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## Sample Forms, in Estate Planning Law and Taxation, 4th ed.

Bridget J. Crawford

*Elisabeth Haub School of Law at Pace University*

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# ESTATE PLANNING LAW AND TAXATION

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FOURTH EDITION

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OF RIA



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**DISCLAIMER**

All forms in this appendix are based on New York law. The forms are intended for purposes of illustration and discussion only and are not appropriate for insertion in any document without independent review and revision, or without the independent assessment by the attorney-drafter as to whether the form is appropriate for the client's particular situation, whether the language used is effective to accomplish the desired results, and whether the language satisfies the technical requirements of the law. State laws vary considerably, and both federal and state laws are revised frequently. The sample language may contain errors or may omit essential required language. See the text of this volume regarding issues raised in using such language. Neither the authors of the forms nor their firm warrant any particular tax or state law result as a consequence of using a particular form. The authors of the forms and their firm disclaim any liability resulting from the use of these forms.

**FORM 1**  
**MINOR'S PRESENT INTEREST TRUST<sup>1</sup>****AGREEMENT OF TRUST FOR**  
**[name of minor]**

This Agreement made [date] between [name and address of grantor] (the "Grantor") and [name and address of trustee] (the "Trustee"),

**WITNESSETH:**

WHEREAS, the Grantor desires to create a trust of the property hereinafter specified for the benefit of **his/her<sup>2</sup>** [relationship of minor to Grantor and name of minor], who was born on [birthdate of minor] (the "Beneficiary"),

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Grantor does hereby assign, convey, transfer and deliver to the Trustee the property set forth in the attached Schedule, TO HOLD the same and any other property which the Trustee may at any time acquire hereunder (the "trust estate") IN TRUST, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

**FIRST:** The Trustee shall hold, manage, invest and reinvest the trust estate, shall collect the income thereof, and shall pay over or apply the net income and principal thereof, to such extent, including the whole thereof, and in such manner and at such time or times as the Trustee, in the exercise of sole and absolute discretion, may deem advisable, to or for the benefit of the Beneficiary until the Beneficiary attains the age of twenty-one (21) years. Any net income not so paid over or applied shall be accumulated and added to the principal at least annually and thereafter shall be held, administered and disposed of as a part thereof. Any net income or principal which the Trustee may determine so to pay over or apply to or for the benefit of the Beneficiary may be applied directly by the Trustee or, in the Trustee's sole and absolute discretion, may be paid over to the Beneficiary or to the guardian of the Beneficiary's property, and the receipt of such guardian shall be a full discharge to the Trustee from all liability with respect to the funds so paid over or applied. Any such payment or application may be made without bond, without intervention of any guardian, without court order, without regard to the duty of any person to support the Beneficiary and without regard to any other funds which may be available for the purpose.

<sup>1</sup> This form is designed to create a trust to receive gifts for a person under the age of twenty-one (21) years that will qualify for the annual exclusion for federal gift tax purposes under Section 2503(c) of the Internal Revenue Code.

<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

Upon the Beneficiary's attaining the age of twenty-one (21) years, the principal of the trust estate and any net income then remaining in the hands of the Trustee shall be transferred, conveyed and paid over to the Beneficiary.<sup>3</sup>

Upon the death of the Beneficiary before attaining the age of twenty-one (21) years, the principal of the trust estate and any net income then remaining in the hands of the Trustee shall be transferred, conveyed and paid over to such person or persons or corporation or corporations, including the Beneficiary's estate, the creditors of the Beneficiary or the creditors of the Beneficiary's estate, to such extent, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as the Beneficiary may by Last Will and Testament appoint. If the power of appointment is for any reason not effectively exercised by the Beneficiary in whole or in part, then upon the Beneficiary's death such portion or all of the principal of the trust estate and any such net income, or such interests or estates therein as shall not have been effectively appointed, shall be transferred, conveyed and paid over to the Beneficiary's descendants who are then living, *per stirpes*, or, if no such descendant is then living, to the Grantor's descendants<sup>4</sup> who are then living, *per stirpes*, or, if no such descendant is then living, to the executors or administrators of the Beneficiary.

**SECOND:** Any portion of the principal of the trust estate to which any individual (other than the Beneficiary) under the age of twenty-one (21) years shall become entitled upon termination thereof shall be held IN TRUST for the benefit of such individual by the Trustee for the following uses and purposes: To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent (including the whole thereof) for such individual's general use and at such time or times as the Trustee, in the exercise of sole and absolute discretion, shall determine, until such individual reaches the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before reaching the age of twenty-one (21) years, the Trustee shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.

If the Trustee in the exercise of sole and absolute discretion determines at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, the Trustee shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent or to a custodian for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed.

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<sup>3</sup> As an alternative, the trust agreement can provide that the trust will continue after the age of twenty-one (21) years for a stated period of time if the Beneficiary is given notice of a right to terminate the trust and withdraw the funds and he or she does not choose to exercise that right.

<sup>4</sup> If the Grantor has created a trust for each child or grandchild, the attorney-drafter may want to provide that any payments to a person for whom a trust with terms that are "substantially identical to the terms hereof" is then in existence, should instead be added to that trust.

The receipt of such individual, if an adult, or the parent or the custodian to whom any principal or income is transferred and paid over pursuant to any of the above provisions shall be a full discharge to the Trustee from all liability with respect thereto.

**THIRD:** The Grantor or any other person may, at any time and from time to time, by Last Will and Testament or otherwise, devise, bequeath, transfer and deliver to the Trustee cash or other property acceptable to the Trustee which shall thereupon become a part of the trust estate and shall be held and disposed of by the Trustee, in all respects subject to the provisions of this Agreement. The trust investments, whether originally or subsequently transferred to the Trustee, may be commingled and treated as part of a single trust.

**FOURTH:** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, but subject to Article TENTH hereof, the Trustee hereunder shall have the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised as the Trustee may deem advisable, in the Trustee's sole and absolute discretion:

1. To purchase or otherwise acquire, and to retain, whether originally a part of any trust held hereunder or subsequently acquired, any and all stocks, bonds, notes or other securities, or any variety of real or personal property (other than the lending of money or other extension of credit to the Grantor and other than insurance on the life of the Grantor), including securities of any corporate Trustee or any successor or affiliated corporation, securities of or other interests in investment companies, investment trusts and common trust funds, whether or not such investments be of the character permissible for investments by fiduciaries; and to make or retain any such investment without regard to degree of diversification. The Trustee may at any time render liquid the trust estate, in whole or in part, and hold cash or readily marketable securities of little or no yield for such reasonable period as may be deemed advisable in the exercise of sole and absolute discretion of the Trustee. Investments need not be diversified and may be made or retained with a view to a possible increase in value.

2. To sell, lease, pledge, mortgage, transfer, exchange, convert or otherwise dispose of, or grant options with respect to, any and all property at any time forming a part of any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions; and to enter into leases which extend beyond the period fixed by statute for leases made by fiduciaries and beyond the duration of any trust.

3. To borrow money from any lender, including the Trustee, for any purpose connected with the protection, preservation or improvement of any trust estate, and as security to mortgage or pledge upon any terms and conditions any real or personal property forming a part of any trust estate.

4. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any

payments and take any steps proper to obtain the benefits of any such transaction.

5. To the extent permitted by law, to register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; and to hold any security in bearer form.

6. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which may at any time form part of any trust estate or which may be liens or charges against any property or the trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of any trust against others or of others against any trust upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages; and to make any payments in connection therewith.

7. To make distribution in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and without regard to the income tax basis of the property, and any property distributed in satisfaction of a distributive share shall be valued as of its date of distribution.

8. To place all or any part of the securities which at any time are held by any trust estate in the care and custody of any bank or trust company with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by this bank or trust company; to have all stocks and registered securities placed in the name of such bank or trust company or in the name of its nominee; to appoint such bank or trust company agent and attorney to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian" account; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal.

9. To appoint, employ and remove, at any time and from time to time, any accountants, attorneys, investment counselors, expert advisers, agents, clerks and employees, and to fix and pay their compensation from income or principal or partially from income and partially from principal []; and to delegate to any such agent any investment decision or authority, including (but without limitation) the purchase and/or sale of assets].<sup>5</sup>

10. Whenever permitted by law, to employ a broker-dealer as custodian for all or any part of the securities at any time held by any trust estate and to register such securities in the name of such broker-dealer.

11. To execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to

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<sup>5</sup> NOTE: The attorney-drafter must ascertain whether the client wishes to include delegation authority for investments contained in subparagraph 9 of Article FOURTH and whether any other specific authority to delegate should be included.

inquire into its validity or to see to the application of any money or other property paid or delivered pursuant to the terms of any such instrument.

The powers granted to the Trustee hereunder in and by this Article or in and by any other Article hereof may be exercised in whole or in part and from time to time, and without court authorization, and shall be deemed to be supplemental and not exclusive, it being the Grantor's intention that the Trustee hereunder shall have all of the general powers of fiduciaries as well as all of the special powers herein expressly granted, and all powers incidental to, reasonably to be implied from or necessary to the proper exercise of, the special powers herein enumerated.

**FIFTH:** The Trustee shall be entitled to all interest accrued and unpaid on any securities at the time of their receipt and the same shall be income. No dividend, the record date of which is prior to the delivery to the Trustee of the shares on which such dividend is declared, shall become property of any trust hereunder.

**SIXTH:** Each Trustee named herein or at any time acting hereunder is authorized to appoint, by acknowledged written instrument filed with the records of this trust, an individual (other than a person who has contributed property to the trust), bank or trust company, to succeed or act in place of himself, herself or itself upon his, her or its ceasing to act as a Trustee. Any such appointment may be revoked by such Trustee prior to its becoming effective, by acknowledged written instrument filed with the records of this trust, and succeeded by a later appointment, the last such appointment to control.

Any Trustee may resign from office at any time and for any reason by delivery of a written instrument of resignation, specifying the effective date thereof, to the Grantor or, if the Grantor is not then living, to the successor Trustee appointed as hereinbefore provided.

Whenever the term "Trustee" is used hereunder, it shall be deemed to refer to the Trustee acting hereunder from time to time.

Except as provided by law, no Trustee shall be required to give any bond. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

**SEVENTH:** The Trustee acknowledges receipt from the Grantor of the aforementioned property and accepts the trusts hereby created upon the terms set forth herein.

**EIGHTH:** This Agreement shall be construed in accordance with the laws of the State of [applicable state], and all questions involving the validity and administration of any trust hereby created shall be determined in accordance with said laws.

**NINTH:** This Agreement and the trusts hereby created are irrevocable, and the Grantor shall execute such further instruments as shall be necessary to vest the Trustee with full title to the property hereby transferred.

**TENTH:**

A. Without limiting the above discretionary authority in any way, the Trustee is asked to give careful consideration to the advisability of paying or

applying any income or principal to any individual for whom a trust is held hereunder in discharge of any person's duty to support such individual.<sup>6</sup>

B. Notwithstanding anything in this Agreement contained to the contrary, neither the Grantor nor any other "nonadverse party" as that term is used in Section 672(b) of the Internal Revenue Code of 1986, as amended, and any successor thereto, shall have the power (1) to purchase, exchange or otherwise deal with or dispose of any principal or income of the trusts hereby created for less than adequate consideration in money or money's worth, or (2) to borrow any principal or income of the trusts hereby created, directly or indirectly, without adequate interest or adequate security; and no person in a nonfiduciary capacity shall have the power (1) to vote or direct the voting of stock or other securities of a corporation in which the holdings of the Grantor and the trusts hereby created are significant from the viewpoint of voting control; (2) to control the investment of the trust assets either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, to the extent that the trust assets consist of stocks or securities of a corporation in which the holdings of the Grantor and the trusts hereby created are significant from the viewpoint of voting control; or (3) to reacquire the trust assets or any portion thereof by substituting other property of an equivalent value.<sup>7</sup>

#### ELEVENTH:

A. As used in this Agreement, the terms "descendant" and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.

B. A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one (1) share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>8</sup>

<sup>6</sup> The attorney-drafter must ascertain whether there is any possibility that the Grantor could have such a support duty. If so, consideration should be given to prohibiting such a payment or application to remove an argument that trust property could be used to satisfy a legal obligation of the Grantor. Moreover, if a parent of the Beneficiary (or any other person having an obligation to support the Beneficiary) will act as Trustee, such a payment should be prohibited. It is preferable, for tax purposes, for a person other than a parent of the Beneficiary to act as Trustee.

<sup>7</sup> This paragraph is intended to prevent the trust from being treated as a grantor trust for federal income tax purposes, all the income, deductions, and credits of which are taxed to the Grantor. If the attorney-drafter does not wish the trust to be a grantor trust, this paragraph should be deleted.

<sup>8</sup> NOTE: The attorney-drafter must ascertain whether this definition of *per stirpes* is what the client wishes. An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition

**TWELFTH:** The Trustee named herein shall be entitled to such compensation as shall be agreed upon in writing between such Trustee and the Grantor, if the Grantor is then living. Any other Trustee shall be compensated as provided in his or her instrument of appointment but not in excess of reasonable compensation under applicable law.

**THIRTEENTH:** This Agreement shall extend to and be binding upon the executors, administrators and assigns of the Grantor and upon the successors to the Trustee.

*[If a New York trust, use the following additional Article.]*

**FOURTEENTH:**

**A.** In accordance with the provisions of Section 315 of New York's Surrogate's Court Procedure Act, in any proceeding involving any trust estate created hereunder, it shall not be necessary to serve process upon or to make a party to any such proceeding any person under disability where another party to the proceeding has the same interest as the person under disability.

**B.** No trust created under this Agreement shall be subject to the provisions of Section 11-2.1(k) of New York's Estates, Powers and Trusts Law ("EPTL"), nor shall the Trustee of any such trust be obliged to make any allocation to income in respect of any property held as a part of any trust created hereunder which at any time is underproductive within the meaning of EPTL § 11-2.1(k). *[End of additional Article for New York trusts.]*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

\_\_\_\_\_  
Grantor

\_\_\_\_\_  
Trustee

*[notary clauses and schedule omitted]*

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becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation



**FORM 2**  
**GENERAL DURABLE POWER OF ATTORNEY**

KNOW ALL BY THESE PRESENTS, that I, *[name of donor of power]*, of *[address of donor of power]*, do hereby make, constitute and appoint *[name of attorney-in-fact]* my true and lawful attorney to act for me and in my name, place and stead:

1. To enter into and take possession of any and all real and personal property and also any and all papers relating to any matter in which I have or may have any interest whatsoever; to have access to any and all property and papers held for my account in the custody of any person, firm or corporation, to withdraw the same from such custody, and to make such further or other arrangements for their custody as my attorney may deem advisable; to have access to any vault or safe deposit box and to make deposits therein and to remove any and all of the contents thereof;

2. To sell, lease, assign, exchange, release or otherwise dispose of any real property, or any part thereof or any interest therein, and any and all goods, wares, merchandise, stocks, bonds, notes, mortgages and other securities, choses in action, and other personal property or interest therein, now or hereafter owned by me; and to buy, rent as tenant, or otherwise acquire, any real property or interest therein and any goods, wares, merchandise, stocks, bonds, notes, mortgages and other securities, choses in action, and other personal property or interest therein. The powers in this paragraph contained may be exercised by my said attorney either personally or by any agent or broker, and the transactions herein authorized may be made for such consideration, whether nominal or otherwise, at such time or times, for such purposes, upon such terms and conditions, and upon such covenants and warranties given or accepted on my behalf as my said attorney may deem advisable;

3. To sign checks on, and withdraw funds from, any bank account, either standing in my name alone or in my name in conjunction with the name of any other person or persons, in any banking institution in any state or country; to endorse for deposit checks, notes and other instruments for the payment of money;

4. To vote upon any stock now or hereafter owned by me or standing in my name at any and all regular or special meetings of the stockholders of any corporation of which I am or may become a stockholder and at all adjournments thereof, as fully as I could do if personally present; to sign and execute on my behalf any and all proxies, consents, certificates, waivers or any other instruments whatsoever covering or affecting any such stock or my rights and interests as a stockholder in any such corporation; to transfer any such stock on the books of any such corporation, and for that purpose to make and execute all necessary forms of assignment and transfer, and to substitute one or more persons with like power; to transfer and assign any such stock for the purpose of carrying out any plan of reorganization, merger, consolidation or readjustment of capitalization affecting any such corporation, and to receive and receipt for any cash or securities that I may be entitled to receive on any such reorganization, merger, consolidation or readjustment;

5. To receive or sign orders in respect of any and all dividends, interest or other income which is or shall be payable on all stocks, bonds, notes or other securities, obligations or certificates owned by me or standing in my name; to exercise any and all rights, options or privileges for the conversion or exchange of stocks, bonds, notes or other securities, obligations or certificates, or for subscription thereto, or for the purchase thereof, or any other rights, options or privileges pertaining thereto, and for that purpose to make and execute all necessary orders and authorizations;

6. To ask, demand, sue for, collect and receive any and all manner of debts and demands whatsoever now or hereafter due me and to make and give due acquittance for the same; to appear before any court, governmental department, official, agency, board or other authority of any state or country in connection with any matter or thing whatsoever; to institute, prosecute, defend or compromise any claim, action or proceeding before any such court, department, official, agency, board or other authority and in connection therewith to execute, verify, file, deliver, and serve any and all papers and also to accept or waive service of the same, to execute such bonds or undertakings, to give such consents or releases and to enter into such stipulations, waivers or agreements as my said attorney may deem advisable;

7. To make, execute, verify, deliver and file any and all original or amended returns, statements, certificates or other papers that may be required to be made by me or to be made in respect of my property or income under any of the provisions of any federal tax law, or any amendments thereto, or under any of the regulations of the Treasury Department issued thereunder, or any State law now or hereafter in force, and any and all claims for the abatement, credit or refund of any tax or taxes which may be assessed against me or paid by me with respect thereto, which my said attorney may deem to be for my benefit, and to appear on my behalf before the Treasury Department of the United States and any taxing authority of any State with respect to any such tax or taxes and any claim or claims relating thereto;

8. To complete, extend or renew any loans, contracts or other obligations of mine and to mortgage or pledge any real or personal property to secure any such loan, contract or obligation;

9. To extend and renew loans I have made to any person, firm or corporation, upon such terms and conditions, and for such periods, and either with or without security, as my said attorney may determine;

10. To execute, acknowledge, deliver and file any and all instruments in writing of any kind under seal or otherwise and containing such provisions as my attorney may deem necessary, advisable, convenient or proper in order to carry out any of the powers granted by this instrument;

11. To do each and every act and thing whatsoever which my said attorney may deem necessary, advisable, convenient or proper to be done as incidental to the proper exercise of the powers hereinabove granted; and generally to do each and every act and thing in relation to my property, estate or interests which in the

judgment of my said attorney would be for my benefit; and giving and granting unto my said attorney full power, discretion and authority to do each and every act and thing whatsoever necessary, advisable, convenient or proper to be done in and about the premises as fully as I might or could do if personally present, whether the same are in this instrument particularly specified or not, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof;

12. To make gifts or other transfers without consideration either outright or in trust whether revocable or irrevocable (including the forgiveness of indebtedness) to such person or persons or organization or organizations as my Attorney-in-Fact selects; provided, however, that no Attorney-in-Fact may make gifts to himself or herself, his or her estate, his or her creditors or to the creditors of his or her estate or to any person whom my Attorney-in-Fact has any obligation to support or in discharge of any other obligation of any Attorney-in-Fact;

13. To prepare, execute and file any gift tax return required by any such gift and pay any gift tax that may arise by reason of any such gift;

14. To create and amend any trust (whether revocable or irrevocable) for any purpose whatsoever and to transfer any property to such trust; and

15. This power of attorney shall not be affected by any disability or incompetence of mine after the date of this instrument.

