify for any other exemption or exclusion from the federal generation-skipping transfer tax; provided, however, that Maker will not be considered to have allocated Maker's GST exemption to any trust if the entire trust principal may, at any time, either be required under the terms of the governing instrument to be paid to a Maker's child or to a person treated as a Maker's child under §2612(c)(2) of the IRC (other than as an invasion of principal in the discretion of the trustee or pursuant to a standard), or be subject to federal estate tax by reason of the death of a Maker's child or the death of a person treated as a Maker's child under §2612(c)(2) of the IRC. **1.52** The "excess GST exemption" means the available GST exemption, less an amount, if any, equal to the GST exemption that can be allocated to The Tax Shelter Trust. (It is Maker's expectation, but Maker does not require, that Maker's available GST exemption will first be allocated to The Tax Shelter Trust.)

## ARTICLE II PROVISIONS RELATING TO POWERS AND

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<sup>114</sup>1.50-1.53 are very important definitions.

## 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, and *subject to the explicit restrictions and limitations on fiduciaries with respect to the distribution and administration of property qualifying for the marital deduction*, 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."

(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, following the death of Maker, 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.<sup>115</sup>

(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). In the case of Maker's Will, such power and discretion will extend to the administration of **Maker's probate estate and any trust under Maker's Will**.

(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

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<sup>115</sup>See Treas. Reg. 301.7701-4 Trusts taxed as associations.

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, and provided further that Maker's personal representative may carry out the terms of any agreement directly or indirectly made by Maker with any fiduciary (or their relatives) individually (including any buy-sell agreement), whether or not fair or prudent, if such agreement would otherwise have been enforceable by such fiduciary (or a relative of such fiduciary) as an individual in the absence of his or its appointment as a fiduciary under this instrument;<sup>116</sup>

(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);

(5) **in the case of Maker's personal representative, to carry out the terms of any valid agreement** that Maker may have entered into during

lifetime;

(6) **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;

(7) **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;

(8) **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;

(8.1) 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;<sup>117</sup>

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<sup>116</sup>See Tex. Prob. Code §352 and Trust Code §§113.053 and 113.059. If you want to be able to self-deal occasionally, this clause will help. It has, however, been somewhat narrowly drawn with regard to disclosure.

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<sup>117</sup>Here is an optional additional provision:

(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

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(8.1) to buy, sell and trade in securities or other property of any nature, including puts, calls, options and short sales, and sales on margin, and for such purposes to maintain and operate margin account with brokers, and to pledge any securities held or purchased by them with such brokers as security for loans and advances made to the trustees, and to otherwise deal with the property of the estate, as fully and completely as if the fiduciary were the absolute owner, and without being restricted by laws limiting the investments of fiduciaries.

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;

(17) to sign or otherwise enter into any agreement or undertaking (with the Internal Revenue Service or anyone else) necessary or helpful in order to obtain an estate tax marital deduction, or to defer payment of estate taxes under Subchapter B of Chapter 62 of the IRC or otherwise.

(18) to enter into joint business arrangements with the beneficiaries and others, including the formation of investment limited partnerships, for any business reason that, in the fiduciary's unfettered discretion, is in the best interest of the beneficiaries of the estate.

### **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.**<sup>118</sup>

**(1) In General.** In the case of The Lotta Moore Money Family Trust, Maker, while living, may make additional contributions and add to any trust created under this instrument at any time and without restriction, and the trustee will accept them. Such additions may be made by an attorney-in-fact acting on Maker's behalf, and the trustee must accept them; provided, however, that no trustee will have any liability to determine the validity or effect of the power of attorney. The trustee will also accept any property payable to the trustee of The Lotta Moore Money Family Trust (or a trust under the instrument establishing The Lotta Moore Money Family Trust) as a result of Maker's death and that is either a part of Maker's probate or nonprobate estate. In addition, 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 (other than a Maker) 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

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<sup>118</sup>This could be useful.

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. This rule applies to all fiduciaries, including an executor with will annexed, a dependent executor, or a court appointed independent executor.

(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 marital deduction and 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

Page II-70

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.<sup>119</sup>

(h) **Instrument Not Contractual.** This instrument is not being executed because of any agreement between Maker and anyone whatsoever. This instrument may be revoked at any time during Maker's lifetime as provided above.

(i) **Effect of Inoperative, Invalid or Illegal Provisions.** If any provision of this instrument or of any amendment to it 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 marital deduction and 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 from Maker's probate estate or during the term of a trust or upon final distribution of a trust 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 the case of a beneficiary other than the Maker's spouse, in a form reserving title, management and custody of such account to a suitable person for the

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<sup>119</sup>We might want to change the situs and the law of the trust to a state where the rule against perpetuities does not apply, for example. Wisconsin and Alaska are worth considering in this and in other regards.

unrestricted use of such beneficiary and solely for expenditure on the beneficiary's behalf,

(F) in any form of **annuity**; provided, however, an annuity distribution to Maker's spouse is not permissible under this Subparagraph, unless it automatically qualifies for the marital deduction under IRC §2056(b)(7)(C),<sup>120</sup>

(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 Subparagraph does not apply in the case of distributions to Maker's spouse.)

(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) Subject to the rules and limitations applicable to distributions qualifying for the marital deduction which will govern in case of conflict with this Paragraph, 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 Maker's probate estate or to any trust created under this instrument, and to pay the amount of such offset to Maker's executor or to the trustee, as the case may be, in discharge of the liability. Further, (subject to the rules and limitations applicable to distributions qualifying for the marital deduction which will govern in case of conflict with this Paragraph) **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.**<sup>121</sup>

(5) It is provided, however, that in the case of a distribution of property that would qualify for the marital deduction, such distribution or offset will only be made in a manner that would not cause the loss of such deduction.