IN WITNESS WHEREOF, I, [name of donor of power], have hereunto set my hand and seal on [date].

(L.S.)

Signed, sealed and delivered in the presence of:

Witness

[notary clause omitted]

**FORM 3**  
**PREMARITAL AGREEMENT<sup>1</sup>**

AGREEMENT made this [date], by and between [name of prospective husband] (hereinafter sometimes called the "Prospective Husband"), of [address of prospective husband], and [name of prospective wife] (hereinafter sometimes called the "Prospective Wife"), of [address of prospective wife].

**WITNESSETH:**

WHEREAS, the parties to this Agreement are about to contract a marriage with each other and, in anticipation of this marriage (which they are entering solely because of the love and affection they bear for each other), they desire by this Premarital Agreement to fix and determine the rights accruing to each of them by reason of their marriage with respect to the property and estate of the other and with respect to the right of support or maintenance from the other and certain other matters as specified herein; and

WHEREAS, the Prospective Husband and the Prospective Wife are in good health and over the age of twenty one (21) years; and

WHEREAS, the Prospective Husband and the Prospective Wife each represents to the other that he or she is capable of self-support in the manner of life to which he or she is now accustomed;

NOW, THEREFORE, in consideration of these premises, and in further consideration of the marriage between the parties, it is mutually agreed as follows:

**FIRST:****A. The Prospective Husband hereby states:**

1. That he has been fully informed regarding the income, property and estate of the Prospective Wife to the extent set forth in the statement of her assets and liabilities and her [year] U.S. Individual Income Tax Return annexed hereto and made a part hereof as Exhibit A.

2. That he has consulted with his attorney who has fully advised him as to the rights which would be conferred upon him by law both during the Prospective Wife's lifetime and following her death by virtue of their marriage and of the effect upon those rights of the waivers and releases contained in this Agreement.

**B. The Prospective Wife hereby states:**

1. That she has been fully informed regarding the property and estate of the Prospective Husband to the extent set forth in the statement of his assets and liabilities and his [year] U.S. Individual Income Tax Return annexed hereto and made a part hereto as Exhibit B.

<sup>1</sup> This Agreement is based on, and refers to, New York law. It provides for a full waiver of spousal rights by each spouse

2. That she has consulted with her attorney, who has fully advised her as to the rights which would be conferred upon her by law both during the Prospective Husband's lifetime and following his death by virtue of their marriage and of the effect upon those rights of the waivers and releases contained in this Agreement.

C. 1. Each of the parties acknowledges that he and she fully understands the terms, covenants and conditions of this Agreement, that all matters embodied herein have been explained to each of the parties by counsel of his or her own selection, that each of them has given due consideration to such matters, and that each has considered all facts and circumstances likely to influence his or her judgment. Each party further acknowledges that the provisions of this Agreement are fair, just, adequate and reasonable as to each of them in view of their respective resources, needs and earning capacity within the meaning of paragraph 3 of Section 236, Part B, of the Domestic Relations Law of the State of New York (a copy of Section 236, Part B, is annexed hereto as Exhibit C) and that the provisions of this Agreement have been arrived at after each party has had the opportunity for a full and detailed disclosure. Each party represents that he or she is entering into this Agreement freely, voluntarily and with full knowledge of its consequences, and not as a result of duress or coercion. Further, the parties represent that each of them believes that this Agreement is valid and binding; that in connection with the negotiation, preparation and execution of this Agreement, each of them has had the benefit of advice of independent counsel of his or her own choosing with whom each has discussed his or her respective rights and obligations, both under the law and under the terms of this Premarital Agreement.

2. The parties agree that each of them shall be solely responsible to pay his or her own counsel fees and disbursements to his or her counsel incurred in connection with the negotiation and execution of this Agreement and in connection with any action which either party may bring in the future to dissolve the marriage, and neither shall make or claim against the other for the payment of legal fees in whole or in part.

**SECOND:** Notwithstanding the marriage between the parties hereto:

A. Each of the parties shall retain all rights in his or her own separate property, as hereinafter defined, whether now owned or hereafter acquired, and each of them shall have the absolute and unrestricted right to manage, control and dispose of such property during his or her lifetime and upon his or her death, free from any claim which may be made by the other by reason of their marriage, and with the same effect as if no marriage had occurred between them, and such separate property shall not be subject to any division between the parties (i) as marital property subject to equitable distribution under Section 236, Part B, of the Domestic Relations Law of the State of New York (a copy of which is annexed hereto as Exhibit C) or under any future law according similar rights, or under the laws of any other

jurisdiction within which they may reside during the course of their marriage, (ii) as community property or quasi community property subject to division between the parties under the laws of any jurisdiction embracing a community property regime, or (iii) under any other concept or rule of law which, but for the provisions of this Agreement, would award a right or property interest to either party by reason of the marriage of the parties. In addition to all property defined as "separate property" under the laws of any jurisdiction to which the property rights of the parties may be subject, each of the parties agrees that the following shall be treated as the separate property of each, even if such property would otherwise constitute community, quasi-community, marital or any other type of property in which the other spouse would have an interest:

1. All property defined as "separate property" under the present provisions of Section 236, Part B, of the Domestic Relations Law of the State of New York (a copy of which is annexed hereto as Exhibit C) or under any future law of said State defining separate property or of any other jurisdiction to which the property rights of the parties may be subject.

2. All property (whether real or personal or a combination thereof and wherever situated) owned at the time of their marriage or acquired before the marriage by either party, including, but without limitation, with respect to the Prospective Wife, the assets and property described in Exhibit A and, with respect to the Prospective Husband, the assets and property described in Exhibit B.

3. All property (whether real or personal or a combination thereof and wherever situated) acquired before the marriage, or property acquired after the marriage at any time, by bequest, devise, descent, or gift other than from one of the parties.

4. All property which may from time to time stand in the sole name of the other. Any interest held by either party in property owned jointly with third parties shall be separate property, and the interest of each in any property which they may together own jointly shall be separate property, with the interest of each to be determined in the same manner as if the parties were individuals who were unmarried to each other owning property jointly. The property described in this subparagraph 4 shall include all property obtained in any manner or derived from any source, including property received by inheritance or as a distribution from any trust.

5. All beneficial interests owned by either party, whether present or future, in any trust now in existence or hereafter created, including, but not limited to, any interest **Prospective Wife/Husband**<sup>2</sup> may have in

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<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document

[*name of trusts of which Prospective Wife/Husband is a beneficiary*], and in any estate in which either may come to have an interest.

6. All property representing or derived from any compensation paid to or earned by the other from any employment, trade, business, profession or other activity engaged in for compensation, including retirement benefits, death benefits and any other benefit under employee benefit plans maintained by the other's employer or which may be maintained by the other in a self-employed capacity.

7. All property representing or derived from the enhanced earning capacity of the other attributable to any educational degree, license or skill of the other.

8. All property derived from separate property, including, all income (such as dividends, interest, rents, issues and profits) from such separate property and the investment and reinvestment of such income; the proceeds of sale of such separate property and the investment and reinvestment of such proceeds; property acquired in exchange for such separate property; and any increase or appreciation in the value of said separate property, whether or not said increase or appreciation in value is due in part or all to the contribution, direct or indirect, of time, skills or efforts of one or the other party or by inflation, or by any other cause or stimulus.

B. Each of the parties hereby WAIVES and RELEASES any and all rights in the separate property of the other or in the estate of the other, and any and all rights which may be assertable against the other, which he or she shall acquire by reason of marriage to the other, or which he or she shall have as a spouse or as a surviving spouse of the other, whether arising under the laws of the State of New York or under the laws of any other jurisdiction, and whether now owned or hereafter acquired, including, without limiting the generality of the foregoing, the following:

1. Any right to have the separate property owned or acquired by either or both of the parties prior to or during their marriage treated as marital property or community property or quasi-community property, or to seek an equitable distribution or other division of such property, it being the intent of each of the parties to provide for the distribution of their separate property by agreement between themselves as is presently permitted pursuant to subdivision 3 of Part B of Section 236 of the Domestic Relations Law of the State of New York, so that the property owned by them from time to time shall be the separate property of each in accordance with the provisions of paragraph A of this Article SECOND and shall not be subject to distribution or other division under any concept or rule of law which, but for the provisions of this Agreement, would award a right or property interest to other parties by reason of the marriage of the parties.

2. Any right or claim to alimony, separate maintenance or support (whether temporary or permanent) during the parties' marriage or follow-

ing the termination of the marriage between the parties whether such termination occurs by reason of dissolution of the marriage or by reason of the death of one of the parties, to the extent permitted by law.

3. Any other right or claim to share in the separate property of the other during his or her lifetime, however such right might arise or of whatever nature.

4. Any right or claim to share in the separate property or estate of the other upon his or her death, whether such right is in the nature of an inheritance, a right to intestate distribution, a right to elect against the will of the other, a right of courtesy, dower, spouse's exemption or allowance, a homestead right, a right to a minimum share, or any other right of a nature similar to the forgoing.

5. Any right to act or be appointed as the personal representative, executor, administrator or other fiduciary of the estate of the other or as conservator, committee or guardian of the person or property of the other.

C. 1. Notwithstanding the provisions of this Agreement that allow the parties to maintain their separate income and assets, the parties recognize that it is possible, through accident or intent, for their respective separate income or assets to become, or appear to be, commingled. It is the parties' intention that such commingling or pooling of assets not be interpreted to imply abandonment of the terms and provisions of this Agreement and that the provisions contained herein addressing the parties' interests in separate property be applied so that each party be determined to be the owner of that proportion of the total fund or value of the assets in question which reflects the proportionate amount deposited or invested by him or her respectively.

2. The fact that the parties may file joint State or federal income tax returns or make gifts of property or cash to each other or not account to each other with regard to the expenditure of the income shall not be interpreted to imply any abandonment of the terms and provisions of this Agreement.

D. Upon the occurrence of a Termination Event, as hereinafter defined, each party agrees to remove himself or herself from any residence occupied by the parties if title to the residence rests solely in the name of the other party within sixty (60) days of the occurrence of the Termination Event. Each party hereby waives and releases any right he or she may have to continue to occupy any such residence following the date he or she is required to vacate the residence in accordance with the preceding sentence. For purposes of this Agreement, a "Termination Event" shall be deemed to occur upon the commencement by either party of an action or proceeding for divorce, annulment, separation or other dissolution of the marriage between the parties and service of notice thereof upon the other, or the delivery of a



written notice to the other substantially in the form annexed hereto as Exhibit D.

**THIRD:** The parties hereto covenant and agree that all marital property of the parties shall be divided between them equally, in the event that either of them shall obtain a final judgment or decree of separation, divorce or annulment or declaration of nullity. The term "marital property" shall be deemed to mean all property acquired by either of them after the date of their marriage, but shall not include property defined as the separate property of each under paragraph A of Article SECOND and any other provision of this Agreement.

**FOURTH:** The parties hereto covenant and agree that, in the event that either of them shall seek a final judgment or decree of separation, dissolution, divorce or annulment or declaration of nullity, neither will seek any provision for support and maintenance, or any provision for the settlement of the property rights of the parties, which is contrary to the provisions of this Agreement.

**FIFTH:** Debts contracted by either party, before the marriage, are the sole obligation and liability of the party who contracted such debt and shall be paid and discharged by such party from such party's separate property. Debts contracted by either party, after the marriage, which are secured by such party's separate property, shall be the sole obligation and liability of the party who shall have contracted such debt and shall be paid and discharged by such party from his or her separate property. Debts contracted by either party, after the marriage, which are secured by the parties' marital property, shall be the joint and equal obligation and liability of the parties and shall be paid and discharged by the parties from the parties' marital property. Each party indemnifies and agrees to hold the other party harmless in connection with any such claim by a third party for the debt of the other party including reasonable attorneys' fees.

**SIXTH:** Nothing herein contained shall be deemed to constitute a waiver by either party of any devise or bequest or other provision made to or for him or her by any Will, Codicil or trust of the other or any appointment as executor of the Will of the other.

**SEVENTH:** There are no representations, warranties, conditions, promises or undertakings other than those set forth herein, and all and singular the terms, conditions and covenants of this Agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators and assigns of the parties hereto.

**EIGHTH:** In the event that any term, provision, paragraph or Article of this Agreement is or is declared illegal, void or unenforceable, the same shall not affect or impair the other terms, provisions, paragraphs and Articles of this Agreement. The doctrine of severability shall be applied. The parties do not intend by this statement to imply the illegality, voidness or unenforceability of any term, provision, paragraph or Article of this Agreement.

**NINTH:** The parties are presently domiciled in the State of New York and, although they anticipate that they will continue to be domiciled in that State, they recognize that they may, at a future time, be domiciled elsewhere. Wherever their domicile may be from time to time, it is their intention, and their direction, that this Agreement shall be construed in all respects in accordance with the laws of the State of New York.

**TENTH:** The waivers and releases contained herein shall in no way be affected by the voluntary contribution of either party to the support of the other, or by any other financial provision either party may voluntarily make for the other, and no such voluntary contribution or financial provision voluntarily made shall be deemed to evidence the intention of either party to forego the benefits of this Agreement or assume an obligation which, but for the provisions of this Agreement, would arise by reason of the marriage of the parties.

No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and signed by the parties hereto and acknowledged in the manner required to entitle a deed to be recorded.

**ELEVENTH:** Each of the parties hereto shall at any time and from time to time hereafter execute and deliver any and all further instruments and assurances and perform any acts that the other party may reasonably request for the purpose of giving full force and effect to the provisions of this Agreement. The parties acknowledge that consents with respect to beneficiary designations, or waivers or releases of spousal rights with respect to pension and retirement plans, may be ineffective if made in agreements entered into prior to marriage. Accordingly, each of the parties agrees immediately after their marriage to execute an agreement, a copy of which is attached hereto as Exhibit E, to ratify and confirm this Agreement in all respects, and each agrees to consent to any beneficiary designation which is consistent with this Agreement and which the other chooses to make with respect to any pension or retirement plan, where such beneficiary designation can only be made with the consent of one's spouse.

**TWELFTH:** Should either party fail to perform any of his or her obligations arising under this Agreement, any instrument executed pursuant hereto, or any judgment entered between the parties, and it thereby becomes necessary for the other party to employ counsel and/or accountants to enforce the same, such other party shall be entitled to apply to any court of competent jurisdiction for attorneys' fees and costs, accounting fees, and other reasonable expenses incurred in connection with the enforcement of such obligations and the party failing to perform his or her obligations agrees to pay such reasonable fees, costs and expenses as may be fixed by the court.

**THIRTEENTH:** Any notice or other communication hereunder (a "notice") shall be in writing and shall be deemed to be properly given or made if personally delivered or mailed, by registered or certified mail, return receipt requested, addressed to either party at their principal marital residence. Any party may by notice to the other party designate (i) a new address to which all notices shall thereafter be sent or (ii) an additional addressee. All notices shall be deemed effective when receipted by the addressee (in the case of personal delivery) or mailed.

**FOURTEENTH:** This Agreement represents the entire agreement of the parties and supercedes all prior agreements and understandings whether oral or written. There are no representations, warranties, conditions, promises or undertakings other than those set forth herein, and all the terms, conditions and covenants of this Agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators and assigns of the parties hereto.

**FIFTEENTH:** This Agreement shall become effective upon the marriage of the parties.

**SIXTEENTH:** Each of the parties has carefully read this Agreement prior to the signing hereof

**SEVENTEENTH:** The Prospective Husband was represented in the preparation and execution of this Agreement by *[name of Prospective Husband's attorney]*. The Prospective Wife was represented in the preparation and execution of this Agreement by *[name of Prospective Wife's attorney]*.

IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year first above written.

*[notary clauses and Exhibits A, B, C and D omitted]*

**EXHIBIT E  
RATIFICATION AGREEMENT**

AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between *[name of husband]*, of \_\_\_\_\_, New York, and *[name of wife]*, of \_\_\_\_\_, New York.

**WITNESSETH:**

WHEREAS, the parties to this Agreement entered into a premarital agreement dated *[date of Premarital Agreement]* (the "Premarital Agreement"); and

WHEREAS, under Article FOURTH of the Premarital Agreement the parties agree immediately after their marriage to enter into an agreement to ratify and confirm the Premarital Agreement in all respects; and

WHEREAS, the parties were married on *[date of marriage]*;

NOW, THEREFORE, the parties each hereby ratify and confirm the terms of the Premarital Agreement in all respects.

\_\_\_\_\_  
*[name of husband]*

\_\_\_\_\_  
*[name of wife]*

*[notary clauses omitted]*

**FORM 4**  
**SEPARATION AGREEMENT<sup>1</sup>**

AGREEMENT made as of [date], by and between [name and address of husband] (hereinafter referred to as the "Husband"), and [name and address of wife] (hereinafter referred to as the "Wife").

**RECITALS**

- A. The parties were married on [date] in [city, state].
- B. There are the following children born of the marriage, namely, [names and birthdates of all children of the marriage] (hereinafter referred to as the "Children").
- C. The parties desire that this Agreement, which is entered into after due and considered deliberation, shall constitute an agreement of separation between them and shall determine the rights of the parties with respect to all property, whether real or personal, wherever situated, now owned by the parties or either of them, or standing in their respective names or which may hereafter be acquired by either of the parties, and shall determine all other rights and obligations of the parties arising out of their marital relationship.

**ARTICLE I****Separation of the Husband and Wife**

1. The parties have agreed to live separate and apart from each other, and they shall hereafter live separate and apart from the other, free from interference or any marital authority or control of the other, as fully as if each were sole and unmarried, and each may conduct, carry on and engage in any employment, profession, business or trade which he or she may desire to pursue, free from interference or any marital authority or control of the other party.
2. Neither party hereto shall in any manner annoy, molest or otherwise interfere with the other party hereto, nor shall either party hereto at any time institute any action, proceeding or suit to compel the other party to cohabit or dwell with him or her, or for the restoration of conjugal rights.

<sup>1</sup> This form contemplates that there was no premarital agreement. If there is a premarital agreement, or based on the intention of the parties, Articles II, IV and X may require substantial revision.

**ARTICLE II**  
**Custody and Visitation of the Children**

1. The parties shall have joint custody of the Children. It is contemplated, however, that the primary residence of the Children shall be with the **Wife/Husband**.<sup>2</sup> The **Husband/Wife** shall have visitation periods which shall be, at a minimum, as follows: *[designate visitation periods for noncustodial spouse]*

2. The parties intend that the Children shall travel to the **Husband's/Wife's** place of residence for **his/her** visitation periods set forth in paragraph 1 of this Article. Notwithstanding this, the parties understand that the Children may not meet the "age appropriate standards" set by the airline industry for air travel. In that event the parties agree to arrange for one of the parties to accompany the Children during their air travel. The costs of air travel incurred by the Children and the party who accompanies the Children shall be shared equally between the parties, provided, however, that if either party is not gainfully employed at the time the costs are incurred, he or she shall not share in such air travel costs. Such air travel costs shall be incurred at economy rates only.

3. Each party agrees to keep the other reasonably informed of the whereabouts of the Children, and agrees that if either of them has knowledge of any serious illness or accident or other circumstances affecting any of the Children's health or general welfare, prompt notice thereof will be given to the other of such circumstances.

4. Each party shall exert every reasonable effort to maintain free access and unhampered contact between the Children and the other party and to foster a feeling of affection between the Children and the other party. Neither party shall do anything that may estrange the Children from the other party or injure the Children's opinion as to the other party or that may hamper the free and natural development of the Children's love and respect for the other party.

5. The parties agree to consult with each other with respect to the Children's education, religious training, summer camp selection, illness and operations (except in emergencies), health, welfare and other matters of similar importance affecting the Children, whose well-being, education and development shall at all times be the paramount consideration of the parties.

6. Each party shall be entitled to complete detailed information from any school and other educational institution, any pediatrician, general physician, dentist, consultant or specialist attending any of the Children and to be furnished with copies of any reports available from them.

7. Each party agrees that in the event of serious illness of any of the Children at any time, the other party shall have the right of reasonable visitation with the ill child at the place of confinement.

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<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

8. The parties agree that the Children will reside with the Husband after the death of the Wife, and the Children will reside with the Wife after the death of the Husband.

9. The parties shall exert every reasonable effort to maintain free access between the Children and both sets of grandparents, and will allow reasonable periods of time for the Children to visit and be visited by the grandparents, provided, however, that if any Child is under the age of thirteen (13) years, he or she shall not visit the grandparents overnight unless he or she is accompanied by one of the parties.

10. The rights of visitation are wholly optional and the non-exercise in whole or in part, shall not constitute a waiver of visitation rights nor shall it deprive the noncustodial parent of the right to insist thereafter on strict compliance with visitation rights.

### ARTICLE III Spousal Support

1. The Husband shall have no obligation for the support or maintenance of the Wife. The Wife hereby acknowledges that she is capable of supporting herself at a standard of living acceptable to her and waives her right, if any, to receive any support or maintenance from the Husband now and forever more.

2. The Wife shall have no obligation for the support or maintenance of the Husband. The Husband hereby acknowledges that he is capable of supporting himself at a standard of living acceptable to him and waives his right, if any, to receive any support or maintenance from the Wife now and forever more.

### ARTICLE IV Child Support

1. The **Husband/Wife** shall pay to the **Wife/Husband**, in equal monthly installments, for the support of the Children the "Basic Child Support Obligation," as hereinafter defined, payable on the fifteenth (15th) day of each month commencing with the fifteenth (15th) day of the sixth (6th) month following the date of execution of this Agreement and terminating upon the earliest of (i) the emancipation, as hereinafter defined, of each of the Children, (ii) the death of the Husband, or (iii) the death of the Wife.

2. A. Commencing with the date of execution of this Agreement and terminating upon the earlier of the death of the **Husband/Wife** or the emancipation of each Child, the **Husband/Wife** agrees to furnish medical insurance for the benefit of each Child, at **his/her** own expense if not provided to **him/her** by **his/her** employer. The **Wife/Husband** shall advise the other party of the availability and cost of any medical insurance that may be furnished to **him/her** for the Children by an employer in order that the **Husband/Wife** need not duplicate coverage. For uninsured medical or dental expenses, the **Husband/Wife** shall pay **his/her** Pro Rata Share of such expenses, provided such expenses are reasonable. The

**Husband's/Wife's "Pro Rata Share"** of uninsured medical or dental expenses under this paragraph is defined in paragraph 6 of this Article.

**B.** The **Wife/Husband** agrees that **she/he** will promptly fill out, execute and deliver to the **Husband/Wife** all forms and provide all information, including copies of bills, in connection with any application **he/she** may make for reimbursement of medical or dental expenses under any insurance policy. Similarly, the **Husband/Wife** agrees that **he/she** will promptly fill out, execute and deliver to the **Wife/Husband** all forms and provide all information, including copies of bills, in connection with any application **she/he** may make for reimbursement of medical or dental expenses under any insurance policy. If either party shall have advanced moneys for said expenses that are covered by insurance and for which a recovery is made for insurance claims filed for said expenses, the payment by the insurance carrier shall belong to the party so advancing said moneys and any checks or drafts or proceeds thereof from the insurance carrier shall be promptly turned over to the party so advancing said moneys.

**C.** The **Husband/Wife** will furnish to the **Wife/Husband** promptly upon **her/his** request documentation and other proof of **his/her** compliance with the provisions of this paragraph 2, and the **Wife/Husband**, in addition, is hereby authorized to obtain direct confirmation of compliance or noncompliance from any insurance carrier or employer.

**3. A.** For purposes of paragraph 1 of this Article, the "Basic Child Support Obligation" shall be, and be determined by the parties, as follows:

- (i) The parties shall first determine their combined income.
- (ii) The parties shall then multiply their combined income up to a maximum of \$..... by the Appropriate Child Support Percentages.
- (iii) The parties shall pro rate between them the amount determined under subparagraph (ii) of this paragraph A in the same proportions as each party's income bears to their combined income.
- (iv) The **Husband's/Wife's** pro rata share determined under subparagraph (iii) of this paragraph A shall be the Basic Support Obligation.

**B.** The parties' "combined income" shall be the sum of their respective incomes. "Income" shall mean the sum of the amounts determined by the addition of the items listed in subparagraphs (i) through (v) of this paragraph B, reduced by the amount determined by the addition of the items listed in subparagraph (vi) of this paragraph B:

- (i) Gross income as should have been reported in the most recent federal income tax return, plus any tax-exempt income. For purposes of this subparagraph (i), each of the parties shall be presumed to be required to file a federal income tax return.
- (ii) To the extent not already included in gross income in subparagraph (i) of this paragraph B, investment income reduced by necessary sums expended in connection with such investment;

provided, however, that sums representing depreciation of real estate shall not be considered necessary for purposes of this paragraph.

- (iii) To the extent not already included in gross income in subparagraph (i) and (ii) of this paragraph B, the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:
  - (a) workers' compensation,
  - (b) disability benefits,
  - (c) unemployment insurance benefits,
  - (d) social security benefits,
  - (e) veterans benefits,
  - (f) pensions and retirement benefits,
  - (g) fellowships and stipends, and
  - (h) annuity payments.
- (iv) An amount imputed as income based upon the party's former resources or income, if a court would determine that the party has reduced resources or income in order to reduce or avoid his or her obligation for child support.
- (v) To the extent not already included in gross income in subparagraphs (i) and (ii) of this paragraph B, the following self-employment deductions attributable to self-employment carried on by the party:
  - (a) any depreciation deduction (other than any depreciation deduction in connection with real estate) greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits; and
  - (b) entertainment and travel expenses deducted from business income to the extent said expenses reduce personal expenditures.
- (vi) The following shall be deducted from income:
  - (a) unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures;
  - (b) alimony or maintenance actually paid to a spouse not a party to this Agreement pursuant to court order or validly executed written agreement;
  - (c) child support actually paid pursuant to court order or written agreement on behalf of any child for whom either party has a legal duty of support and who is not subject to this Agreement;
  - (d) public assistance;
  - (e) supplemental security income;
  - (f) local income or earnings taxes actually paid; and
  - (g) federal insurance contributions act (FICA) taxes actually paid.



C. For purposes of paragraph 3(A) of this Article, the "Appropriate Child Support Percentages" shall be as follows:

- (i) For combined income up to ..... Dollars (\$.....), ..... percent (.....%) during any period in which all Children are unemancipated and ..... percent (.....%) during any period in which only one Child is unemancipated; and
- (ii) For combined income over ..... Dollars (\$.....), up to \$..... percent (.....%) during any period in which all Children are unemancipated and ..... percent (.....%) during any period in which only one Child is unemancipated.

4. A. The Basic Child Support Obligation shall be determined as of the fifteenth (15th) day of the sixth (6th) month after the date of execution of this Agreement (the date upon which the **Husband's/Wife's** Basic Child Support Obligation commences) and shall be redetermined as of the fifteen (15th) day of May in each year the obligation exists (based upon the combined income for the period covered by the most recent federal tax return, as set forth in paragraph 3 of this Article).

B. Notwithstanding the provisions of paragraph 4(A) of this Article, the Basic Child Support Obligation shall also be redetermined as of the happening of the following events:

- (i) For three consecutive months the amount of the current income of either party, on an annualized basis, shall diverge twenty-five percent (25%) or greater from the amount of the annual income of that party which was used to determine the current Basic Child Support Obligation. Any redetermination of the Basic Child Support Obligation which results under this subparagraph (i) shall be made by annualizing the current income figures for such three-month period; or
  - (ii) The emancipation of any Child.
- C. (i) No later than thirty (30) days before the date as of which the Basic Child Support Obligation is to be determined (other than any such date set pursuant to paragraph 4(B)(i) of this Article), each party shall submit to the other a copy of his or her most recent federal income tax return, and any supporting data that may be reasonably required, and any other data necessary to establish combined income under paragraph 3(B) of this Article. Notwithstanding the foregoing, in the event either party remarries and files joint returns with a spouse or in the event that either party was not required to file a federal tax return for the most recent tax year, such party may elect to submit in lieu of the most recent federal tax return, a certified statement of the amount of his or her income determined in accordance with paragraph 3(B) of this Article

- (ii) If the date as of which the Basic Child Support Obligation is to be determined is set pursuant to paragraph 4(B)(i) of this Article, the party asserting the divergence of current income described in that paragraph shall submit to the other party evidence substantiating such divergence of current income.
- (iii) Upon the request of either party, the other party shall make available for examination by the requesting party, all data as shall be reasonably necessary to enable the requesting party to determine the accuracy of the other party's claimed income.
- (iv) Each party shall furnish notice to the other of any audits which may be conducted in connection with any tax returns which may hereafter be submitted by him or her, and shall also furnish copies of any letter or other instrument received from any taxing authority setting forth the result of such audit. In addition, each party shall inform the other of any material change in the income previously reported to the other by any federal tax return or any certified statement.

5. For purposes of paragraph 2(A) of this Article, the **Husband's/Wife's** "Pro Rata Share of Expenses" shall be the proportion that the **Husband's/Wife's** income bears to the parties' combined income, as determined pursuant to paragraph 3(A) of this Article.

6. A child shall be deemed "emancipated" for all purposes of this Agreement upon the first to occur of the following events: (i) the Child's attaining the age of twenty-one (21) years; (ii) the Child's marriage; (iii) the Child's death; (iv) the Child's full-time gainful employment excluding vocational and seasonal employment, provided, however, that if the Child shall cease to have full-time gainful employment, then upon that event the Child shall no longer be regarded as emancipated until the occurrence of another emancipation event, as defined in (i) through (iii) above and (v) through (vii) below; (v) the Child's primary residence away from the **Wife's/Husband's** home other than for attendance at school; (vi) the Child's entry into the Armed Forces of the United States or into the Peace Corps or other similar service, provided, however, that upon discharge from the Armed Forces, Peace Corps or other similar service, the Child shall not be regarded as emancipated until the occurrence of another emancipation event, as defined in (i) through (v) above; or (vii) any event other than an event defined in (i) through (vi) above that would constitute emancipation under the laws of New York.

7. The parties have been advised of the provisions of a statewide Child Support Standards Act with Guidelines for establishing appropriate amounts for child support which is now effective in the State of New York (presently enacted as Section 240(1-b) of the Domestic Relations Law and Section 413(1)(b) of the Family Court Act of New York State) and that such guidelines may provide for different amounts of child support and a different pattern of allocation than that provided in this Agreement. Each of the parties hereby voluntarily acknowledges that he or she is capable of providing and willing to provide the amount of support he or she has agreed to provide in this Agreement and agrees that he or she (a) does not intend or desire that the Child Support Guidelines and Formula of Domestic Relations Law Section 240(1-b) and Family Court Act Section 413(1)(b) or any other statute apply to the parties; (b) will not

seek modification of this Agreement or the child support arrangement provided herein on the grounds that application of the Child Support Formula of Domestic Relations Law Section 240(1-b) and Family Court Act Section 413(1)(b) or any other statute would result in a judgment or order of child support greater to or less than the arrangement provided herein; and (c) hereby elects that any and all Child Support Formulae and Guidelines that have been or hereafter may be enacted in this State including, but not limited to, Domestic Relations Law Section 240(1-b) and Family Court Act Section 413(1)(b) or in any other State or jurisdiction to which the parties may be subject shall not apply to the parties.

The computations contained in this Article are not material provisions of its execution as between the parties, and neither party is relying upon them or the amounts set forth below in entering into this Agreement.

The calculation of the "Basic Child Support" obligation in accordance with the aforementioned statutes, which would presumptively result in the correct amount of child support to be awarded, is as follows:

[supply appropriate figures]

The parties have provided in this Agreement for an amount of child support other than that which may be calculated based upon the Child Support Standards Act, in consideration of other provisions of this Agreement and because the parties believe that the level of support for the Children which they have agreed to provide is sufficient to satisfy all of the Children's needs.

8. The Husband shall be entitled to claim on his federal income tax return any exemption deduction allowed for *[names of Children, if any, that Husband can claim as dependent(s) for income tax purposes]* as a dependent(s) pursuant to the provisions of Section 151 of the Code, and he shall also be entitled to claim any similar exemption or deduction allowed by the New York State Income Tax Law, or under any other income tax law. The Wife agrees to sign, at the request of the Husband, a written declaration of the type contemplated by Section 152(e)(2) of the Code to the effect that she will not claim *[names of Children, if any, that Husband can claim as dependent(s) for income tax purposes]* as a dependent(s) for any taxable year in which the Husband is entitled to an exemption deduction for *[names of Children, if any, that Husband can claim as dependent(s) for income tax purposes]* under the terms of this paragraph.

9. The Wife shall be entitled to claim on her federal income tax return any exemption deduction allowed for *[names of Children, if any, that Wife can claim as dependent(s) for income tax purposes]* as a dependent(s) pursuant to the provisions of Section 151 of the Code, and she shall also be entitled to claim any similar exemption or deduction allowed by the New York State Income Tax Law, or under any other income tax law. The Husband agrees to sign, at the request of the Wife, a written declaration of the type contemplated by Section 152(e)(2) of the Code to the effect that he will not claim *[names of Children, if any, that Wife can claim as dependent(s) for income tax purposes]* as a dependent(s) for any taxable year in which the Wife is entitled to an exemption deduction for *[names of Children, if any, that Wife can claim as dependent(s) for income tax purposes]* under the terms of this paragraph.

**ARTICLE V****Settlement of the Property Rights of the Husband and Wife<sup>3</sup>**

1. The parties agree that except for the dispositions provided in this Article V, each party shall retain full ownership and control of all property presently standing in his or her name, whether individually, jointly or otherwise, or which may be held for his or her benefit by third parties, or to which he or she shall have any right of whatsoever nature, and whether such property interests or rights are present or contingent, vested or unvested, and each agrees that all such property is the separate property of the other and shall belong to the other alone.

2. The Husband owns in his sole name the following assets: *[designate assets owned by Husband, title to which will be retained by him]*

3. The Wife owns in her sole name the following assets: *[designate assets owned by Wife, title to which will be retained by her]*

4. Upon the date of execution of this Agreement, the **Husband/Wife** shall pay to the **Wife/Husband** the sum of *[amount, if any, Husband or Wife will pay to the other upon signing this Agreement]*.

5. The parties agree to divide equitably between themselves, all of the furniture, furnishings, rugs, pictures, books, silver, plate, china, glassware, objects of art, and other tangible personal property acquired by them during the course of their marriage.

**ARTICLE VI****Liability for Debts of Husband and Wife**

Each of the parties hereto represents and warrants that from and after the date of this Agreement, he or she will not contract any debts, charges or liabilities for which the other party, or his or her property or estate, shall be or become answerable or liable, and, except as otherwise provided by this Agreement, each of the parties hereto covenants and agrees that he or she will indemnify and save the other party harmless from any and all claims made by third parties because of any debts or liabilities heretofore or hereafter incurred by him or her.

**ARTICLE VII****Tax Treatment of Payments Made by One Party to the Other**

No payment made in cash or in kind by the **Husband/Wife** or the **Wife/Husband** which may be construed as being to or for the benefit of the other, whether made hereunder or otherwise, shall be includable under Section 71 of the Code in the gross

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<sup>3</sup> The attorney-drafter should address any property which may require special consideration. Such property may include interests in limited partnerships, life insurance policies and retirement plans.

income of the **Wife/Husband** or the **Husband/Wife**, nor deductible under Section 215 of the Code by the **Wife/Husband** or the **Husband/Wife**.

#### **ARTICLE VIII**

##### **Income Taxes**

1. Each party represents that to the best of his or her knowledge all Federal, State and local income taxes on all joint returns previously filed by the parties have been paid, that no interest or penalty is due, and that no tax deficiency proceeding is pending or threatened with respect to them.

2. In the event of any audit or proposed deficiency arising out of any joint tax return previously filed, each party will cooperate with the other to contest or compromise the proposed deficiency. Such cooperation shall include, but shall not be limited to, the following:

A. The making available of such books, records, and other data as may be in a party's possession or under his or her control and necessary with respect to the conduct of any tax audit or examination or necessary to the resolution of any dispute arising thereunder;

B. Joining in and executing any protest, petition or document in connection with any proceedings for the purpose of contesting, abating or reducing any tax, penalty or interest assessed or due, or any part thereof.

3. Any additional tax assessment, penalty and/or interest relating to joint income tax returns filed by the parties in the past shall be borne by the party whose income, deductions or credits are the cause of such assessment, penalty and/or interest, and the party so bearing said assessment, penalty and/or interest agrees to indemnify and hold harmless the other with respect thereto.

4. Any tax overpayment for which a refund is received by the parties with respect to a joint return filed by them shall be shared jointly by the parties.