**(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

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<sup>120</sup>An unrestricted power to make a gift annuity could disqualify the marital deduction. Ex. 14 of Prop. Reg. 20.2056(b)-7(e) did not make the final regulations. See IRC §2056(b)(1)(C).

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<sup>121</sup>I recommend this provision.

“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 estate or trust property to a beneficiary or to satisfy any other obligation of a beneficiary to the estate or 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.<sup>122</sup>

(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 other than Maker’s surviving spouse<sup>123</sup> dies within 91 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. (If Maker’s surviving spouse survives Maker for any length of time whatever, Maker’s surviving spouse will be treated as surviving Maker, notwithstanding anything in state law to the contrary.

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<sup>122</sup>What is the law in the absence of this provision?

<sup>123</sup>This provision does not apply to the surviving spouse because I may want to make use of the §2013 previously taxed property credit.

(n) **Gift To Include Future Income.**<sup>124</sup>

(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 Maker's probate estate or any trust under this instrument, but will be used in construing the character of the property distributed from Maker's probate estate or 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.

(5) This Subsection does not apply to a trust under this instrument if and so long as the trust is revocable, except in the case of a permissible distribution made to someone who is not a Grantor with respect to the distribution.

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

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<sup>124</sup>I do not know whether this will make the income from the gift separate as opposed to community property or not, but it can't hurt. This clause could be eliminated to shorten the instrument.

instrument or otherwise, except as otherwise specified.

**(p) Maximum Duration Rule/Rule Against Perpetuities Savings Clause.**<sup>125</sup>

(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.<sup>126</sup>

(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 **date of Maker’s death or sooner incompetency**, 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.<sup>127</sup>

(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 Decedent’s Will or 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.<sup>128</sup> 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

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<sup>125</sup>Rule Against Perpetuities Savings Clause. Note that South Dakota, Wisc. and Idaho have no rule against perpetuities. Consider the effect this rule has on the Delaware Tax Trap. See Tex Jur Estates §54-60 and Tex Prop. Code §§5.043, 112.0054 and 121.004 and Tex. Const. art I §6. This provision could certainly be shortened. Because I expect it to be very important in a generation skipping trust, I have opted to use the extra language.

<sup>126</sup>See also Texas Property Code §5.043. Must the life in being be a person who is or could be a beneficiary of the interest under the terms of this instrument?

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<sup>127</sup>IRC §2041(a)(3) and 2514(d) Delaware tax trap.

<sup>128</sup>It is all well an good to use lots of measuring lives (e.g., the descendants of George V); however, the lives must be ascertainable. “Persons living in Texas at the time of my death,” for example, would not be a qualified class. However, even if the class is ascertainable in theory, the poor fiduciary will have to take a survey sooner or later, so it occurred to me that some help would be in order.

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 Maker's probate estate (which will not be delayed beyond the time reasonably required for the administration of Maker's probate estate), Maker's executor may make partial distributions to one or more beneficiaries or trusts. As a consequence, the executorship and any trust may exist contemporaneously. A distribution may be made subject to any indebtedness or liability of Maker's estate. 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. Any such division may be made effective on the date of Maker's death. (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.

Page II-74

(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 (other than the Maker) 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.<sup>129</sup>

**(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.<sup>130</sup>

Notwithstanding the preceding provisions of this

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<sup>129</sup>The intent is to avoid a §2042 problem. The law in this area has changed at least three times since I have been practicing law.

<sup>130</sup>See Trust Code §113.085. Probate Code §240 is different.

An alternative provision might be—

Wherever a power under this instrument is vested in three or more trustees, such power must be exercised by a majority of such trustees. If such power is vested in only two trustees, they must act unanimously, unless otherwise in this instrument provided. If there shall be more than one trustee, they may authorize any one or more of them to sign papers and instruments on their behalf. Should there be more than one executor, the acts of any one of them shall be valid as if all had acted jointly, including the conveyance of real estate.

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, *other than the Maker*, 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 estate (trust or probate) to be includible in such individual's estate for estate tax purposes (other than estate taxes imposed by IRC §2044), 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.

(4) This Subsection will govern in the event of conflict with any other provision of this instrument, other than the Article disposing of the Marital Deduction Gift.

(w) **S-Corporation Stock.** If, following Maker's death, but during Maker's spouse's life, and notwithstanding any other provision to the contrary, any portion of any trust under this instrument that is not an "electing small business trust" within the meaning of IRC §1361(e), and in which Maker's spouse is a beneficiary, ever consists of S-Corporation stock, within the meaning of §1361(a) of the IRC, in which Maker had an interest during life, such stock will be held as a substantially separate and independent share (or shares) sufficient to be treated as a separate trust (or trusts) under §663(c) of the IRC, and **all of the income** (within the meaning of §643(b)) of such trust will be required to be distributed currently to Maker's spouse. In all other respects, such share will be treated identically with the underlying trust of which it is a part.

(x) **Intent Regarding Revocable Trusts.** In the case of Maker's Will, Maker does not intend such Will to revoke any revocable trust of which Maker is a Grantor. Nor (subject to the provisions in this instrument regarding tax apportionment) is it intended by such Will to dispose of any property in a revocable trust of which Maker is the Grantor, except to the extent that the trust estate is payable to Maker's estate, or to Maker's executor, or to the trustee as provided in this instrument, or to the extent that the trust instrument fails to provide for the disposition of the trust estate.

(y) **Multiple Party Accounts. Reserved.**

(z) **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.