#### **ARTICLE IX**

##### **Financial Disclosure and Fairness of Provisions Contained Herein**

1. Each of the parties represents that the assets attributed to him or her on Exhibits E and F annexed hereto is a full and complete statement of his or her assets as of the dates shown on said Exhibit, and that the values ascribed to such assets are accurate. Each acknowledges that the other is entering into this agreement in reliance upon the representation made by the other with respect to his or her assets, and each states that there has been no material change in composition of his or her assets nor in their value since the dates so shown.

2. Each party represents and acknowledges that the financial and other provisions of this Agreement are adequate, fair and reasonable, within the meaning of Paragraph 3 of Section 236, Part B, of the Domestic Relations Law of the State of New

York, in view of their respective resources, needs and earning capacity, and in view of the factors set forth in Paragraphs 5(d) and 6(a) of Section 236, Part B, of the Domestic Relations Law of the State of New York.

3. Each party hereto declares that he or she is entering into this Agreement freely and of his or her own volition, with a complete understanding of all the terms and provisions contained herein.

#### **ARTICLE X**

##### **Waivers and Releases**

1. Except for the obligations assumed hereunder, and subject to the provisions of Article XII hereof, each of the parties hereby WAIVES and RELEASES any and all rights in the real or personal property of the other, or in the estate of the other, or which may be assertable against the other, which he or she has acquired or shall acquire by reason of marriage to the other, or which he or she has or shall have as a spouse, surviving spouse or former spouse of the other, whether arising under the laws of the State of New York or under the laws of any other jurisdiction, and whether now owned or hereafter acquired, including, without limiting the generality of the foregoing, the following:

A. Any right to have property acquired by either or both of the parties during their marriage treated as marital property or community property or quasi-community property, or to seek an equitable distribution or other division of such property, or to seek a distributive award or any other similar interest, it being the intent of each of the parties to provide for the distribution of their property by this Agreement as is presently permitted pursuant to Paragraph 3 of Section 236, Part B, of the Domestic Relations Law of the State of New York.

B. Any other right to share in the property or estate of the other during his or her lifetime, however such right might arise or of whatever nature.

C. Any right to share in the property or estate of the other upon his or her death, whether such right is in the nature of an inheritance, a right to intestate distribution, a right to elect against the will of the other, a right of curtesy, dower, spouse's exemption or allowance, a homestead right, a usufruct in the property of the other, or any other right of a nature similar to the foregoing.

D. Any right to act as the administrator of the estate of the other, or as conservator, committee or guardian of the person or property of the other, except to the extent voluntarily appointed pursuant to an instrument executed after the date hereof.

E. Any right to receive support or maintenance from the other during their marriage or following termination of their marriage, whether such termination occurs by reason of the dissolution of the marriage or by reason of the death of one of the parties; subject, however, to Section 5-311 of the General Obligations Law of the State of New York, it being agreed between the parties that neither support nor maintenance is desired or necessary.

2. Each of the parties does hereby mutually release and discharge the other from any and all other actions, suits, rights, claims, demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or hereafter may have against the other upon or by reason of any matter, cause or thing up to the date hereof, it being the intention of the parties that henceforth there shall exist, as between them, only such rights and obligations as are specifically provided for in this Agreement.

3. Each party agrees that he or she will execute any further waivers, releases, assignments, deeds or other instruments which may be necessary to effectuate or accomplish the purpose of the waivers and releases contained in this Article and in any other Article of this Agreement. In this connection, each of the parties, upon the request of the other, expressly agrees to consent to any disposition, beneficiary designation, and selection of the form of distribution of any pension or other qualified plan benefits accrued by or for the other.

4. Nothing herein contained in this Article shall be deemed to constitute a waiver by either party of any devise or bequest made to him or her by any Will or Codicil of the other executed after the date of this Agreement.

#### **ARTICLE XI**

##### **Costs to Be Borne by Defaulting Party**

If either party is in default in the performance of any of the provisions of this Agreement, and if said default is not remedied within fifteen (15) days after the sending of a written notice by registered mail to the defaulting party specifying such default, and if the other party shall institute and prevail in arbitration or legal proceedings to enforce the performance of such provisions by the defaulting party, then the defaulting party shall pay to the other party the necessary and reasonable arbitration costs, court costs and reasonable attorneys' fees incurred by the other party in connection with such arbitration or legal proceedings.

#### **ARTICLE XII**

##### **Each Party Shall Be Free to Institute Suit for Divorce**

Each of the parties shall be free at any time hereafter to institute suit for absolute divorce against the other. The execution of this Agreement shall not be deemed to constitute a waiver or forgiveness of any conduct on the part of either party which may constitute grounds for divorce.

#### **ARTICLE XIII**

##### **Effect of Reconciliation or Resumption of Marital Relations; Effect of Matrimonial Decrees**

1. This Agreement shall not be invalidated or otherwise affected by a temporary reconciliation between the parties hereto or a resumption of marital relations between them.

2. The parties hereto covenant and agree that in the event that either of them shall obtain a final judgment or decree of separation or divorce, under the laws of any jurisdiction, it shall contain no provision for the support and maintenance of the Wife or of the Husband and no provision for the settlement of the property rights of the parties hereto except as herein provided.

The parties hereto agree to submit this Agreement to the court granting such separation or divorce for ratification, confirmation, approval and adoption, it being their desire that the Agreement shall be ratified, confirmed, approved and fully adopted by the court and incorporated in any such judgment or decree. Notwithstanding such incorporation, the terms and provisions of this Agreement shall not be merged in any such judgment or decree but shall in all respects survive the same. Each of the parties agrees that he or she will seek no modification of the Agreement through application to the court granting any judgment or decree of separation or divorce, or by application to any other court.

#### **ARTICLE XIV**

##### **General Provisions**

1. This Agreement and all the obligations and covenants hereunder shall bind the parties hereto, their heirs, executors, administrators, legal representatives and assigns and shall inure to the benefit of their respective heirs, executors, administrators, legal representatives and assigns.

2. No modification, rescission or amendment to this Agreement shall be effective unless in writing signed by the parties hereto and acknowledged in the manner required to entitle a deed to be recorded.

3. This Agreement and its provisions supercede any prior agreements, if any, of the parties and is the complete and entire agreement of the parties.

4. This Agreement shall be governed by the Laws of the State of New York.

5. Each of the parties hereto, without cost to the other, shall at any time and from time to time hereafter execute and deliver any and all further instruments and assurances and perform any acts that the other party may reasonably request for the purpose of giving full force and effect to the provisions of this Agreement.

6. Each of the parties has carefully read this Agreement prior to the signing thereof.

7. In the event that any term, provision, paragraph, or article of this Agreement is or is declared illegal, void or unenforceable, the same shall not affect or impair the other terms, provisions, paragraphs or articles of this Agreement. The doctrine of severability shall be applied. The parties do not intend by this statement to imply the illegality, voidness or unenforceability of any term, provision, paragraph or article of this Agreement.

8. Failure of either party to insist on the performance of any provisions herein by the other party shall not be deemed to be a waiver of such provisions thereafter or of any other provisions herein, or a waiver of any subsequent breaches thereof. No



modification or waiver of any of the terms of this Agreement shall be valid unless in writing and signed by the parties hereto.

9. Each of the parties has obtained independent legal advice from counsel of his or her own selection. The Husband was represented in the preparation and execution of this Agreement by *[name and address of Husband's attorney]*. The Wife was represented in the preparation and execution of this Agreement by *[name and address of Wife's attorney]*.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

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*[notary clauses omitted]*

**FORM 5**  
**SIMPLE WILL FOR MARRIED PERSON—NO CHILDREN UNDER AGE 21—RESIDUE OUTRIGHT TO SURVIVING SPOUSE OR DESCENDANTS**

I, [name of testator], of [domicile of testator], do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

**FIRST:**

A. I give and bequeath all furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles and their accessories, and all other tangible personal property (excluding cash and bullion) owned by me at the time of my death and primarily used in a trade or business at the time of my death to my **husband/wife**,<sup>1</sup> [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my children who survive me, to be divided **between/among** them by my **Executor/Executors**, in the exercise of sole and absolute discretion, in as nearly equal portions as may be practicable, having due regard for the personal preferences of my children.<sup>2</sup>

B. The bequest of any sculpture, painting or other item of artwork under this Article shall include all applicable copyrights and other rights of reproduction therein. I direct that the decision of my **Executor/Executors** as to the identification and distribution of any property under this Article shall be final and binding on all persons having an interest in my estate. I direct my **Executor/Executors** to pay as an expense of administration of my estate the cost of shipping any item bequeathed in this Article to the legatee thereof.

**SECOND:** I give and devise all real property owned by me at the time of my death and used by me or by my family as a place of residence (whether permanent, temporary or seasonal) or held in connection with such use, including all buildings thereon and all rights and easements appurtenant thereto and all policies of insurance relating thereto, to my **husband/wife**, [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my children who survive me, in equal shares *per capita*, as tenants-in-common.<sup>3</sup>

**THIRD:** I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situated, which I own or am entitled to dispose of at the time of my death to my **husband/wife**, [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my descendants who survive me, *per stirpes*, or, if no descendant of

<sup>1</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

<sup>2</sup> Consider changing this disposition to descendants, *per stirpes*, if appropriate.

<sup>3</sup> Consider changing this to an authorization or direction to Executors to sell and/or add property or proceeds to the residuary estate, if appropriate.

mine survives me, to [name of beneficiary or beneficiaries to receive property if neither spouse nor any descendant survives].

**FOURTH:** If any individual under the age of twenty-one (21) years becomes entitled to any property from my estate upon my death or any property from any trust created hereunder upon the termination thereof, such property shall be held by, and I give, devise and bequeath the same to, my **Executor/Executors** hereinafter named, IN TRUST, for the following uses and purposes: To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent (including the whole thereof) for such individual's general use and at such time or times as my **Executor/Executors**, in the exercise of sole and absolute discretion, shall determine, until such individual reaches the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before reaching the age of twenty-one (21) years, my **Executor/Executors** shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.

If my **Executor/Executors**, in the exercise of sole and absolute discretion, shall determine at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, my **Executor/Executors** shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed, or to the person with whom such individual resides.

The receipt of such individual, if an adult, or the parent, guardian or custodian, or any other person to whom any principal or income is transferred and paid over pursuant to any of the above provisions, shall be a full discharge to **Executor/Executors** from all liability with respect thereto.

**FIFTH:** If my husband/wife, [name of spouse], dies simultaneously with me or in such circumstances as to render it impossible to determine who predeceased the other, I direct that I shall be deemed to have predeceased/survived my husband/wife and that the provisions of this Will shall be construed upon that assumption.<sup>4</sup>

**SIXTH:**

**A.** All estate, inheritance, legacy, succession, transfer or other death taxes, including any generation-skipping transfer tax imposed on any direct skip transfer (including any interest and penalties thereon), imposed by any domestic or foreign taxing authority with respect to all property taxable by reason of my death and which passes under this Will shall be paid out of my residuary estate as an expense of administration with no apportionment within my residuary estate and with no right of reimbursement from any recipient of any such property.

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<sup>4</sup> Note that the dispositive provisions need to be consistent with both husband's and wife's Wills.

B. I authorize my **Executor/Executors** to make such elections under the tax laws as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem advisable, regardless of the effect thereof on any of the interests under this Will, and I direct that there shall be no adjustment of such interests by reason of any action taken by my **Executor/Executors** pursuant hereto

C. I authorize my **Executor/Executors**, in the exercise of sole and absolute discretion, to make any adjustment to tax basis authorized by law, including but not limited to increasing the basis of any property included in my estate, whether or not passing under this Will, by allocating any amount by which the bases of assets may be increased. My **Executor/Executors** shall be under no duty and shall not be required to allocate basis increase exclusively, primarily, or at all to assets passing under the Will as opposed to other property included in my estate. I waive any such duty that otherwise would exist. My **Executor/Executors** may elect, in the exercise of sole and absolute discretion and without permission of any court or other authority, to allocate basis increase to one or more or all assets that the **Executor/Executors** may receive or in which the **Executor/Executors** may have a personal interest, to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any Executor to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

**SEVENTH:**

A. I appoint *[name(s) of Executor(s)]* **Executor/Executors** of this, my Last Will and Testament. If *[name of Executor]* fails to qualify or ceases to act as Executor, I appoint *[name of successor]* as Executor in **his/her** place. If *[name of Executor]* fails to qualify or ceases to act as an Executor, I appoint *[name of successor Executor]* as Executor in **his/her** place.

B. Subject to the provisions of paragraph A of this Article, if at any time and for any reason there is only one Executor acting hereunder, I authorize, but do not direct, such Executor to appoint such individual(s) or such bank or trust company as such Executor, in the exercise of the sole and absolute discretion, shall select as successor **Executor/Executors**, to act in his, her or its place if he, she or it should cease to act provided, however, that at no time shall more than one (1) bank or trust company be acting as Executor hereunder. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court and may be revoked by the appointing Executor in the same manner prior to its becoming effective and succeeded by a later appointment, the last such appointment to control.

C. Any Executor may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the clerk of the appropriate court.

D. Whenever the terms "Executor" or "Executors" are used in this Will, they shall be deemed to refer to the Executor or Executors acting hereunder from time to time. Except as otherwise provided herein, each Executor taking the place of any other Executor shall have all the same estates, powers, discretions and

duties, including any power hereinabove given to fill vacancies, as if appointed an original Executor of this my Will.

**EIGHTH:** I direct that my **Executor/Executors** shall not be required to file any inventory of my estate and that no Executor, Trustee or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.<sup>5</sup>

**NINTH:** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, I hereby expressly grant to my **Executor/Executors** with respect to my estate and with respect to each of the trust estates herein created, including any accumulated income thereof, the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised in absolute discretion: To purchase or otherwise acquire, and to retain, whether originally a part of my estate or subsequently acquired, any and all stocks, bonds, notes or other securities, or any variety of real or personal property, including securities of any corporate fiduciary, or any successor or affiliated corporation, interests in common trust funds and securities of or other interests in investment companies or investment trusts, whether or not such investments be of the character permissible for investments by fiduciaries; to sell, lease, pledge, mortgage, transfer, exchange, convert or otherwise dispose of, or grant options with respect to, any and all property at any time forming a part of my estate or any trust estate, in any manner, at any time or times, for any purposes, for any prices and upon any terms, credits and conditions; whenever no corporate fiduciary is acting hereunder, to place all or any part of the securities which at any time are held by my estate, or any trust estate, in the care and custody of any bank or trust company, with no obligation while such securities are so deposited, to inspect or verify the same, and with no responsibility for any loss or misapplication by the bank or trust company, to have all stocks and registered securities placed in the name of such bank or trust company or in the name of its nominee, to appoint such bank or trust company agent and attorney to collect, receive, receipt for and disburse any income, generally to perform the duties and services incident to a so-called custodian account and to allocate the charges and expenses of such bank or trust company to income or principal, or partially to income and partially to principal; to appoint, employ and remove, at any time and from time to time, any accountants, attorneys, investment counselors, expert advisers, agents, clerks and employees, and to fix and pay their compensation from income or principal, or partially from income and partially from principal; to borrow money from any lender, including any corporate fiduciary, for any purpose connected with the protection, preservation, or improvement of my estate or any trust estate, and as security to mortgage or pledge any real or personal property

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<sup>5</sup> If non-New York resident, replace this paragraph with the following:

To the extent permitted by law, I direct that my **Executor/Executors** shall not be required to file an inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

forming a part of my estate or any trust estate upon any terms and conditions; to compromise and adjust any claims or demands of my estate or any trust estate against others, or of others against my estate or any trust estate; to make distribution in kind (including in satisfaction of pecuniary bequests), and to cause any distribution to be composed of cash, property, or undivided fractional shares in property different in kind from any other distribution, without regard to the income tax basis of the property distributed to any beneficiary or any trust; whenever permitted by law, to employ a broker-dealer as custodian for all or any part of the securities at any time held by my estate or any trust estate, and to register such securities in the name of such broker-dealer; and to execute and deliver such instruments as may be necessary to carry out any of these powers.

**TENTH:**

**A.** As used in this Will, the terms "child," "children," "descendant" and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.<sup>6</sup>

**B.** A disposition in this Will to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each member living at the time such disposition becomes effective of the class consisting of first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>7</sup>

**C.** A disposition in this Will to the children of a person *per capita* shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each child living at the time such disposition becomes effective.

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<sup>6</sup> The attorney-drafter must ascertain whether this definition is what the client wishes.

<sup>7</sup> The attorney-drafter must ascertain whether this definition is what the client wishes. An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

**ELEVENTH:** I direct that the validity and effect of this Will and the testamentary dispositions contained herein shall be governed by the laws of the State of *[applicable law]* in effect from time to time.

IN WITNESS WHEREOF, I, *[name of testator]*, have to this my Last Will and Testament subscribed my name and set my seal this *[date of execution of Will]*.

..... (L.S.)

Subscribed and sealed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by **him/her** to us to be **his/her** Last Will and Testament, and thereupon we, at the request of the said Testator, in **his/her** presence and in the presence of each other, have hereunto subscribed our names as witnesses this *[date of execution of Will]*.

..... residing at .....

..... residing at .....

..... residing at .....

**NOTE: ATTESTING WITNESSES SHOULD READ CAREFULLY BEFORE SIGNING THIS AFFIDAVIT—NOTARY SHOULD NOT BE A PARTY OR WITNESS**

STATE OF NEW YORK                    )  
  : ss.:  
COUNTY OF NEW YORK                )

Each of the undersigned, individually and severally being duly sworn, deposes and says:

The within Will was subscribed in our presence and sight at the end thereof by [name of testator], the within-named Testator, on [date], at [address] in [City or County], New York.

Said Testator at the time of making such subscription declared the instrument so subscribed to be **his/her** Last Will and Testament.

Each of the undersigned thereupon signed his or her name as a witness at the end of said Will at the request of said Testator and in **his/her** presence and sight and in the presence and sight of each other.

Said Testator was, at the time of so executing said Will, over the age of eighteen (18) years and, in the respective opinions of the undersigned, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a will.

The Testator, in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech or from any other physical or mental impairment which would affect **his/her** capacity to make a valid will. The Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator at said time and makes this affidavit at **his/her** request.

The within Will was shown to the undersigned at the time this affidavit was made, and was examined by each of them as to the signature of said Testator and of the undersigned.

The foregoing instrument was executed by the Testator and witnessed by each of the undersigned affiants under the supervision of [name of supervising attorney], an attorney-at-law.

Severally sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Notary Public



**FORM 6****WILL FOR MARRIED PERSON—CHILDREN UNDER AGE 21—CREDIT SHELTER AMOUNT INTO BYPASS TRUST—RESIDUE OUTRIGHT TO SURVIVING SPOUSE OR DESCENDANTS<sup>1</sup>**

I, [name of testator], of [domicile of testator], do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

**FIRST:**

A. I give and bequeath all furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles and their accessories, and all other tangible personal property (excluding cash and bullion) owned by me at the time of my death and used primarily in a trade or business at the time of my death to my **husband/wife**,<sup>2</sup> [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my children who survive me, to be divided **between/among** them by my **Executor/Executors**, in the exercise of sole and absolute discretion, in as nearly equal portions as may be practicable, having due regard for the personal preferences of my children.<sup>3</sup>

B. Notwithstanding the foregoing, if any child of mine who becomes entitled to property pursuant to paragraph A of this Article FIRST is under the age of twenty-one (21) years at the time of my death, I direct my **Executor/Executors**, after appropriate consultation with such child and with his or her Guardian or Guardians, if any, or with the person with whom such child resides, to select from

<sup>1</sup> This form contemplates that the entire estate will not qualify for the federal estate tax marital deduction under Section 2056(b)(7) of the Internal Revenue Code. The amount of the trust held for the surviving spouse and descendants is intended to equal the Testator's applicable exclusion amount.

Note that on account of the tax-driven definition of the applicable exclusion (or "credit shelter") amount, the bypass trust may comprise some or all of the assets of the decedent's estate. Pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), to the extent not used with respect to lifetime taxable gifts, the unified credit allowed under Section 2010 of the Code may protect \$1,000,000 of assets in 2003 (and years after 2010); \$1,500,000 in 2004 and 2005; \$2,000,000 in 2006 through 2008; and \$3,500,000 in 2009. Under EGTRRA, the federal estate tax is repealed for 2010.

The attorney-drafter also should consider whether the state's death tax system is "decoupled" from the federal estate tax system, especially the credit allowed under Section 2011 of the Code. In such a case, the use of a federal estate tax-driven formula such as the one contained in this form may result in some state death tax liability which otherwise could have been avoided (or reduced) if the formula were tied instead to the state death tax exemption. Further complications could arise, however, if the estate is divided based upon the state death tax exemption. See, e.g., <http://www.lawontheweb.com>; Bruce D. Steiner, "Coping With the Decoupling of State Estate Taxes After EGTRRA," 30 Est. Plan. 167 (April, 2003), 2003 WL 1604962 (WG&L).

For an analogous structure, which does not rely on a tax-driven division of the residue, see note 9 below.

<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

<sup>3</sup> Consider changing this disposition to descendants *per stirpes*, if appropriate.

the property herein bequeathed to such child such articles, if any, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem appropriate for ownership by such child. Any articles so selected shall be delivered to the Guardian or Guardians or to the person with whom such child resides to be held, without bond, for such child's benefit, and the receipt of such Guardian or Guardians or such person, as the case may be, shall constitute a complete discharge to my **Executor/Executors** with respect to any such articles so delivered. Any articles not so selected shall be sold and the net proceeds of sale shall be added to the principal of the trust held for such child in accordance with the provisions of Article SEVENTH, thereafter to be held, administered and disposed of as a part thereof.<sup>4</sup>

C. The bequest of any sculpture, painting or other item of artwork under this Article shall include all applicable copyrights and other rights of reproduction therein. I direct that the decision of my **Executor/Executors** as to the identification and distribution of any property under this Article shall be final and binding on all persons having an interest in my estate. I direct my **Executor/Executors** to pay as an expense of administration of my estate the cost of shipping any item bequeathed in this Article to the legatee thereof.

#### SECOND:

A. I give and devise all real property owned by me at the time of my death and used by me or by my family as a place of residence (whether permanent, temporary or seasonal) or held in connection with such use, including all buildings thereon and all rights and easements appurtenant thereto and all policies of insurance relating thereto (my "real property"), to my **husband/wife**, [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, I direct that said real property shall be sold and that the net proceeds of sale be added to my residuary estate thereafter to be held, administered and disposed of as a part thereof.<sup>5</sup>

B. I give, devise and bequeath all stock owned by me at the time of my death in any corporation which is the owner of any building in which I have a cooperative apartment, together with any lease to such apartment and all right, title and interest owned by me at the time of my death in and to any agreements relating to said building and the real property on which it is located, together with all policies of insurance relating thereto (collectively, my "cooperative apartment") to my **husband/wife**, [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, I direct that said cooperative apartment shall be sold and that the net proceeds of sale be added to my residuary estate thereafter to be held, administered and disposed of as a part thereof.<sup>6</sup>

<sup>4</sup> Consider changing this to an authorization as opposed to a direction to sell.

<sup>5</sup> Consider changing this disposition to surviving descendants, *per stirpes* as tenants-in-common or surviving children *per capita* as tenants-in-common, if appropriate.

<sup>6</sup> See note 4, above.

**THIRD:<sup>7</sup>**

A. I give and bequeath the following amounts to the following individuals who survive me:

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee].

B. I give and bequeath the following amounts to the following charitable organizations to be used by each for its general purposes, unless otherwise noted below:

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution]<sup>8</sup>.

**FOURTH:** If at the time of my death I have any power of appointment over any property then held in trust or otherwise I hereby declare that I intend not to exercise such power and that nothing herein contained shall constitute an exercise thereof in whole or in part.

**FIFTH:** All the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situated, of which I shall die seized or possessed or of which I shall be entitled to dispose of at the time of my death (my "residuary estate"), after the payment therefrom of my funeral expenses, my debts, the expenses of administering my estate and the taxes directed in Article NINTH to be paid from my residuary estate (my "net residuary estate"), shall be disposed of as follows:

A. If my husband/wife, [name of spouse], survives me, I direct that my net residuary estate shall be divided into two portions, to be known as Portion A and Portion B.<sup>9</sup>

<sup>7</sup> If the spouse survives the testator, consider making these gifts to the spouse with the suggestion that the spouse then give the gifts to the selected individuals and/or charities.

<sup>8</sup> Consider using a charitable remainder trust to receive retirement benefits if analysis shows that a charitable remainder trust would be more beneficial in the event that the spouse does not survive the testator.

<sup>9</sup> Alternately, consider revising this Article to provide that the entire net residuary estate passes to the surviving spouse. Then, within nine months of the first spouse's death, the surviving spouse may disclaim property otherwise qualifying for the federal estate tax marital deduction, thereby taking full advantage of the decedent's unused federal or state estate tax exemption, if any. The survivor could disclaim into a trust in which he or she has an interest, such as the "Portion A" Trust held under paragraph A of Article SIXTH. Sample disclaimer language is as follows:

1. Portion A shall consist of (a) that fractional part of my net residuary estate of which (i) the numerator shall be an amount equal to the maximum amount by which my federal taxable estate (or, if there is no federal estate tax in effect at the time of my death, my taxable estate as determined for death tax purposes under the law of the state of my domicile as in effect at the date of my death) may be increased without causing an increase in the federal estate tax payable by reason of my death (or, if there is no federal estate tax in effect at the time of my death, without causing an increase in state death taxes payable by reason of my death), after taking into account all credits available against such tax, and (ii) the denominator of which shall be the value of my net residuary estate as finally determined for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of my death, for death tax purposes under the law of the state of my domicile as in effect at the date of my death) or (b) my entire net residuary estate, if there is neither a federal estate tax in effect at the time of my death nor any death tax in effect at the time of my death under the law of the state of my domicile at the time of my death.

For this purpose, my federal taxable estate shall be determined before giving effect to this subparagraph 1 of this paragraph A and before giving effect to any disclaimer or renunciation which my **husband/wife** may make of any interests in property passing to **him/her** upon my death whether under this Will or otherwise, and on the basis that the election under Section 2056(b)(7) of the Code has been made wherever applicable with respect to all property includable in my estate for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of my death, any comparable section for death tax purposes under the law of the state of my domicile as in effect at the date of my death) whether under this Will or otherwise, regardless of what election is in fact made, and after taking into account all credits available against such tax, except that the credit for state death taxes shall

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If my **husband/wife**, or **his/her** **Executor/Executors**, shall disclaim or renounce **his/her** interest in any part or all of my net residuary estate, I give, devise and bequeath such part or all of my net residuary estate so disclaimed to the Trustee/Trustees hereinafter named, IN TRUST, to be held and disposed of as a separate trust in accordance with the provisions of paragraph A of Article SIXTH.

The advantage of this type of optional disclaimer (as opposed to the tax-driven division of the residue contemplated by this form) is that the surviving spouse will have the opportunity to consider post-mortem circumstances and to decide, within nine months of the decedent's death, what is the most appropriate size of the "Portion A" Trust. Note, however, some spouses may be hesitant to disclaim, even if it will save considerable tax when he or she later dies, because after disclaimer, the spouse will no longer own the property outright. Further note that if the surviving spouse is under a legal disability, affecting a disclaimer by that spouse may be complicated and/or foreclosed.

The optional disclaimer described in this footnote ordinarily would be used in two circumstances. First, this structure is appropriate if the spouse dying first has confidence that the surviving spouse will make the best "overall" decision for himself or herself and for those who are expected otherwise to succeed to the couple's property. Second, this structure is appropriate in circumstances where the spouse dying first has little concern about reducing taxes for successor beneficiaries and/or wishes the surviving spouse to have maximum control and benefit over the property included in the estate of the spouse dying first.

be taken into account only to the extent that it does not result in an increase in the state death taxes which would otherwise be payable.

2. I authorize my **Executor/Executors**, in the exercise of sole and absolute discretion, to allocate to Portion A so much of the maximum exemption against generation-skipping transfer ("GST") tax allowed under Section 2631(a) of the Code as shall be unused at the time of my death (my "Unused GST Exemption") as my **Executor/Executors** shall determine, including, but without limitation, such portion thereof as shall make Portion A wholly exempt from federal GST tax. If Portion A is greater than my Unused GST Exemption, I expect my **Executor/Executors** and the **Trustee/Trustees** to divide Portion A pursuant to the authority in paragraph B of Article NINTH below into two separate shares, one of which, on account of the allocation of my Unused GST Exemption, would be wholly exempt from federal GST tax.

I intend Portion A to be equal to, and to take advantage of, the so-called "federal estate tax exemption equivalent" available to my estate, or, if there is no federal estate tax in effect at the time of my death, the "state death tax exemption equivalent," if there is a death tax under the law of the state of my domicile in effect at the time of my death, or, if there is neither a federal estate tax in effect at the time of my death nor any death tax in effect at the time of my death under the law of the state of my domicile at the time of my death, my entire net residuary estate.

[I hereby acknowledge that if there is a federal estate tax in effect at the time of my death, because Portion A will equal my federal estate tax exemption equivalent, there may be estate taxes due and payable to the extent that the state death tax exemption equivalent is less than my federal estate tax equivalent.<sup>10</sup>]

I give, devise and bequeath Portion A to the **Trustee/Trustees** hereinafter named, IN TRUST, to be held and disposed of in accordance with the provisions of Article SIXTH hereof.

3. Portion B shall consist of the balance of my net residuary estate. I give, devise and bequeath Portion B to my **husband/wife**, [name of spouse], if **he/she** survives me.

B. If my **husband/wife**, [name of spouse], does not survive me, but any descendant of mine survives me, I give, devise and bequeath my net residuary estate to my descendants who survive me, *per stirpes*.

C. If neither my **husband/wife** nor any descendant of mine survives me, I give, devise and bequeath my net residuary estate, or, if upon the termination of any trust hereunder, there is no effective disposition of the trust property by

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<sup>10</sup> Add this paragraph if the law of the state of the testator's domicile provides for death taxes which are not equal to the state death tax credit under Section 2011 of the Code. Consider this paragraph also if real property or tangible personal property is located in a state other than the state of the testator's domicile and that state subjects such property to death tax in the non-domicile state.

another provision of this Will, I direct that such trust property and any other property which is directed to be disposed of in accordance with the provisions of this paragraph C, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to *[name of beneficiary or beneficiaries to receive property if neither spouse nor any descendant survives]*.

**SIXTH:** Portion A of my net residuary estate and any other property which is directed to be held and disposed of in accordance with the provisions of this Article shall be held as a separate trust by the **Trustee/Trustees** hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners, either outright or in trust, as the **Trustee/Trustees** (other than my **husband/wife** or any descendant of mine) may determine, in the exercise of sole and absolute discretion, to or for the benefit of such one or more members of the class consisting of such of my **husband/wife**, *[name of spouse]*, and my descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of others, as the **Trustee/Trustees** may select, in the exercise of sole and absolute discretion.

Upon the death of my **husband/wife** *[name]*, the trust shall terminate and the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to my descendants who are then living, *per stirpes*, subject to the provisions of Article SEVENTH, or, if no descendant of mine is then living, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

**SEVENTH:** If any individual under the age of twenty-one (21) years becomes entitled to any property from my estate upon my death or any property from any trust created hereunder, such property shall be held by, and I give, devise and bequeath the same to, the **Trustee/Trustees** hereinafter named, IN TRUST, for the following uses and purposes: To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent, including the whole thereof, for such individual's general use and at such time or times as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, shall determine, until such individual reaches the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before reaching the age of twenty-one (21) years, the **Trustee/Trustees** shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.

If my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, in the exercise of sole and absolute discretion, shall determine at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian for such individual under any Uniform Gifts to

Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed, or to the person with whom such individual resides

Notwithstanding the foregoing, unless sooner terminated as provided above, each trust held under this Article shall terminate on the date which is twenty-one (21) years after the date of death of the last to die of all the descendants of my parents and my spouse's parents who are living at the time of my death, and upon such termination the trust estate of each such trust shall be transferred, conveyed, and paid over to the individual for whom it is being held, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian, including but not limited to a custodian selected by the **Trustee/Trustees**, for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed

The receipt of such individual, if an adult, or the parent, guardian or custodian or any other person to whom any principal or income is transferred and paid over pursuant to any of the above provisions, shall be a full discharge to my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, from all liability with respect thereto.

**EIGHTH:**

A. If my **husband/wife**, [*name of spouse*], dies simultaneously with me or in such circumstances as to render it impossible to determine who predeceased the other, I direct that I shall be deemed to have predeceased my **husband/wife** and that the provisions of this Will shall be construed upon that assumption.<sup>11</sup>

B. I intend to take full advantage of the special rule under Section 2651(e) of the Code for transfers to great-grandchildren (and more remote descendants) of my parents who are descendants of a predeceased descendant of my parents with respect to any property transferred to or held in trust hereunder for the benefit of descendants of my parents who are descendants of a predeceased descendant of my parents and the provisions of this Will shall be construed consistent with and to carry out that intent.

C. In addition, (i) if any person dies within ninety (90) days after my death or the termination of any trust created hereunder or any other event covered by Treas. Reg. § 26.2612-1(a)(2) (or any successor thereto), as the case may be, and (ii) if such person had not, in fact, survived my death or the trust termination, as the case may be, such failure to survive would have caused the special rule relating to a predeceased child or other descendant under Section 2651(e) of the Code to apply to any property passing under this Will, then I direct that such person shall be treated with respect to such property as having predeceased me, the trust termination or other event, as the case may be, so that in accordance with Treas. Reg. § 26.2612-1(a)(2) (or any successor thereto), the special rule under Section 2651(e) of the Code shall apply with respect to such property.

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<sup>11</sup> Note that the dispositive provisions (including paragraph C of Article FIFTH) need to be consistent in both husband's and wife's Wills

**NINTH:**

**A.** All estate, inheritance, legacy, succession, transfer or other death taxes, including any interest and penalties thereon, imposed by any domestic or foreign taxing authority (including any additional estate tax imposed by Sections 2031(c), 2032A or 2057 of the Code, any generation-skipping transfer tax imposed by Chapter 13 of the Code, or any comparable taxes imposed by any other taxing authority) with respect to all property taxable by reason of my death and which passes under this Will shall be charged against and paid without apportionment out of my residuary estate and without apportionment within my residuary estate.<sup>12</sup>

I appreciate that if my **husband/wife** survives me, the tax burden may be borne, in whole or in part, by Portion A by reason of the formula under which the size of Portion A is determined.

**B.** The following provisions relating to tax elections shall apply:

**1.** My **Executor/Executors** may, in the exercise of sole and absolute discretion, elect to treat any part or all of any bequest of property passing under this my Will or any other property includible in my estate for federal tax purposes as qualified terminable interest property ("QTIP") within the meaning of Section 2056(b)(7) of the Code, or any successor thereto, and any comparable election granted by any other taxing authority.

**2.** My **Executor/Executors** may make such other elections under the tax laws, including but not limited to, the election to use the alternate valuation date for estate tax purposes, and the election to treat administrative expenses as deductions against income tax instead of against estate tax, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem advisable, regardless of the effect thereof on any of the interests under this Will, and I direct that there shall be no adjustment of such interests by reason of any action taken by my **Executor/Executors** pursuant hereto.

**3.** I authorize my **Executor/Executors** to allocate any amount of my GST tax exemption under Section 2631(a) of the Code to such property of which I am the transferor as my **Executor/Executors** shall select in the exercise of sole and absolute discretion, whether or not passing under this Will, including property transferred by me during life whether or not I allocated any GST exemption to such property during my life, and without any duty to favor beneficiaries under this Will over beneficiaries of property passing outside this Will.

**4.** I authorize my **Executor/Executors**, in the exercise of sole and absolute discretion, to make any adjustment to tax basis authorized by law, including but not limited to increasing the basis of any property included in my

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<sup>12</sup> The tax apportionment clause may need to be changed if there is a mixed residue, either marital and taxable nonmarital residue or charitable and noncharitable residue. Note that if the Will contains a qualified domestic trust ("QDOT"), special tax provisions will be required (as well as special QDOT provisions for the marital trusts, and attention to any outright bequests to the spouse).



estate, whether or not passing under this Will, by allocating any amount by which the bases of assets may be increased. My **Executor/Executors** shall be under no duty and shall not be required to allocate basis increase exclusively, primarily, or at all to assets passing under the Will as opposed to other property included in my estate. I waive any such duty that otherwise would exist. My **Executor/Executors** may elect, in the exercise of sole and absolute discretion and without permission of any court or other authority, to allocate basis increase to one or more or all assets that the **Executor/Executors** may receive or in which the **Executor/Executors** may have a personal interest, to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any Executor to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

5. I authorize my **Executor/Executors** or the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to divide (whether before or after any trust is funded and whether before or after any allocation of GST exemption under Section 2631 of the Code is made) any trust or any property used or to be used to fund or augment any trust created under this Will into two or more fractional shares. The shares shall be held and administered by the **Trustee/Trustees** as separate trusts, but may be managed and invested *in solido*. One of the purposes for granting this authority is to provide an inclusion ratio (within the meaning of Section 2642(a) of the Code) of zero for the separate trust receiving the fractional share to which the allocation of GST exemption is made, and, if that trust is a trust described in Section 2652(a)(3) of the Code, to enable my **Executor/Executors** to make the election described in that section with respect to it as a separate trust.