(aa) **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 or executorship 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, unless the prior fiduciary was a Maker.

(bb) **Allowances and Special Claims.** Notwithstanding the Preamble of this instrument, a beneficiary may not accept benefits under this instrument and also assert Special Claims **against**

Maker or Maker's estate. By accepting benefits under this instrument, a beneficiary will be treated as having renounced any Special Claims then existing. A beneficiary who does not renounce any Special Claims after being asked to do so, and after having been made aware of this Subsection, will be treated as having predeceased Maker.

A "Special Claim" is a beneficiary's assertion of equitable charges or claims, statutory allowances, tort claims, or similar claims, **against** Maker or Maker's estate. Claims arising out of the post death administration of Maker's estate and related items are not Special Claims. A claim based upon an instrument in writing, signed by Maker, in which Maker acknowledges or consents to the claim or the right on which such claim is based, is not a Special Claim. A claim that property or the right to property is community or separate is ordinarily not a Special Claim. However, a claim against a trust in which Maker had or has an interest, asserting entitlement to all or a portion of the undistributed trust estate of such trust, on the basis that such estate as is claimed is or was or should have been the community property of Maker and Maker's spouse, will, to that extent, be treated as a Special Claim against Maker, if the claim is at variance with the characterization expressly given the property by the trustee or by Maker.<sup>131</sup>

A claim that Maker's spouse or the community estate is entitled to reimbursement as a result of expenditures or gifts made by Maker (whether or not made in trust), or that such gifts or trust should be set aside or declared void, or because Maker's separate property was somehow enhanced at the expense of the community, or similar claim, is a Special Claim. For this purpose, a "gift" obviously does not include a non-donative transfer or a transfer that was made under undue influence or with lack of capacity.

**(cc) 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 which governs the administration of Maker's probate estate in the case of a pecuniary gift under Maker's Will), 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 other than Maker, 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.

**(dd) Compensation.** Each fiduciary will be entitled to reasonable compensation for services actually performed and to reimbursement for expenses necessarily incurred in the administration of Maker's probate estate or 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.

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<sup>131</sup>I recently had this issue come up. This clause was not in the instrument, because the client preferred the shorter version. The cost of litigation is definitely going to exceed the cost of the paper.

(ee) **Disclaimer.**<sup>132</sup> Texas Probate Code §37A provides that “property subject [to a disclaimer] will pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent unless decedent’s will provides otherwise.” Texas Trust Code §112.010(d) contains a similar provision. Moreover, 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.

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<sup>132</sup>The popular perception—which could not be farther from the truth—is that disclaimers are a routine matter. However, if the disclaimer is out of the residuary estate or out of a trust, or if a formula gift is involved, a disclaimer can raise many issues, only some of which are addressed here.

(2) **Disclaimer on Behalf of Maker.** Maker’s executor is authorized to disclaim all or any portion of any bequest, devise or trust interest (or other disclaimable interest) provided for Maker under any will or trust or otherwise provided. In particular, such executor is authorized to exercise this authority in order to obtain advantageous results considering, in the aggregate, the taxes to be imposed on Maker’s estate and Maker’s spouse’s estate, even though this may cause some beneficiaries of the estate to receive less than they would otherwise have received.

(3) **Specific Property Not A Part of Residuary Estate And Not In Trust Disclaimed By Someone Other Than Maker’s Spouse.** Except where it has been specifically provided to the contrary elsewhere in this instrument, if any property that is not a part of the residuary estate and that is not held in trust is disclaimed by a beneficiary under this instrument, *other than Maker’s spouse*, such property will pass to the then living descendants of the disclaimant, by right of representation, if any, and if none, then such property will become part of the residuary estate. (For purposes of this Subsection, 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.)

(3.1) **Specific Property Not A Part of Residuary Estate And Not In Trust Disclaimed By Spouse.** Except where specifically provided to the contrary elsewhere in this instrument, if any property that is not a part of the residuary estate, and that is not otherwise to be held in trust under this instrument, is disclaimed by Maker’s spouse (e.g., disclaimed property otherwise left to Maker’s spouse as a specific gift not in trust), such property will become part of the Tax Shelter Trust, but will not be subject to a power of appointment in Maker’s spouse (if any such power would otherwise exist).

(4) **Residuary Property Not In Trust.** Except where specifically provided to the contrary elsewhere in this instrument, if any property in the residuary estate that is not otherwise to be held in trust is disclaimed, such property will pass to the then living descendants of the disclaimant, by right of representation, if any, and if none, then such property will pass as if the disclaimant predeceased Maker.

(5) **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 the death of 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.<sup>133</sup> Notwithstanding the above, it is specifically provided that if Maker's spouse disclaims all of his or her interest in all (or any portion) of the Marital Deduction Trust, the trust (or the affected portion) will become a part of (be added to) the Tax Shelter Trust.

**(6) Disclaimer of Specific Assets Out of a Trust or Residuary Estate.**<sup>134</sup> A beneficiary of a trust or of the residuary estate 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**

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<sup>133</sup>Here is the problem: assume that a disclaimant disclaims the right to receive distributions out of trust for "comfort," but retains other interests in the trust. Where does the disclaimed interest go? To the remaindermen?

<sup>134</sup>If there are two beneficiaries of the residuary estate and one beneficiary disclaims "Blackacre," where does Blackacre go if the executor has a pick and choose power and decides to distribute Blackacre to the nondisclaiming beneficiary? What happens if the executor sells Blackacre and adds the proceeds to the residuary? What happens if the executor sells Blackacre to pay debts? What happens if the executor sells Blackacre and uses the proceeds to fund a pecuniary marital deduction gift? What if the executor uses Blackacre to fund a pecuniary marital deduction gift? What if the disclaimant is the beneficiary of the marital deduction gift and disclaims Blackacre, and Blackacre may or may not be used to fund the marital deduction gift? **In the above examples, does it make any difference that the executor is the disclaimant, and thus can control where the disclaimed property is going to go?**

**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.<sup>135</sup> (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.)

**(7) Property of the Decedent Held By The Lotta Moore Money Family Trust Only As A Conduit.** Property that is to be distributed free of trust upon the death of the Decedent (including probate property of the Decedent that is held by or payable to the trustee of The Lotta Moore Money Family Trust but which the trustee is directed to distribute free of trust upon the death of the Decedent) will be treated as property "not held in trust," for purposes of this Subsection.

**(8) 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.

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<sup>135</sup>See Treas. Reg. §25.2518-3(a)(2) and (b) and (c).

§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)).

**(9) 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.

**(10) 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.

**(11) 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).

**(ff) 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.

**(gg) Termination of Trust.** A trust will terminate after the death of Maker if all income and principal is paid out under mandatory or discretionary powers granted in such trust.

Notwithstanding anything else in this instrument to the contrary, however, all of the income and principal may not be paid out of the trust during the lifetime of Maker, unless Maker amends the trust to terminate it.

**(hh) 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.

**(ii) 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<sup>136</sup> 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.

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<sup>136</sup>I firmly believe that most people would prefer that a corporate fiduciary be held to a higher standard than an individual.

(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.

(jj) **Tax Elections.**<sup>137</sup>

(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,

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

(E) the date that should be selected for the valuation of property in a gross estate for federal and estate death tax purposes,

(F) whether any portion of an estate should be valued under any of the applicable provisions of

§2032A of the IRC,

(G) whether any portion of the federal estate tax liability for an estate will be paid under any deferred payment option available to Maker's estate under the IRC,

(H) whether a deduction will be taken as an income tax deduction or as an estate tax deduction,

(I) whether and to what extent to elect to report on Maker's final income tax return unrecognized income from United States Series E and EE savings bonds,

(J) whether to make, terminate or revoke an S-Corporation election under §1362 of the IRC.

(K) whether to make an election to qualify a trust as an "electing small business trust" under IRC §1361(e).

(2) The fiduciaries are specifically given the discretion to make all tax elections, including those enumerated above. In the case of a tax election affecting Maker's probate estate, such election will be made by Maker's executor or as otherwise required by law in order to make the election. 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. It is provided, however, that no such compensating adjustment will have the effect of reducing the Marital Deduction Gift or the income interest in it, and further, compensating adjustments will be made as and if necessary to prevent the loss or diminution of such marital or charitable deduction as is required to reduce estate taxes in Maker's estate.

(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

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<sup>137</sup>The enumeration below could safely be eliminated, thus shortening the instrument. It has been retained simply as a checklist for the fiduciary to consider.

spouse's lifetime. If (as is hereby expressly authorized) Maker's executor joins with Maker's spouse (or the estate of Maker's spouse if Maker's spouse is deceased) on Maker's behalf in filing income tax returns, or consents for gift tax purposes to having gifts made by either of them during Maker's life considered as made one-half (1/2) by each of them, any resulting liability will be borne as prescribed by law.

**(kk) 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.

**(ll) 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.

**(mm) Priorities.**

**(1)** It is realized that due to certain tax elections and decisions in the course of the administration of the estate or 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.

**(nn) 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.<sup>138</sup>

**(oo) Computing Values For GST Purposes.** In computing the value of property for purposes of funding a trust that is created by reference to the available **GST exemption**, values will be determined as of the time of the distribution concerned, as required by IRC §2642(b)(2)(A), unless the requirements prescribed by the Secretary respecting allocation of post death changes in value are met. To the extent consistent with the preceding sentence, if the property involved is divided in order to create a GST exempt share, post death appreciation and depreciation (or interest, if applicable) will be allocated ratably, such that, if appreciation and depreciation (or interest, if applicable) is not otherwise allocated proportionately, in accordance with the inherent nature of the type of gift, then the property distributed will be fairly representative of the appreciation or depreciation in the value of all property available for the distribution. *Cf.* Rev. Proc. 64-19, 1964-1 C.B. 682.<sup>139</sup> At the time this Subsection is being written, all of the final regulations governing the determination of values for GST funding purposes have yet to be set forth. It is difficult, therefore, for the Maker to address the valuation question with the precision that Maker would prefer. Accordingly, the preceding provisions of this Subsection must be interpreted using common sense with regard to Maker's obvious objectives and intent, which will be overriding. In this regard, it is

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<sup>138</sup>This is simply a reminder of a very important relief provision available to the executor.

<sup>139</sup>See TAMRA House Report fn 45 at 389, n. 47. TM 444 A-25. See the last clause of IRC §2642(b)(2)(A), as amended by TAMRA. This doesn't make sense to me, in the case of a pecuniary amount, but this language seems to be required nevertheless.

Maker's intent that (1) any trust clearly intended to be a GST exempt trust be able to have an inclusion ratio of zero, and that all other trusts have an inclusion ratio of one within the meaning of §2642 of the IRC (if the Decedent's executor makes the proper allocation election) and (2) to the extent consistent with clause (1) and the preceding provisions of this Subsection, any trust intended to have a zero inclusion ratio will be funded with property and its proceeds having the greatest value consistent with the formula by which the amount is to be determined.