6. If my **Executor/Executors** shall make the so-called QTIP election under Section 2056(b)(7) of the Code over a portion (but less than all) of any property passing to a trust hereunder, my **Executor/Executors** or the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, divide such property into the portion as to which the election was made and the portion as to which it was *not* made in the manner prescribed by Treas. Reg. § 20.2056(b)-7(b) or any successor regulation. Those shares shall be held and administered by the **Trustee/Trustees** as separate trusts with identical terms, so that one of said trusts is entirely subject to said election and the other is not subject to it. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

7. Whenever two trusts created under this Will are directed to be combined in a single trust (for example, because property of one trust is to be added to the other trust), whether or not the trusts have different inclusion ratios with respect to any common transferor or have different transferors for generation-skipping transfer tax purposes, the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, instead of combining said trusts, administer them as two separate trusts with identical terms in accordance with the provisions that would have governed the combined trusts. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*. If anyone adds or is deemed to add by gift or bequest property to a

trust created under this Will, I authorize the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to hold the added property as a separate trust with terms identical to the trust to which it would have been added and the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

8. The **Trustee/Trustees** may, in the exercise of sole and absolute discretion, combine any one or more trusts with identical terms for an identical beneficiary or beneficiaries created under this Will as a single trust. The **Trustee/Trustees** may also, in the exercise of sole and absolute discretion, later divide such trust as provided above in this paragraph. Without in any way limiting the absolute discretion of the **Trustee/Trustees** granted by this paragraph, I expect that the **Trustee/Trustees** will not elect to combine two or more trusts with different inclusion ratios or different transferors for generation-skipping transfer tax purposes.

9. Although I have authorized my **Executor/Executors** or the **Trustee/Trustees** to divide any property into separate shares or trusts in order to facilitate administration of my estate or of certain trusts created hereunder, I direct that any division made under said powers shall be disregarded for purposes of the commissions allowable to the **Trustee/Trustees**, and each separate trust created as the result of any such division shall bear its *pro rata* share, based on its then market value, of the commissions which would have been payable from time to time by the original fund or trust if the same had not been divided.

10. Notwithstanding the foregoing, if my **husband/wife** or any other beneficiary disclaims any interest created under this Will within nine (9) months of my death, and my **husband/wife** or such other beneficiary is acting as a fiduciary under this Will, neither my **husband/wife** nor such other beneficiary shall participate in any of the elections (including any allocation and any division of property) hereinabove described which affects any property so disclaimed by such individual.

**TENTH:** I appoint my **husband/wife**, [name of spouse], Guardian of the person and property of each minor child of mine or, if **he/she** fails to qualify or ceases to act, then I appoint [name of successor Guardian] Guardian in **his/her** place.

**ELEVENTH:**

A. I appoint [name(s) of Executor(s)] **Executor/Executors** of this my Last Will and Testament. If [name of Executor] for any reason fails to qualify or ceases to act as Executor, I appoint as [name of successor] Executor in **his/her** place. If [name of Executor] fails to qualify or ceases to act as an Executor, I appoint [name of successor Executor] as Executor in **his/her** place.

B. I appoint *[name(s) of Trustee(s)]*<sup>13</sup> **Trustee/Trustees** of the trusts hereby created. If *[name of Trustee]* fails to qualify or ceases to act as a Trustee, I appoint *[name of successor Trustee]* as Trustee in **his/her** place.<sup>14</sup> If *[name of Trustee]* fails to qualify or ceases to act as a Trustee hereunder, I appoint *[name of successor]* as Trustee in **his/her** place.

C. Notwithstanding any provision herein to the contrary, at no time shall more than one (1) bank or trust company be acting as Executor of this my Will or as Trustee with respect to any single trust hereunder.

D. Subject to the provisions of paragraphs A, B and C of this Article, I authorize, but do not direct, my **Executor/Executors** and the **Trustee/Trustees** acting hereunder from time to time, in the exercise of sole and absolute discretion, to appoint as a co-Executor or as a co-Trustee, as the case may be, such individual(s), bank or trust company as my **Executor/Executors** or the **Trustee/Trustees**, as the case may be in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court.

Subject to the provisions of paragraphs A, B and C of this Article, I authorize, but do not direct, each Executor and each Trustee acting hereunder from time to time, in the exercise of sole and absolute discretion, to appoint such individual(s) or such bank or trust company as such Executor or the Trustee, as the case may be, in the exercise of sole and absolute discretion, shall select as successor **Executor/Executors** or successor **Trustee/Trustees** to act in his, her or its place if he, she or it should cease to act. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court and may be revoked by the appointing **Executor/Executors** or **Trustee/Trustees**, as the case may be, in the same manner prior to its becoming effective and succeeded by a later appointment, the last such appointment to control.

Subject to the provisions of paragraphs A, B and C of this Article, if any Executor or any Trustee shall for any reason cease to act without having appointed a successor, then I authorize the remaining Executor or Executors or Trustee or Trustees, as the case may be, to appoint a successor by a written instrument filed with the clerk of the appropriate court. I direct, however, that pending the qualification of such successor, the remaining Executor or Executors or Trustee or Trustees, as the case may be, shall have all the rights, powers and authority herein conferred upon my **Executor/Executors** or the **Trustee/Trustee** generally.

The appointment of any co-Executor or co-Trustee or successor Executor or successor Trustee hereunder shall be on such terms and conditions, including the

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<sup>13</sup> Someone other than the spouse should be named as Trustee, unless there is no estate tax in effect at the time of the surviving spouse's death or the surviving spouse's applicable exclusion amount is sufficiently large to equal or exceed the amount of the bypass trust and the property otherwise includable in the surviving spouse's estate. Because of the difficulty in foreseeing the law or circumstances in effect at the time of the surviving spouse's death, however, naming the spouse as sole Trustee is not recommended.

<sup>14</sup> Depending on the circumstances, the client may wish to designate different Trustees to act with respect to different trusts.

fixing of compensation, as may be set forth in the instrument affecting such appointment. In particular, without limiting the foregoing, the term of service and duties of a co-Executor or co-Trustee or successor Executor or successor Trustee, as the case may be, may be limited if so specified by his, her or its instrument of appointment. The co-Trustees or successor Trustees of different trusts, portions, shares, or subshares created under this Will need not be identical.<sup>15</sup>

E. Any Executor or Trustee may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the clerk of the appropriate court.

F. Should it be necessary for a representative of my estate to qualify in any jurisdiction wherein any Executor named herein cannot or may not desire to qualify as such, any other Executor named herein may, without giving any security, act as Executor in such jurisdiction and shall have therein all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will, or, if such other Executor cannot or does not desire to qualify as Executor in such other jurisdiction, or, if at any time and for any reason there shall be no Executor in office in such other jurisdiction, I appoint as Executor therein such person or corporation as may be designated by my **Executor/Executors** acting hereunder. Such substituted Executor shall, without giving any security, have in such other jurisdiction all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will.

G. Except as provided by law, I direct that my **Executor/Executors** shall not be required to file any inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

H. Except as otherwise expressly herein provided, any actions or decisions of the Executors or the Trustees, if more than two shall be acting, shall be determined by a majority of them.

I. Notwithstanding any other provision of this Will, no Trustee who is a current beneficiary of income and/or principal of any trust created hereunder shall

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<sup>15</sup> If non-New York resident, replace this paragraph with the following:

To the extent permitted by law, I direct that my **Executor/Executors** shall not be required to file an inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, accumulations, or uses of income or principal by the **Trustee/Trustees** to or for any beneficiary (including, but without limitation, any power described in paragraphs M through O of Article TWELFTH), (ii) the exercise of any general power of appointment described in Sections 2041 or 2514 of the Code. No Trustee who is under a duty to support a beneficiary or who is acting as a guardian of any person who is a beneficiary shall participate in the exercise, or the decision not to exercise, any discretion over payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Section 2042(2) of the Code) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall serve as Trustee of any trust which holds property with respect to which such individual has made a qualified disclaimer within the meaning of Section 2518 of the Code.

**J.** No Executor shall participate in any decision where participation would cause that Executor to be deemed to have made a transfer for estate, gift or generation-skipping transfer tax purposes or cause a renunciation which would otherwise constitute a qualified disclaimer under Section 2518 of the Code to be treated as not so qualified, and if by reason of this limitation there is no Executor then acting who is eligible to participate in such decision, the then-acting **Executor/Executors** shall appoint a co-Executor pursuant to paragraph D of this Article.

**K.** Every act done, power exercised or obligation assumed by any Executor or Trustee pursuant to the provisions of this Will shall be held to be done, exercised or assumed, as the case may be, by the Executor or Trustee acting in a fiduciary capacity and not otherwise, and every person, firm or corporation contracting or otherwise dealing with the Executor or Trustee shall look only to the funds and property of my estate or the trust estate for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Executor or Trustee shall not be individually liable therefor even though the Executor or Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of my estate or the trust estate.

**L.** Whenever the terms "**Executor/Executors**" and "**Trustee/Trustees**" are used in this Will, they shall be deemed to refer to the Executor or Executors and the Trustee or Trustees, as the case may be, acting hereunder from time to time. Except as otherwise provided herein, each Executor and each Trustee taking the place of any other Executor or Trustee shall have all the same estates, powers, discretions and duties, including any power hereinabove given to fill vacancies, as if appointed an original Executor of this my Will or an original Trustee of any trust created hereunder.

**TWELFTH:** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, I hereby expressly grant to my **Executor/Executors** and to the **Trustee/Trustees** hereunder the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised by my **Executor/Executors** and/or the **Trustee/Trustees** as my **Executor/Executors** and/or the **Trustee/Trustees**, as the case may be, may deem advisable, in the exercise of sole and absolute discretion:

**A.** To purchase or otherwise acquire and to retain, whether originally a part of my estate or any trust held hereunder or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property, including, but without limitation, foreign real estate, foreign securities, interests in any business venture (incorporated or unincorporated), securities of any corporate fiduciary (or any successor or affiliated corporation) and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, partnerships, and limited liability companies (participating therein as a general or limited partner or member), whether or not the property so invested in or the entity whose securities are so invested in is located in the state in which this Will is offered for original probate or in any other state or country, and whether or not such investment be secured or unsecured, or shall be unproductive, underproductive, overproductive or of a wasting nature, or shall constitute all or the greater part of the assets of my estate or the particular trust for which such investments are made, and whether or not the investment in the securities, stocks, bonds or notes of any one corporation or association shall constitute all or the greater part of the issued and outstanding securities, stocks, bonds or notes of such corporation or association, and to make or retain any or all of such investments not solely for the preservation of principal or production of income but also for the possibility of an increase in value, and to render liquid the assets held by my fiduciaries, in whole or in part, and to hold cash or readily marketable securities of little or no yield for such period as my fiduciaries may deem advisable;

**B.** To sell, lease, pledge, mortgage, transfer, exchange, convert, grant options with respect to, or otherwise dispose of, any and all real or personal property or interests therein, at any time forming a part of my estate or any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions, my fiduciaries may deem desirable; and to enter into leases, mortgages or options which extend beyond the period fixed by law for leases and options made by fiduciaries or beyond the term of the trust;

**C.** To borrow money from any lender for any purpose, and to mortgage or pledge as security upon any terms and conditions any real or personal property held;

**D.** To take part in the management of any business in which investment is retained or made hereunder and to delegate duties with respect to such management, with the requisite powers, to any employee, manager, partner or associate of such business, without liability for such delegation; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to subject to the risks of any such business any part or all of my estate or any trust estate, for

such term or period as my fiduciaries may determine in the exercise of sole and absolute discretion; to advance money or other property to any such business; to make loans, subordinated or otherwise, of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business, either alone or with other persons interested therein, and to secure such loan or loans by a pledge or mortgage of any part of *my estate or any trust estate*; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners, associates and officers of any such business either individually or through an officer or officers if any fiduciary be a corporation, and to receive compensation from such business for so acting; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to liquidate, either alone or jointly with others, any such business or any interest in any such business; and generally to exercise any and all powers as my fiduciaries may deem necessary in connection with the management, sale or liquidation of any such business;

E. To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein which may form at any time a part of my estate or any trust estate; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith;

F. To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships, limited liability companies and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of my estate or any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as my fiduciaries may deem advisable;

G. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps which they may deem necessary or proper to obtain the benefits of any such transaction;

H. To rent office space, whether or not from, or in conjunction with any other such space being used by, any beneficiary hereunder, or any relative of mine or of any beneficiary hereunder, or any fiduciary hereunder in his, her or its individual capacity, and to pay the expenses thereof from the principal of my estate or the respective trust estate;

I. To appoint, employ and remove at any time and from time to time any accountants, attorneys, investment or other expert advisers, agents, clerks and employees, including any fiduciary hereunder acting in his, her or its individual capacity or the officer, employee or affiliate of any fiduciary, or any firm, partnership, corporation or other organization in which a fiduciary may have an interest; and to fix and pay their reasonable compensation and incidental employment benefits from the funds of my estate or any trust estate without reducing the compensation to which any fiduciary is otherwise entitled hereunder;

J. To place and leave all or any part of the funds or securities at any time held by my estate or any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of my **Executor/Executors** or the **Trustee/Trustees** to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account"; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal;

K. To register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; to hold any security in bearer or non-certificated form; and to use a central depository for securities;

L. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which may at any time form part of my estate or any trust estate or which may be liens or charges against any property of my estate or the trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of my estate or any trust estate against others or of others against my estate or the trust upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith, and to abandon any real or personal property which my fiduciaries in the exercise of sole and absolute discretion may determine to be worthless;

M. To divide any trust, into one or more separate trusts for the benefit of one or more of the beneficiaries (to the exclusion of the other beneficiaries) of the trust so divided, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a Subchapter S corporation as described in Section 1361(d)(3) of the Code, or for any other purpose as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine;

N. To make or terminate elections with respect to S corporation stock, and to make such adjustments between income and principal to compensate for the consequences of the trust's ownership of S corporation stock as the **Trustee/Trustees** shall deem just and equitable; provided, however, that if the trust holds S corporation stock, the **Trustee/Trustees** shall immediately take such actions to



ensure that the trust qualifies as either an Electing Small Business Trust within the meaning of Section 1361(e)(1)(A) of the Code or a Qualified Subchapter S Trust within the meaning of Section 1361(d)(3) of the Code and (A) if the **Trustee/Trustees** seeks to qualify the trust as an Electing Small Business Trust, the **Trustee/Trustees** shall have the authority to exclude by an acknowledged written instrument any person or organization from having any interest therein, and (B) if the **Trustee/Trustees** shall seek to qualify the trust as a Qualified Subchapter S Trust, the **Trustee/Trustees** shall not make adjustments that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and no Trustee shall exercise any power conferred under this Article or under this Agreement that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and provided further, during the term of any trust created hereunder, (i) if the **Trustee/Trustees** should sell any interest in a corporation or if the assets of any entity constituting a corporation in which the trust has an ownership interest are sold, and (ii) if that corporation has made an election to be taxed under Subchapter S of the Code, then in the sole and absolute discretion of the **Trustee/Trustees**, the **Trustee/Trustees** may distribute to the income beneficiary such amounts of principal as shall be necessary to pay any income tax caused by that sale, if the income or gain attributable to that sale is taxed directly to the income beneficiary under applicable federal tax law;

**O.** To permit any one or more of the beneficiaries of any trust, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, to occupy any real property and to use any tangible personal property forming part of the trust on such terms as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, whether for rent, rent-free, in consideration of payment of taxes, insurance, maintenance or ordinary repairs, or otherwise;

**P.** To make distributions from my estate or any trust in kind or partially in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and without regard to the income tax basis of such property; and any property distributed in satisfaction of a legacy or a distributive share shall be valued as of its date of distribution;

**Q.** To allocate to income or to principal or partly to each any receipt or disbursement;

**R.** To hold the assets of any trusts hereby created for convenience of administration and investment as an undivided whole, provided that no such undivided holding shall be deemed to defer or postpone the vesting or distribution of any property so held in trust;

**S.** To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country;

T. To make payment from time to time on account of commissions and legal fees without requiring the payment of interest thereon and without obtaining any security for the repayment of the same;

U. To delegate any duties or powers, discretionary or otherwise, to any person or institution for such periods and upon such terms and conditions as may be designated in a written acknowledged instrument delivered to such person or institution (including, but without limitation, to delegate discretionary authority to make changes in investments to investment counsel); and, if any duties or powers are delegated to a co-fiduciary, the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument so delivered at any time provided, however, that no duties or powers described in paragraph I of Article ELEVENTH may be delegated to an individual who is prohibited in said paragraph from participating in the exercise of such duties or powers;

V. To execute and deliver any and all instruments the fiduciaries may deem advisable to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with my estate and any trust estate created hereunder as in their judgment the best interests of my estate or such trust may require.

The powers granted to my **Executor/Executors** and the **Trustee/Trustees** hereunder in and by this Article or in and by any other Article of this Will may be exercised in whole or in part and from time to time, and without court authorization, and shall be deemed to be supplemental and not exclusive, it being my intention that my **Executor/Executors** and the **Trustee/Trustees** hereunder shall have all of the general powers of fiduciaries as well as all of the special powers herein expressly granted, and all powers incidental to, reasonably to be implied from or necessary to the proper exercise of, the special powers herein enumerated.

**THIRTEENTH:** No beneficial eligibility or entitlement of any individual beneficiary to receive current distributions of income and/or principal from any trust created under this Will shall be subject to assignment, pledge, sale or transfer in any manner by such beneficiary, and no individual beneficiary of any such trust shall have the power to encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any individual beneficiary of any such trust; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of Section 2518 of the Code with respect to interests herein.<sup>16</sup>

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<sup>16</sup> In some cases it may be appropriate to relax the spendthrift provisions. For example, it may be desired to permit the assignment of remainder interests in a trust for estate planning purposes

**FOURTEENTH:**

A. As used in this Will, the terms "child," "children," "descendant," and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.<sup>17</sup>

B. As used in this Will, the term "Code" shall mean the Internal Revenue Code of 1986, as amended, including amendments adopted after the date of this Will.

C. A disposition in this Will to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one such share for each member living at the time such disposition becomes effective of the class consisting of first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>18</sup>

**FIFTEENTH:** I direct that the validity and effect of this Will and the testamentary dispositions contained herein shall be governed by the laws of the State of [applicable law] in effect from time to time.

IN WITNESS WHEREOF, I, [name of testator], have to this my Last Will and Testament subscribed my name and set my seal this [date of execution of Will].

(L.S.)

Subscribed and sealed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by him/her to us to be his/her Last Will and Testament, and thereupon we, at the request of the said Testator, in his/her presence and in the presence of each other, have hereunto subscribed our names as witnesses this [date of execution of Will].

residing at

residing at

residing at

[self-proving affidavit omitted]

<sup>17</sup> The attorney-drafter must ascertain whether this definition is what the client wishes

<sup>18</sup> The attorney-drafter must ascertain whether this definition is what the client wishes. An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

**FORM 7**  
**WILL FOR MARRIED PERSON—CHILDREN UNDER AGE 21—NO  
TAX-DRIVEN DIVISION OF RESIDUE—RESIDUARY ESTATE TO A  
MARITAL QTIP TRUST, OR IN SEPARATE SHARE TRUSTS FOR  
SURVIVING CHILDREN UNDER AGE 30, WITH PARTIAL PRINCIPAL  
PAYOUT AT 25<sup>1</sup>**

I, [name of testator], of [domicile of testator], do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

**FIRST:**

A. I give and bequeath all furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles and their accessories, and all other tangible personal property (excluding cash and bullion) owned by me at the time of my death and used primarily in a trade or business at the time of my death) to my **husband/wife**,<sup>2</sup> [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my children

<sup>1</sup> This form contemplates that the decedent's executor will elect under Section 2056(b)(7) of the Code for some or all of the net residuary estate to be treated as QTIP property and thus to qualify for the federal estate marital deduction. There are several advantages to this structure, compared to the structure described in note 9 of Form 6 which contemplates an optional disclaimer by the surviving spouse. First, with this form, by electing not to QTIP a portion of the residuary estate (under subparagraphs 1 and 6 of paragraph D of Article NINTH), the executor, not the surviving spouse, largely determines the federal estate tax treatment of the net residuary estate. Second, if the executor applies for an extension to file the estate tax return, the executor may wait until 15 months after the decedent's death to decide on the most appropriate size of marital deduction. (In contrast, the disclaimer contemplated in the structure described in note 9 of Form 6 must be made within nine months of death, or nine months after a spouse under the age of 21 years reaches that age.) Third, with this form, the executor can tend to maximize the effect of the prior transfer credit under Section 2013 of the Code, if it is anticipated that the surviving spouse will not survive the first spouse for an appreciable time. (The prior transfer credit will be allowable with respect to the income interest in the "QTIP-able" trust with respect to which the QTIP election is not made.)

There are two principal disadvantages to the structure contemplated by this form. First, all the net income of the net residuary estate must be paid to the surviving spouse and no distributions may be made to any other person from the trust during the surviving spouse's lifetime, even though the QTIP election may not have been made with respect to some or all of the net residuary estate. In contrast, if the portion with respect to which the QTIP election is not made passes into a trust for the benefit of the surviving spouse and descendants, both subsequent income tax and gift tax could be saved. For example, the executor could distribute trust income to a descendant who is in a lower income tax bracket than the surviving spouse is. Similarly, if a distribution is made from such trust to a descendant, no gift tax will be imposed. If the surviving spouse were to make the same gift from his or her own assets (or assets of the QTIP trust distributed to him or her), however, gift tax could be imposed.

The structure contemplated by this form might be considered by a married person who wishes his or her spouse to be guaranteed to receive all income generated after his or her death and views income and gift tax planning for the surviving spouse and for those who ultimately are expected to succeed to the couple's property (e.g., their descendants) as of secondary importance.

<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

who survive me, to be divided **between/among** them by my **Executor/Executors**, in the exercise of sole and absolute discretion, in as nearly equal portions as may be practicable, having due regard for the personal preferences of my children.<sup>3</sup>

B. Notwithstanding the foregoing, if any child of mine who becomes entitled to property pursuant to paragraph A of this Article is under the age of twenty-one (21) years at the time of my death, I direct my **Executor/Executors**, after appropriate consultation with such child and with his or her Guardian or Guardians, if any, or with the person with whom such child resides, to select from the property herein bequeathed to such child such articles, if any, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem appropriate for ownership by such child. Any articles so selected shall be delivered to the Guardian or Guardians or to the person with whom such child resides to be held, without bond, for such child's benefit, and the receipt of such Guardian or Guardians or such person, as the case may be, shall constitute a complete discharge to my **Executor/Executors** with respect to any such articles so delivered. Any articles not so selected shall be sold and the net proceeds of sale shall be held for such child in accordance with the provisions of Article EIGHTH.<sup>4</sup>

C. The bequest of any sculpture, painting or other item of artwork under this Article shall include all applicable copyrights and other rights of reproduction therein. I direct that the decision of my **Executor/Executors** as to the identification and distribution of any property under this Article shall be final and binding on all persons having an interest in my estate. I direct my **Executor/Executors** to pay as an expense of administration of my estate the cost of shipping any item bequeathed in this Article to the legatee thereof.

## SECOND:

A. I give, devise and bequeath all real property owned by me at the time of my death and used by me or by my family as a place of residence (whether permanent, temporary or seasonal) or held in connection with such use, including all buildings thereon and all rights and easements appurtenant thereto and all policies of insurance relating thereto, to my **husband/wife**, [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my descendants who survive me, *per stirpes* as tenants-in-common.<sup>5</sup>

B. I give, devise and bequeath all stock owned by me at the time of my death in any corporation which is the owner of any building in which I have a cooperative apartment, together with any lease to such apartment and all right, title and

<sup>3</sup> Consider changing this disposition to descendants *per stirpes*, if appropriate.

<sup>4</sup> Consider changing this to an authorization as opposed to a direction to sell and/or adding property or proceeds to the trust held under Article SEVENTH, if appropriate.

<sup>5</sup> Consider changing this disposition to surviving children, *per capita*, if appropriate. Also consider whether it would be appropriate to dispose of the residential real estate as part of the residue (i.e., in trust), rather than outright to spouse and/or children and descendants. If the spouse does not survive the testator, consider directing a sale of the real estate, if appropriate, with the proceeds added to the residue. See Form 6.

interest owned by me at the time of my death in and to any agreements relating to said building and the real property on which it is located, together with all policies of insurance relating thereto, to my husband/wife, [name of spouse], if he/she survives me, or, if he/she does not survive me, to my descendants who survive me, *per stirpes* as tenants-in-common.<sup>6</sup>

**THIRD:**

A. I give and bequeath the following amounts to the following individuals who survive me:<sup>7</sup>

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];

B. I give and bequeath the following amounts to the following organizations to be used by each for its general purposes, unless otherwise noted below:

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution]<sup>8</sup>

**FOURTH:** If at the time of my death I have any power of appointment over any property then held in trust or otherwise, except as provided in paragraph B of Article NINTH, I hereby declare that I intend not to exercise such power and that nothing herein contained shall constitute an exercise thereof in whole or in part.

**FIFTH:** All the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situated, of which I shall die seized or possessed or of which I shall be entitled to dispose of at the time of my death (my "residuary estate"), after the payment therefrom of my funeral expenses, my debts, the expenses of administering my estate and the taxes directed in Article NINTH to be paid from my residuary estate (my "net residuary estate"), shall be disposed of as follows:

A. If my husband/wife, [name of spouse], survives me, I give, devise and bequeath my net residuary estate to the **Trustee/Trustees** hereinafter named, IN

<sup>6</sup> See note 4, above

<sup>7</sup> If the spouse survives the testator, consider making these gifts to the spouse with the suggestion that the spouse then give the gifts to the selected individuals and/or charities.

<sup>8</sup> Consider using a charitable remainder trust to receive retirement benefits if analysis shows that a charitable remainder trust would be more beneficial in the event that the spouse does not survive the testator.

TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph A of Article SIXTH.<sup>9</sup>

**B.** If my **husband/wife** does not survive me, but any descendant of mine survives me, my net residuary estate shall be divided into a sufficient number of equal shares such that there shall be set aside one (1) such share for each child of mine who survives me and one (1) such share for the collective descendants who survive me of each child of mine who shall have predeceased me. Each such share so set aside for the collective descendants of any child of mine who shall have predeceased me shall be further subdivided into *per stirpital* subshares for such descendants who survive me. Each child who survives me for whom a share is set aside and each descendant who survives me of a child of mine who has predeceased me for whom a *per stirpital* subshare is set aside is herein referred to as the "primary beneficiary" of such share or subshare. Each such share or subshare shall be disposed of in accordance with the provisions of paragraph A of Article SEVENTH.

**C.** If neither my **husband/wife** nor any descendant of mine survives me, I give, devise and bequeath my net residuary estate, or, if upon the termination of any trust hereunder, there is no effective disposition of the trust property by another provision of this Will, I direct that such trust property and any other property which is directed to be disposed of in accordance with the provisions of this paragraph C, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to *[name of beneficiary or beneficiaries to receive property if neither spouse nor any descendant survives]*.

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<sup>9</sup> Alternately, this section could be revised to provide explicitly that the surviving spouse may disclaim his or her interest in some portion or all of the trust held in accordance with the provisions of paragraph A of Article SIXTH. In the event of such a disclaimer, the disclaimed property could pass to a "sprinkle" trust for the benefit of the surviving spouse and descendants (such as the "Portion B" trust found in paragraph B of Article EIGHTH of Form 8). Sample disclaimer language is as follows:

If my husband/wife, or **his/her Executor/Executors**, shall disclaim or renounce **his/her** interest in any part or all of the trust held for **his/her** benefit in accordance with the provisions of paragraph A of Article SIXTH, I give, devise and bequeath the property which would have been used to fund such part or all of the principal of such trust to the Trustee/Trustees hereinafter named, IN TRUST, to be held and disposed of as a separate trust in accordance with the provisions of **paragraph/Article** *[insert cross-reference to a new paragraph or Article modeled on paragraph B of Article EIGHTH of Form 8]*

Note that this ability of the surviving spouse to disclaim into a sprinkle trust gives the surviving spouse more authority to determine the federal estate tax treatment of the net residuary estate. For further discussion, see note 9 in Form 6.

**SIXTH:**

**A.** Any property which is directed to be held and disposed of in accordance with the provisions of this paragraph or this Article shall be held as a separate trust by the **Trustee/Trustees** hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income, on a quarterly basis insofar as may be practicable, but at least annually, to or for the benefit of my **husband/wife**, [name of spouse], during **his/her** life. I authorize the **Trustee/Trustees** (other than my **husband/wife**), to pay over to my **husband/wife** or to apply for **his/her** benefit, out of the principal of the trust such portion thereof, including the whole, as the **Trustee/Trustees** (other than my **husband/wife**) may select, in the exercise of sole and absolute discretion.

Upon the death of my **husband/wife**, [name], the remainder of the principal of the trust, if any, as it is then constituted, subject to the payment of taxes as provided in paragraph B of Article NINTH, shall be transferred, conveyed, and paid over, and I give, devise and bequeath the same, to or for the benefit of such person or persons or corporation or corporations (other than my **husband/wife**, **his/her** estate, **his/her** creditors or the creditors of **his/her** estate), to such extent, if any, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as my **husband/wife** may, by acknowledged written instrument executed by **him/her** during **his/her** life and delivered to the **Trustee/Trustees**, or by **his/her** Last Will and Testament, appoint by a specific reference to this power. Any such written instrument of appointment shall be revocable by any subsequent instrument or by the Will of my **husband/wife**, by specific reference to such prior instrument, unless pursuant to its terms such prior instrument is specified to be irrevocable. In the event of any inconsistency between any such instrument and a subsequent instrument or **husband/wife's** Will which is not resolved by the terms of such instruments and Will, such instruments and Will shall be applied in the following order of priority: first, any such instrument which pursuant to its terms is specified to be irrevocable; second, my **husband/wife's** Will (regardless of whether executed before or after any such instrument); third, any such instrument executed after any other such instrument. My **husband/wife** may, at any time and from time to time during **his/her** life, release such power of appointment with respect to any or all of the property subject to such power and may further limit the persons or organizations in whose favor such power may be exercised.

If this power of appointment is for any reason not effectively exercised in whole or in part, then any property which is directed to be disposed of as provided in this paragraph, to the extent not effectively appointed by my **husband/wife**, shall, upon **his/her** death, be divided into a sufficient number of equal shares so that there shall be set aside one (1) such share for each child of mine who is living at the time of such division and one (1) such share for the collective descendants who are then living of each child of mine who shall have previously died leaving one or more descendants who are living at the time of such division. Each such share so set aside for the collective descendants of any child of mine who shall have previously died shall be further subdivided into *per stirpital* subshares for such descendants. Each child of mine who is then living for whom a share is set aside and each such descendant of mine who is then living for whom a share or



subshare is set aside is hereinafter referred to as the "primary beneficiary" of such share or subshare. Each such share or subshare shall be disposed of in accordance with the provisions of paragraph A of Article SEVENTH.

B. I intend (a) that any trust held under paragraph A of this Article will constitute an interest which is a "qualifying income interest for life" as defined in Section 2056(b)(7) of the Code, and (b) that such property will constitute "qualified terminable interest property" as defined in that Section. To that end, the following provisions shall apply:

1. I direct that this trust shall not be funded with any property or the proceeds of any property (i) which would not qualify for the marital deduction allowable in determining the federal estate tax on my estate, or (ii) which is includible in my gross estate for federal estate tax purposes and also subject by reason of my death to any inheritance tax, succession tax, transfer tax, estate tax or other death duty in any foreign country or political subdivision thereof, except that the property described in this clause (ii) may be allocated to the trust to the extent that other property of my estate which does qualify for the marital deduction is not sufficient to fund the trust in full.

2. If any property forming a part of the principal of this trust is unproductive at the time of its receipt by the **Trustee/Trustees** or thereafter becomes unproductive, the **Trustee/Trustees** may retain the same if the **Trustee/Trustees** shall determine the retention of such property to be in the best interests of the trust estate, provided, however, that the **Trustee/Trustees**, upon written demand of my **husband/wife**, shall make such property productive or convert it to productive property within a reasonable time.

3. I direct that this Will shall be construed and this trust shall be administered in all respects so as to effectuate my intention referred to above, and that the **Trustee/Trustees** shall not exercise any of the general powers conferred elsewhere in this Will or otherwise to the extent such exercise would defeat such intention. Any net income on hand or accrued upon the death of my **husband/wife** shall be paid to **his/her** estate to the extent provided by applicable law and to any greater extent required to make the interest of my **husband/wife** in such trust a qualifying income interest for life.

#### SEVENTH:

A. Any share or subshare which is directed to be disposed of in accordance with the provisions of this paragraph A shall be disposed of as follows:

1. With respect to any share or subshare set aside for a primary beneficiary who has then attained the age of thirty (30) years, I give, devise and bequeath the share or subshare to the primary beneficiary.

2. With respect to any share or subshare set aside for a primary beneficiary who has then attained the age of twenty-five (25) but not thirty (30) years, I give, devise and bequeath one-half (½) of the share or subshare

to the primary beneficiary. The balance of the share or subshare shall be held and disposed of in accordance with the provisions of paragraph B of this Article.

3. With respect to any share or subshare set aside for a primary beneficiary who has not then attained the age of twenty-five (25) years, the share or subshare shall be held and disposed of as provided in paragraph B of this Article.

B. Any share or subshare which is directed to be held and disposed of in accordance with the provisions of this paragraph B shall be held by the **Trustee/ Trustees**, IN TRUST, as a separate trust, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners either outright or in trust, as the **Trustee/ Trustees** may determine in the exercise of sole and absolute discretion, may select to or for the benefit of such one or more members of the class consisting of the primary beneficiary for whom the share or subshare shall have been set aside and his or her descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of the others, as the **Trustee/ Trustees** may select, in the exercise of sole and absolute discretion. Any net income not so paid or applied, which may consist of the whole of such income, shall be added to the principal of the trust and thereafter shall be held, administered and disposed of as a part thereof.

With respect to any trust held for a primary beneficiary who had attained the age of twenty-five (25) but not thirty (30) years at the time such share or subshare initially was set aside for him or her, when such primary beneficiary attains the age of thirty (30) years, the trust shall terminate, and the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same to the primary beneficiary.

With respect to any trust held for a primary beneficiary who had not attained the age of twenty-five (25) years at the time such share or subshare initially was set aside for him or her, when such primary beneficiary attains the age of twenty-five (25) years, one-half (½) of the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to the primary beneficiary. The balance of the share or subshare shall continue to be held and disposed of as provided in this paragraph B, until such primary beneficiary attains the age of thirty (30) years, whereupon the trust shall terminate, and the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same to the primary beneficiary.

C. 1. Upon the death of the primary beneficiary before attaining the age of thirty (30) years, if the primary beneficiary has any descendants then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be divided into shares for the primary beneficiary's then living descendants *per stirpes*. Each descendant

for whom a share is set aside shall thereafter be the "primary beneficiary" of such share. Each share so set aside for a primary beneficiary shall be disposed of in accordance with the provisions of paragraph A of this Article.

2. Upon the death of the primary beneficiary before attaining the age of thirty (30) years, if the primary beneficiary does not have any descendants then living, but any descendant of mine is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be divided into shares for the then living descendants *per stirpes* of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary, which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of mine or which ancestor was me. Each descendant for whom a share is set aside shall thereafter be the "primary beneficiary" of such share. Each share so set aside for a primary beneficiary shall be disposed of in accordance with the provisions of paragraph A of this Article.

3. Upon the death of the primary beneficiary before attaining the age of thirty (30) years, if the primary beneficiary does not have any descendants then living and no descendant of mine is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

D. If not sooner terminated pursuant to the foregoing provisions of this Article, each such trust held hereunder shall terminate upon the date which is twenty-one (21) years after the date of death of all the descendants of my parents and my spouse's parents who are living at the time of my death, and thereupon the principal, each such trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over to the primary beneficiary, if he or she is then living, or, if he or she is not then living, to the descendants of such primary beneficiary who are then living, *per stirpes*, or, if none, to the then living descendants, *per stirpes*, of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of mine or which ancestor was me, or, if no descendant of mine is then living, the principal of each such trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

E. Notwithstanding the foregoing, if upon the division as provided above of any property disposed of in accordance with the provisions of this Article a separate trust is already being held hereunder for a primary beneficiary, then the separate share or subshare for such primary beneficiary resulting from such division instead may be added, in the sole and absolute discretion of the **Trustee/ Trustees**, to the existing trust for such primary beneficiary, thereafter to be held, administered and disposed of as a part thereof.

**EIGHTH:** If any individual under the age of twenty-one (21) years becomes entitled to any property from my estate upon my death or any property from any trust created hereunder, such property shall be held by, and I give, devise and bequeath the same to, the **Trustee/Trustees** hereinafter named, IN TRUST, for the following uses and purposes: *To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent, including the whole thereof, for such individual's general use and at such time or times as the Trustee/Trustees, in the exercise of sole and absolute discretion, shall determine, until such individual reaches the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before reaching the age of twenty-one (21) years, the Trustee/Trustees shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.*

If my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, in the exercise of sole and absolute discretion, shall determine at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed, or to the person with whom such individual resides.

Notwithstanding the foregoing, unless sooner terminated as provided above, each trust held under this Article shall terminate on the date which is twenty-one (21) years after the date of death of the last to die of all the descendants of my parents and my spouse's parents who are living at the time of my death, and upon such termination the trust estate of each such trust shall be transferred, conveyed, and paid over to the individual for whom it is being held, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian, including but not limited to a custodian selected by the **Trustee/Trustees**, for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed.