#### **2.4 Miscellaneous Trust Distribution Provisions.**

(a) **Final Alternate Distribution.** The final alternate distribution of the Decedent's residuary estate, or 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 Decedent's descendants are living at the relevant time, will be made as follows:

1/2 to the heirs-at-law of Moore Money and 1/2 to the heirs-at-law of Lotta 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, orphaned 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, or the date of the Decedent's death in the case of a distribution from the Decedent's residuary estate. 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. This distribution will be to either an Exempt Protected Trust or to a Nonexempt Protected Trust, as set forth elsewhere.

(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.

#### **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 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, provided that the trustee may exercise only those options of settlement as will not cause the loss of any portion of the Marital Deduction Gift needed to reduce the federal estate taxes payable by Maker's estate.

**(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.

**(5) Special Definition of Term "The Trustee."** Any Death Benefits that are to be paid, in accordance with a beneficiary designation or otherwise, to "the trustee named in Maker's last Will" (or designation of similar import), will mean that the Death Benefits will be paid to the Trustee, in trust, of The Lotta Moore Money Family Trust, under the terms and conditions existing under the trust at the date of the Maker's death, whether or not this trust was or is in existence at the time the beneficiary designation was signed, and whether or not the trust that is in existence at such time was subsequently amended or restated. Further, such designation will be effective, according to its terms, whether or not Maker's will was in existence at the time the beneficiary designation was signed, and whether or not the will that was in existence at such time is subsequently replaced by a new last will. As to the Death Benefits, the trustee will serve only in

Page II-84

the capacity as trustee and not as executor or administrator of Maker's estate.

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

**(1) Spouse Is Not Divested of State Property Law Interest.**<sup>140</sup> If a spouse of Maker had, on the date of Maker's death, a community or separate property interest in a life insurance contract, retirement plan benefits (or other arrangement) paying Death Benefits to the trustee or to Maker's estate, then the portion of those Death Benefits that comprises or represents the separate or community property interest of the surviving spouse, if any, will be allocated and distributed in fee simple outright to that spouse, unless that spouse is a Maker under The Lotta Moore Money Family Trust, in which case the allocation and distribution will be added to the Survivor's Share. (For this purpose, any distribution of Death Benefits to a spouse, other than by virtue of this or any other Article of this instrument, will be considered to have been first made out of the spouse's community or separate property interest, thereby reducing the amount passing under this Subsection.) For purposes of this Paragraph, a spouse will be treated as having survived Maker if the order of their deaths cannot be determined, or if the spouse survived Maker by any time at all, notwithstanding the general rule (otherwise applicable) requiring survival for a specific period of time. The allocations below will be made after satisfaction of (or otherwise taking into account) the community property interest of any spouse of Maker.

**(2) Death Benefits Are To Be Added To Trust Estate.** All other 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, or that alternatively are payable to Maker's probate estate, will be allocated and distributed as a part of Decedent's Share of The Lotta Moore Money Family Trust.

**(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

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<sup>140</sup>Although, absent fraud, the insured may have the power as manager of a community property life insurance contract, to divest the surviving spouse of death benefits, the problems raised are best avoided.

beneficiaries of that trust (but only in accordance with its terms). For example, if the trustee of "The Tax Shelter Trust" is named as the beneficiary, then the proceeds will be allocated to that trust, and if the trustee of The Marital Deduction Trust is named as the beneficiary, then the proceeds will be allocated to that trust.

(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.

2.7 **Abatement If Residuary Estate Insufficient to Pay all Debts and Expenses.**

(a) **Order of Abatement.** Except as otherwise specifically provided in this instrument to the contrary, if the residuary estate is insufficient to pay the debts and expenses that are chargeable against it (after taking into account any contribution or reimbursement to which the residuary estate is entitled under the terms of this instrument), or if there is no residuary estate (e.g., if the estate is not large enough to satisfy all non-residuary gifts), and abatement of other property is therefore required, abatement will take place in the following order (the items listed first abating first, and the items listed last abating last), except as otherwise specifically provided to the contrary.

(1) **Probate assets not disposed of under Maker's Will** (if any).

(2) **General bequests.**

(3) **Specific gifts of a general nature** (sometimes referred to as generic specific gifts).<sup>141</sup>

(4) **Other forms of specific gifts**, including specific gifts of an individual nature (sometimes referred to as individual specific gifts).

(5) **Demonstrative gifts** (if any) to the extent of the fund or property with respect to which the gift is primarily charged.

(6) **Nonprobate assets** that are otherwise subject to debts and expenses.

(b) **Property in Same Gift Category.** Property in the same gift category (e.g., residuary gifts, specific gifts of a general nature or general gifts) will abate pro rata within the category, *without distinction whether the property is real or personal.*

(c) **Valuation For Abatement Purposes.** Gifts will be valued for abatement purposes at fair market value at such date or dates as my fiduciary will in good faith determine.

(d) **All Specific Gifts Are Exonerated.** Except as otherwise specifically provided to the contrary (as might be the case with Maker's home, for example), the doctrine of exoneration or unexoneration will not be applied to vary the general order of abatement, and the fact that property that is the subject of a specific gift under this Will is security for a lien will not alter the general rule that all of my legally enforceable debts are to be paid by my residuary estate or, if my residuary estate is insufficient for this purpose, are to be paid under the

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<sup>141</sup>What is a gift of 51% of my stock in C-Corporation, a closely held corporation of which I am the sole owner? Is a fractional share gift, a specific gift, a fractional share of a specific gift? If the 51% goes to my spouse, is the marital deduction enhanced by a control premium. If I leave 33.3% of C-Corporation to each of three charities, is the charitable deduction reduced to reflect a minority discount? See *Estate of Chenoweth v. Commissioner*, 88 T.C. 1577 (1987).

general order of abatement specified above.<sup>142</sup>

(e) **Exempt Assets Not to Be Used to Pay Debts if Estate Insolvent.** Debts and expenses will not be paid out of assets that are otherwise exempt from creditor claims, unless the nonexempt assets are clearly sufficient for this purpose and my estate is otherwise solvent.

(f) **Marital Deduction Property Abates Last.** Notwithstanding the above, to the extent that the marital deduction is necessary to reduce transfer taxes in the Decedent's estate, gifts that do not qualify for the marital deduction will abate before abating any gifts that do qualify, and the order of abatement will be subject to this overriding rule.

## 2.8 **Provisions Respecting Retirement Plans.**

### (a) **Definitions**

(1) **Retirement Plan.** The term "retirement plan" means an annuity, employee pension plan, or a qualified or nonqualified plan of deferred compensation or an IRA (individual retirement plan or individual retirement annuity), or similar arrangement. The term includes a plan or arrangement described in IRC §§401(a), 403, or 408(a), (b) or (k). The term "retirement plan proceeds" means proceeds receivable by any beneficiary (including a fiduciary) under a retirement plan. The term "participant" or "beneficiary" with respect to a qualified plan includes the named owner of an IRA.

(2) **Required Beginning Date.** The term "required beginning date" or "RBD" will have the meaning given by IRC §401(a)(9) and the regulations under it. The RBD generally refers to the April 1 following the calendar year in which Maker attains age 70½, except that if Maker is not a 5-percent owner (as defined in IRC §416) the RBD may be the April 1 following the calendar year in which Maker retires, if later.

(3) **Applicable Date.** The term "applicable date" as used in this Section means the RBD, or the date of Maker's death if sooner.

(4) **Minimum Distribution Rules.** The "minimum distribution rules" are the rules

described in IRC §401(a)(9) and §§408(a)(6) or (b)(3), as the case may be.

(b) **Trustee May Be Named As Death Beneficiary of Retirement Plan.** A fiduciary, as such, may be named as the death beneficiary of a retirement plan. If so, the fiduciary will be treated as having an interest in the retirement plan as fully as any other person or individual. Such interest will be treated as an asset of the trust, and will be subject generally to the same provisions applicable to other trust assets. The death of a beneficiary of the trust will not terminate the interest that the trust has in a retirement plan.

(c) **Method of Distribution Under Retirement Plans.** To the extent any fiduciary has an interest in a retirement plan, the fiduciary will have the power to determine the form and manner of distribution from the retirement plan, provided, however, that the trustee of The Marital Deduction Trust must elect a form, time and manner of payment that assures that the Surviving Spouse will have a qualifying income interest for life in The Marital Deduction Trust or the retirement plan or both, with respect to such interest.

(d) **Rollovers and Transfers.** The trustee will have the unrestricted power to transfer any interest in a retirement plan held by the trust to any other eligible retirement plan or plans, in order to effectuate the requirements of this Section, or as the trustee may otherwise determine to be in the best interest of the beneficiaries, provided that in such case the trustee will continue as the holder of the interest, to the same extent as before.

(e) **Coordination With Minimum Distribution Rules.**<sup>143</sup> If the trustee is named as the beneficiary of retirement plan death benefits ("the death benefits") that are subject to the minimum distribution rules, and if, under the circumstances existing on the "applicable date" (or at the time of such designation if later), the death benefits or the right to receive the death benefits are or may be payable to a trustee (and for this purpose the survival of the beneficiaries of the trust for any post death survivorship period will be irrebutably presumed), then if (a) the participant (employee) dies prior to

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<sup>143</sup>If you are fairly confident that some of the matters addressed in this Section will not be a problem, then by all means, eliminate as many of the offending Subsections and shorten the instrument.

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<sup>142</sup>See *Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).  
Page II-86

his RBD, or (b) (i) the participant dies on or after the RBD and (ii) the beneficiary(ies) of the trust are or are intended to be “designated beneficiary(ies)” under the minimum distribution rules, then (and then only), in either case (a) or (b), the following rules apply:

(1) So long as the trust beneficiary or beneficiaries are living, such retirement plan benefits (1) will be used exclusively for the benefit of the “designated beneficiary(ies)” (within the meaning of that phrase under IRC §401(a)(9) and the regulations under it), and (2) will not be used to pay debts or expenses **or pecuniary bequests**, or to benefit persons other than the designated beneficiary(ies), if other assets are available for those purposes, notwithstanding the rules otherwise applicable to apportionment, abatement and the payment of debts and expenses. Further, the rules otherwise applicable to apportionment and abatement of death taxes are hereby expressly *limited* to provide that in no event will retirement plan benefits be used to pay death taxes that are not directly attributable and proportionate to the estate tax value of the benefits.

(2) If the trust estate of a trust that is the beneficiary of retirement plan benefits is itself to be divided into fractional shares, the interests of the trustee (and the beneficiaries) of that trust in such retirement plan benefits will be likewise divided, proportionately.

(3) Notwithstanding anything else to the contrary, no one other than a beneficiary who is living at the participant’s death will be entitled to receive the participant’s (employee’s) retirement plan benefits from the trust, unless such beneficiary’s entitlement to such benefits is contingent on the death of a prior beneficiary who died after the applicable date. (4) Notwithstanding anything else to the contrary, no one (other than Maker with respect to Maker’s share of the trust) will have any power of appointment over any retirement plan death benefits of which the trust has been named as death beneficiary, except that Maker’s Surviving Spouse will have all such demand rights over income that are otherwise provided herein, in cases where the Spouse has a qualifying income interest for life in the trust or in the retirement plan. (Any power of appointment otherwise applicable will be treated as if it existed but was unexercised.)

It is the sole purpose of these rules to insure that the trust is considered irrevocable and that the

beneficiaries of the trusts be identifiable, so that the life expectancies of the beneficiaries may be used to calculate the minimum distributions required by the IRC, and this paragraph will be interpreted with this intent being paramount to any other direction in it, because that is the intent of the Maker.

(f) **Incorporation By Reference of Terms of Beneficiary Designation.** If the terms of any beneficiary designation signed by Maker would otherwise fail because such terms are not a part of Maker’s Will, Maker incorporates such terms, as a part of Maker’s Will, by reference, as if fully set out in this document.

(g) **Reserved.**

(h) **Provisions Respecting the Marital Deduction.** Notwithstanding the following or anything else in this instrument to the contrary, a trust in which the Surviving Spouse has a qualifying income interest for life may not be funded with property that does not constitute Eligible Marital Deduction Property if there is any other alternative available to the fiduciary. Subject to this rule, Maker recognizes that there may be situations in which a Surviving Spouse has a “**qualifying income interest for life in a retirement plan,**” or in which The Marital Deduction Trust estate has an interest in a retirement plan. For example, the trust may own the right to receive distributions from a retirement plan that constitutes Eligible Marital Deduction Property. In such event, the interest will be held, invested, reinvested and maintained, and income attributable to the interest will be determined, in a manner that guarantees that the Surviving Spouse has a qualifying income interest for life with respect to such interest.<sup>144</sup> The rule that the Surviving Spouse is guaranteed a qualifying income interest for life in such cases is overriding and will govern in case of conflict with the following rules, which Maker nevertheless believes to be consistent with it.

(1) **Determination of Fiduciary Accounting Income.** Subject to the overriding rule that the Surviving Spouse is guaranteed a qualifying income interest for life in any retirement plan in which the trust has an interest, income from an interest in a retirement plan will be determined by reference to state statutory law, if any, or if none, by applying general equitable principles, having due regard for

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<sup>144</sup>But see TAM 9220007.

the interest of the income beneficiary and the remaindermen.

Further, in the case of any retirement plan in which the trust has an interest, fiduciary accounting income, *if greater*, will be determined and distributed in the same manner as if the retirement plan in which the trust has an interest was itself “qualified terminable interest property” within the meaning of IRC 2056.

Income is an accounting notion representing a value, and not representing particular assets. Therefore, whether or not all of the income from a retirement plan (in which The Marital Deduction Trust has an interest) is distributed by the plan in a given year, an amount representing the income will nevertheless be credited to the income account and will be distributable by the trust, in the manner otherwise provided under the terms of the trust. If the other assets available for distribution in The Marital Deduction Trust are insufficient for that purpose, then the trustee will compel a distribution from the retirement plan of such an amount as is necessary to satisfy the obligation to the spouse.

(2) **Additional Demand Rights Granted to Surviving Spouse.** In addition to the above, and notwithstanding anything else herein to the contrary, the Surviving Spouse, at any and all times, will have the unfettered right to demand an immediate distribution from each retirement plan in which the trustee of The Marital Deduction Trust has an interest, of all (or any part of) the income from such plan (determined as if the plan were itself a trust in which the Spouse had a qualifying income interest for life), and the trustee will comply with such request. (Any distribution under this Paragraph will be credited against any rights the spouse would otherwise have had to such income, of course.) This right will survive and continue with respect to any assets, including their proceeds, distributed from the retirement plan to the trustee of The Marital Deduction Trust, so that there will be no question but that the Surviving Spouse at all times has a qualifying income interest for life in such retirement plan (and its proceeds) that will continue under all events and contingencies.<sup>145</sup>

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<sup>145</sup>[N.B. This paragraph should not really be necessary. It is included as a matter of caution, or perhaps overkill. In fact, if this clause is used, the paragraph before it is probably not necessary.]

(3) **Explicit Provisions Regarding Distributions and Acceleration of Installment Distributions.**

For so long as The Marital Deduction Trust has any interest in a retirement plan, the trustee will take whatever steps are required to assure that such interest, to the extent not previously distributed, is (and will at all times remain) immediately distributable on demand to the trust. Accordingly, the trustee will retain the unrestricted power to accelerate any installment distributions elected under the *minimum* distribution rules or otherwise. If the right to accelerate cannot be assured, the trustee will not make an installment distribution election.

If The Marital Deduction Trust has an interest in a retirement plan, no distribution of all or any part of such interest will be made to anyone other than the Surviving Spouse (or to the trustee, as such) during the Surviving Spouse’s lifetime, and no distribution of all or any part of such interest will be made directly out of the retirement plan to anyone else (other than the trustee, as such), following the Surviving Spouse’s lifetime.

(4) **Unproductive Property In Retirement Plan.**

If the assets of a retirement plan in which the Surviving Spouse has (or is treated as having) a qualifying income interest for life, or in which The Marital Deduction Trust has an interest, 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 the trustee of The Marital Deduction Trust and the trustee or custodian of the retirement plan to either make the property productive or convert it within a reasonable time. This right will include the power, to the extent necessary, to cause the retirement plan interest to be distributed directly to the trustee, or rolled over or transferred to another eligible retirement plan, where, in either case, the property can be made productive.

**2.9 Contesting Beneficiaries.** If any person will contest the validity of this instrument, Maker’s Will or The Lotta Moore Money Family Trust, or any of their provisions, or will institute or join in (except as a party defendant) any proceedings to contest the validity of this instrument, Maker’s Will or The Lotta Moore Money Family Trust, or to prevent any of their provisions from being carried out in accordance with their terms, then, unless the proceedings are instituted in good faith and with probable cause, **all benefits provided for that person under this instrument, Maker’s Will and**

**under The Lotta Moore Money Family Trust, are revoked** and will be distributed and administered in the same manner as if the contesting person had predeceased the Maker without surviving descendants.<sup>146</sup> Further, the contesting person will not have or hold any power (including a power of appointment) otherwise granted under this instrument, and will be ineligible to serve in any fiduciary capacity.<sup>147</sup>

This Section does not apply to a proceeding that is not designed to substantially alter the underlying dispositive scheme of this instrument, such as a reformation or similar proceeding brought primarily to save taxes,<sup>148</sup> or a declaratory judgment proceeding brought to clarify an ambiguous provision. Further, this Subsection does not apply to the Surviving Spouse in the case of the Marital Deduction Gift.<sup>149</sup>

**2.10 Survivorship Property Will be Paid To Fiduciary.** If a person who benefits under this instrument is the ostensible beneficiary of Maker's interest in Survivorship Property as a result of Maker's death, any interest that such person otherwise would have under this instrument will be offset by the value of such Survivorship Property, the same as if such Survivorship Property were a part of Maker's probate or residuary trust estate (as the case may be), unless (or except to the extent that) such person delivers such property to the fiduciary to be administered and distributed as a part of the estate. My fiduciary may condition any distribution to a person on the sworn affirmation by the person that all such Survivorship Property has been disclosed. Such person has been named as the beneficiary of Survivorship Property for convenience only, and will be holding the property as a fiduciary in nominee form, so that the beneficiary may act as special trustee for Maker in collecting the property and delivering it to the appropriate fiduciary, to the extent this is necessary; however, the conditions of

this Section will apply even if that was not the case. The term "**Survivorship Property**" is limited to property in which the Maker has an interest, *to the extent* Maker's interest in such property otherwise passes to an individual as a result of Maker's death. For this purpose, the term "Survivorship Property" includes any savings account, checking account, money market, stock, bond, real estate or Certificate of Deposit. The term "Survivorship Property" expressly does not include death benefits under a life insurance policy, annuity, IRA, retirement plan or similar arrangement, and does not include any property to the extent that a person other than the deceased Maker had a state law property interest not dependent on surviving the deceased Maker. (An "individual" does not include Maker's probate estate or a trustee in trust.)<sup>150</sup>

**[END OF PAGE, END OF ARTICLE II, AND  
END OF PART II]**

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<sup>146</sup>If the interest is simply going to pass to the contestants children, the contestant might not be dissuaded from contesting.

<sup>147</sup>Don't overlook this issue. You probably don't want a person who is contesting the instrument to be simultaneously serving in a fiduciary capacity under it.

<sup>148</sup>I certainly do not want my no contest provision to inhibit an action that is being brought for purposes other than to thwart the testator's intent.

<sup>149</sup>This is to avoid a possible terminable interest.

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<sup>150</sup>This can be a thorny problem, no doubt about it. And the proffered cure is not all I would like it to be.

SCHEDULE A

The Lotta Moore Money Family Trust

The following property is transferred to The Lotta Moore Money Family Trust.

The characterization of the following property as community or separate property, or as sole or joint management, reflects the belief of the undersigned as to the characterization *immediately prior to* the transfer. Because the trust is revocable and amendable, it is the intention of the undersigned that the characterization after the transfer will be as designated below, the same as it was believed to be prior to the transfer. However, the transfer will be fully effective according to its terms even if the undersigned are mistaken as to the characterization.

<b>Joint Management Community Property of Moore Money and Lotta Money:</b>	• None.
<b>Sole Management Community Property of Moore Money:</b>	• None.
<b>Sole Management Community Property of Lotta Money:</b>	• None.
<b>Sole and Separate Property of Moore Money:</b>	• Ten Dollar Bill, attached hereto, bearing Serial No. 777999777.
<b>Sole and Separate Property of Lotta Money:</b>	• Ten Dollar Bill, attached hereto, bearing Serial No. 999777999.

If either Moore Money or Lotta Money, or both, had (immediately before the transfer) a community or separate property interest, an equitable claim, or any other interest, in the property described above in this Schedule A (or described in any other instrument of conveyance to the trust signed by both Moore Money and Lotta Money), then each spouse, by signing his or her name to the instrument, ratifies the transfer to the trust, by first making a gift of his or her interest in the property to the spouse to whom the schedule (or other document) reflects it is to belong. Such gift or transfer includes all the income, proceeds and other property that may arise from the property or property interest transferred; except that if property is described above as having been separate immediately prior to the transfer, when it was, in fact, community, the transferring spouse does not intend by this Subsection to make a gift of the income or property which may arise from that property, unless otherwise provided. To the extent necessary to carry out this agreement and conveyance, this schedule (or any other instrument of conveyance to the trust signed by both Makers) operates as a partition and exchange of the property.

The characterization of the property described in Schedule A (or described in any other instrument of conveyance to the trust signed by both Makers) as being joint or sole management property constitutes an agreement between Makers under §5.22 of the Texas Family Code providing for the management, control and disposition of the property in the manner characterized. This management agreement may only be revoked by both Makers jointly and will survive the distribution of the property upon revocation of the trust or otherwise.

Date Signed: \_\_\_\_\_

\_\_\_\_\_  
Moore Money, Maker

Date Signed: \_\_\_\_\_

\_\_\_\_\_  
Lotta Money, Maker