The receipt of such individual, if an adult, or the parent, guardian or custodian or any other person to whom any principal or income is transferred and paid over pursuant to any of the above provisions shall be a full discharge to my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, from all liability with respect thereto.

**NINTH:**

**A.** Subject to the provisions of paragraph B of this Article, all estate, inheritance, legacy, succession, transfer or other death taxes, including any interest and penalties thereon, imposed by any domestic or foreign taxing authority (other than any additional estate tax imposed by Sections 2031(c), 2032A or 2057 of the Code, any generation-skipping transfer tax imposed by Chapter 13 of the Code,

or any comparable taxes imposed by any other taxing authority) with respect to all property taxable by reason of my death and which passes under this Will shall be charged against and paid without apportionment out of my residuary estate and without apportionment within my residuary estate; provided, however, that any generation-skipping transfer tax imposed by Chapter 13 of the Code (or by the comparable laws of any other taxing authority) on a direct skip with respect to property passing under Articles FIRST, SECOND or THIRD also shall be charged against and paid without apportionment out of my residuary estate and without apportionment within my residuary estate.<sup>10</sup>

B. The tax on any Qualifying Terminable Interest Property ("QTIP Property") included in my gross estate under Section 2044 of the Code held in accordance with the provisions of paragraph A of Article SIXTH, shall be charged, apportioned and paid in the manner as provided in Section 2207A of the Code. If not already provided by applicable law, to the extent that I have power to do so, I direct that state and foreign taxes shall be charged, apportioned to and paid from the property at the marginal rate in the same way federal tax is payable under Section 2207A of the Code, so that QTIP Property shall contribute all the additional tax at the marginal rate caused by its inclusion. I further direct that any provision of my spouse's Will or other governing instrument that provides which portion of a trust, or which of two or more trusts, of QTIP Property should pay taxes shall be followed and I waive any right of reimbursement under Section 2207A of the Code and comparable provision of any other law which are inconsistent with that provision.

C. With respect to any trust which is held for my **husband/wife** in accordance with the provisions of paragraph A of Article SIXTH, upon the death of my **husband/wife**, except to the extent that **his/her** Will shall by specific reference to this provision direct to the contrary, the **Trustee/Trustees** shall pay from the principal of this trust the increase in all estate, inheritance, legacy, succession, transfer or other death taxes (including any interest and penalties thereon) [hereinafter "taxes"], imposed by any domestic or foreign taxing authority on the death of my **husband/wife** by reason of the inclusion in **his/her** gross estate for the purposes of any such tax of all or any part of the principal of such trust (such increase being the difference between all such taxes actually paid by reason of the death of my **husband/wife** and the taxes which would have been payable if such part or all of the principal of such trust had not been included in **his/her** gross estate), provided, however, that such payments shall be made only from the portion of such trust which, without regard to the provisions of this paragraph, shall be includible in the gross estate of my **husband/wife** for federal estate tax purposes. Such payments shall be made either to the legal representative of the estate of my **husband/wife** for payment by such legal representative of such

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<sup>10</sup> The tax apportionment clause may need to be changed if there is a mixed residue, either marital and taxable nonmarital residue or charitable and noncharitable residue. Note that if the Will contains a qualified domestic trust ("QDOT"), special tax provisions will be required (as well as special QDOT provisions for the marital trusts, and attention to any outright bequests to the spouse). Note also that if the Form is revised to provide for a disclaimer by the surviving spouse into a "sprinkle" trust, the tax apportionment clause should be changed as well.

taxes, interest and penalties or directly to such taxing authorities as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, shall determine. The **Trustee/Trustees** may rely solely upon the written certification of the legal representative of the estate of my **husband/wife** as to the amount of such increase payable to each taxing authority, may pay any such increase in one or more installments and shall have no duty or responsibility to make any further inquiry or take part in the determination or apportionment of such taxes, and upon making payment of such increase as the same shall be finally determined the **Trustee/Trustees** shall have no further liability in connection therewith. Payment of such increase in such taxes, interest and penalties shall fully discharge all liability of such trust for such taxes, interest and penalties, it being my intention and direction that my **husband/wife** not have any power to apportion additional taxes, interest or penalties against such trust.

Notwithstanding the foregoing, I direct that if at the death of my **husband/wife**, there shall be a separate portion of a Qualified Trust to which I shall be deemed to be the transferor for generation-skipping transfer tax purposes, then all taxes referred to in the preceding paragraph on the entire trust for my **husband/wife** shall first be paid from that portion of the trust as to which I am not deemed to be such transferor and from the portion as to which I am deemed to be the transferor only if there is insufficient property in such other portion to pay all such taxes.

D. The following provisions relating to tax elections shall apply:

1. My **Executor/Executors** may, in the exercise of sole and absolute discretion, elect to treat any part or all of any bequest of property passing under this my Will or any other property includible in my estate for federal tax purposes as QTIP within the meaning of Section 2056(b)(7) of the Code, or any successor thereto, and any comparable election granted by any other taxing authority.

2. My **Executor/Executors** may make such other elections under the tax laws, including but not limited to, the election to use the alternate valuation date for estate tax purposes, and the election to treat administrative expenses as deductions against income tax instead of against estate tax, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem advisable, regardless of the effect thereof on any of the interests under this Will, and I direct that there shall be no adjustment of such interests by reason of any action taken by my **Executor/Executors** pursuant hereto.

3. I authorize my **Executor/Executors** to allocate any amount of my generation-skipping transfer ("GST") tax exemption under Section 2631(a) of the Code to such property of which I am the transferor as my **Executor/Executors** shall select in the exercise of sole and absolute discretion, whether or not passing under this Will, including property transferred by me during life whether or not I allocated any GST exemption to such property during my life, and without any duty to favor beneficiaries under this Will over beneficiaries of property passing outside this Will.

4. I authorize my **Executor/Executors**, in the exercise of sole and absolute discretion, to make any adjustment to tax basis authorized by law, including but not limited to increasing the basis of any property included in my estate, whether or not passing under this Will, by allocating any amount by which the bases of assets may be increased. My **Executor/Executors** shall be under no duty and shall not be required to allocate basis increase exclusively, primarily, or at all to assets passing under the Will as opposed to other property included in my estate. I waive any such duty that otherwise would exist. My **Executor/Executors** may elect, in the exercise of sole and absolute discretion and without permission of any court or other authority, to allocate basis increase to one or more or all assets that the **Executor/Executors** may receive or in which the **Executor/Executors** may have a personal interest, to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any Executor to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

5. I authorize my **Executor/Executors** or the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to divide (whether before or after any trust is funded and whether before or after any allocation of GST exemption under Section 2631 of the Code is made) any trust or any property used or to be used to fund or augment any trust created under this Will into two or more fractional shares. The shares shall be held and administered by the **Trustee/Trustees** as separate trusts, but may be managed and invested *in solido*. One of the purposes for granting this authority is to provide an inclusion ratio (within the meaning of Section 2642(a) of the Code) of zero for the separate trust receiving the fractional share to which the allocation of GST exemption is made, and, if that trust is a trust described in Section 2652(a)(3) of the Code, to enable my **Executor/Executors** to make the election described in that section with respect to it as a separate trust.

6. If my **Executor/Executors** shall make the so-called QTIP election under Section 2056(b)(7) of the Code over a portion (but less than all) of any property passing to a trust hereunder, my **Executor/Executors** or the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, divide such property into the portion as to which the election was made and the portion as to which it was not made in the manner prescribed by Treas. Reg. § 20.2056(b)-7(b) or any successor regulation. Those shares shall be held and administered by the **Trustee/Trustees** as separate trusts with identical terms, so that one of said trusts is entirely subject to said election and the other is not subject to it. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

7. Whenever two trusts created under this Will are directed to be combined in a single trust (for example, because property of one trust is to be added to the other trust), whether or not the trusts have different inclusion ratios with respect to any common transferor or have different transferors for generation-skipping transfer tax purposes, the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, instead of combining said trusts,

administer them as two separate trusts with identical terms in accordance with the provisions that would have governed the combined trusts. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*. If anyone adds or is deemed to add by gift or bequest property to a trust created under this Will, I authorize the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to hold the added property as a separate trust with terms identical to the trust to which it would have been added and the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

8. The **Trustee/Trustees** may, in the exercise of sole and absolute discretion, combine any one or more trusts with identical terms for an identical beneficiary or beneficiaries created under this Will as a single trust. The **Trustee/Trustees** may also, in the exercise of sole and absolute discretion, later divide such trust as provided above in this paragraph. Without in any way limiting the absolute discretion of the **Trustee/Trustees** granted by this paragraph, I expect that the **Trustee/Trustees** will not elect to combine two or more trusts with different inclusion ratios or different transferors for generation-skipping transfer tax purposes.

9. Although I have authorized my **Executor/Executors** or the **Trustee/Trustees** to divide any property into separate shares or trusts in order to facilitate administration of my estate or of certain trusts created hereunder, I direct that any division made under said powers shall be disregarded for purposes of the commissions allowable to the **Trustee/Trustees**, and each separate trust created as the result of any such division shall bear its *pro rata* share, based on its then market value, of the commissions which would have been payable from time to time by the original fund or trust if the same had not been divided.

10. Notwithstanding the foregoing, if my **husband/wife** or any other beneficiary disclaims any interest created under this Will within nine (9) months of my death, and my **husband/wife** or such other beneficiary is acting as a fiduciary under this Will, neither my **husband/wife** nor such other beneficiary shall participate in any of the elections (including any allocation and any division of property) hereinabove described which affects any property so disclaimed by such individual.

11. With respect to any trust held for a primary beneficiary under paragraph B of Article SEVENTH, the **Trustee/Trustees** hereunder (other than any beneficiary of such trust) may, in the exercise of sole and absolute discretion, with respect to all or any part of the principal of the trust (including a pecuniary amount), by an instrument filed with the trust records, (a) confer on such primary beneficiary a general power of appointment within the meaning of Section 2041 of the Code (including a power the exercise of which requires the consent of the **Trustee/Trustees** other than any beneficiary) that may be exercised by deed or will but that may take effect only upon the death of such primary beneficiary and may dispose only of the principal as then constituted, (b) eliminate such power for all or any part of such property as to which such power was previously created, (c) irrevocably



release the right to create or eliminate such power, and (d) divide the trust property into two fractional shares based upon the portion of the trust that would be includible in the gross estate of the primary beneficiary holding such power if he or she died immediately before such division (in which case the power thereafter shall extend to all of one share and no part of the other), and each such share shall be administered as a separate trust unless the **Trustee/Trustees** (other than any beneficiary), in the exercise of sole and absolute discretion, thereafter shall combine such separate trusts into a single trust, which the **Trustee/Trustees** may do. In authorizing such action it is my hope (but I do not direct) that a general power will be kept in effect when the **Trustee/Trustees** (other than any beneficiary) believe the inclusion of the property affected thereby in the primary beneficiary's gross estate may achieve a significant savings in taxes, for example by having an estate tax rather than a generation-skipping transfer tax imposed on the property subject to the general power, or by permitting a greater use of the primary beneficiary's GST exemption under Section 2631(a) of the Code.

**TENTH:**

**A.** I appoint *[name(s) of Executor(s)]* **Executor/Executors** of this, my Last Will and Testament. If *[name of Executor]* fails to qualify or ceases to act as an Executor, I appoint *[name of successor Executor]* Executor in **his/her** place. If *[name of Executor]* also fails to qualify or ceases to act as Executor hereunder, I appoint *[name of successor]* Executor in **his/her** place.

**B.** I appoint *[name(s) of Trustee(s)]* **Trustee/Trustees** of the trusts hereby created. If *[name of Trustee]* fails to qualify or ceases to act as a Trustee hereunder, I appoint *[name of successor Trustee]* as Trustee in **his/her** place. If *[name of Trustee]* also fails to qualify or ceases to act as Trustee hereunder, I appoint *[name of successor Trustee]* as Trustee in **his/her** place.<sup>11</sup>

**C.** Notwithstanding any provision herein to the contrary, at no time shall more than one (1) bank or trust company be acting as Executor of this my Will or as Trustee with respect to any single trust hereunder.

**D.** Subject to the provisions of paragraph C of this Article, I authorize, but do not direct, my **Executor/Executors** and the **Trustee/Trustees** acting hereunder from time to time, in the exercise of sole and absolute discretion, to appoint as a co-Executor or as a co-Trustee, as the case may be, such individual(s), bank or trust company as my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court.

Subject to the provisions of paragraphs A, B and C of this Article, I authorize, but do not direct, each Executor and each Trustee acting hereunder from time to

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<sup>11</sup> Depending on the circumstances, the client may wish to designate different Trustees to act with respect to different trusts.

time, in the exercise of sole and absolute discretion, to appoint such individual(s) or such bank or trust company as such Executor or Trustee, as the case may be, in the exercise of sole and absolute discretion, shall select as successor **Executor/Executors** or successor **Trustee/Trustees** to act in his, her or its place if he, she or it should cease to act. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court and may be revoked by the appointing **Executor/Executors** or **Trustee/Trustees**, as the case may be, in the same manner prior to its becoming effective, and succeeded by a later appointment, the last such appointment to control.

Subject to the provisions of paragraphs A, B and C of this Article, if any Executor or any Trustee shall for any reason cease to act without having appointed a successor, then I authorize the remaining Executor or Executors or Trustee or Trustees, as the case may be, to appoint a successor by a written instrument filed with the clerk of the appropriate court. I direct, however, that pending the qualification of such successor, the remaining Executor or Executors or Trustee or Trustees, as the case may be, shall have all the rights, powers and authority herein conferred upon my **Executor/Executors** or the **Trustee/Trustees** generally.

The appointment of any co-Executor or co-Trustee or successor Executor or successor Trustee hereunder shall be on such terms and conditions, including the fixing of compensation, as may be set forth in the instrument effecting such appointment.<sup>12</sup> In particular, without limiting the foregoing, the term of service and duties of a co-Executor or co-Trustee or successor Executor or successor Trustee, as the case may be, may be limited if so specified by his, her or its instrument of appointment. The co-Trustees or successor Trustees of different trusts, portions, shares, or subshares created under this Will need not be identical.

E. Any Executor or Trustee may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the clerk of the appropriate court.

F. Should it be necessary for a representative of my estate to qualify in any jurisdiction wherein any Executor named herein cannot or may not desire to qualify as such, any other Executor named herein may, without giving any security, act as Executor in such jurisdiction and shall have therein all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will, or, if such other Executor cannot or does not desire to qualify as Executor in such other jurisdiction, or, if at any time and for any reason there shall be no Executor in office in such other jurisdiction, I appoint as Executor therein such person or corporation as may be designated by my **Executor/Executors** acting hereunder. Such substituted Executor shall, without giving any security, have in such other jurisdiction all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will.

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<sup>12</sup> Consider adding provision specifying fiduciary compensation for initial Executor(s) and Trustee(s) and their successors

G. Except as provided by law, I direct that my **Executor/Executors** shall not be required to file any inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.<sup>13</sup>

H. Except as otherwise expressly herein provided, any actions or decisions of the Executors or the Trustees, if more than two (2) shall be acting, shall be determined by a majority of them.

I. Notwithstanding any other provision of this Will, no Trustee who is a current beneficiary of income and/or principal of any trust created hereunder shall ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, accumulations, or uses of income or principal by the **Trustee/Trustees** to or for any beneficiary (including, but without limitation, any power described in subparagraphs 13 through 15 of paragraph A of Article TWELFTH), (ii) as to any trust held in accordance with the provisions of paragraph A of Article SIXTH, the exercise of discretion to allocate receipts or expenses between principal and income or (iii) the exercise of any general power of appointment described in Sections 2041 or 2514 of the Code. No Trustee who is under a duty to support a beneficiary or who is acting as a guardian of any person who is a beneficiary shall participate in the exercise, or the decision not to exercise, any discretion over payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Section 2042(2) of the Code) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall serve as Trustee of any trust which holds property with respect to which such individual has made a qualified disclaimer within the meaning of Section 2518 of the Code.

J. No Executor shall participate in any decision where participation would cause that Executor to be deemed to have made a transfer for estate, gift or generation-skipping transfer tax purposes or cause a renunciation which would otherwise constitute a qualified disclaimer under Section 2518 of the Code to be

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<sup>13</sup> If non-New York resident, replace paragraph with the following:

To the extent permitted by law, I direct that my **Executor/Executors** shall not be required to file an inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

treated as not so qualified, and if by reason of this limitation there is no Executor then acting who is eligible to participate in such decision, the then-acting **Executor/Executors** shall appoint a co-Executor pursuant to paragraph D of this Article.

K. Every act done, power exercised or obligation assumed by any Executor or Trustee pursuant to the provisions of this Will shall be held to be done, exercised or assumed, as the case may be, by the Executor or Trustee acting in a fiduciary capacity and not otherwise, and every person, firm or corporation contracting or otherwise dealing with the Executor or Trustee shall look only to the funds and property of my estate or the trust estate for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Executor or Trustee shall not be individually liable therefor even though the Executor or Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of my estate or the trust estate.

L. No Executor or Trustee acting hereunder shall be liable for any loss which may result by reason of any investment made or retained pursuant to the powers conferred hereunder, except through his, her or its gross negligence or willful misconduct.

M. Whenever the terms "**Executor/Executors**" and "**Trustee/Trustees**" are used in this Will, they shall be deemed to refer to the Executor or Executors and the Trustee or Trustees, as the case may be, acting hereunder from time to time. Except as otherwise provided herein, each Executor and each Trustee taking the place of any other Executor or Trustee shall have all the same estates, powers, discretions and duties, including any power hereinabove given to fill vacancies, as if appointed an original Executor of this my Will or an original Trustee of any trust created hereunder.

**ELEVENTH:** I appoint my **husband/wife**, [*name of spouse*], Guardian of the person and property of each minor child of mine, or if **he/she** fails to qualify or ceases to act, then I appoint [*name of successor Guardian*] Guardian in **his/her** place.

**TWELFTH:**

A. In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, I hereby expressly grant to my **Executor/Executors** and to the **Trustee/Trustees** hereunder the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised by my **Executor/Executors** and/or the **Trustee/Trustees** as my **Executor/Executors** and/or the **Trustee/Trustees** may deem advisable, in the exercise of sole and absolute discretion (but subject to the provisions of paragraph B of Article SIXTH):

1. To purchase or otherwise acquire and to retain, whether originally a part of my estate or any trust held hereunder or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property, including, but without limitation, foreign real estate, foreign securities, interests in any business venture (incorporated or unincorporated), securities of any corporate fiduciary (or any suc-

cessor or affiliated corporation) and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, partnerships, and limited liability companies (participating therein as a general or limited partner or member), whether or not the property so invested in or the entity whose securities are so invested in is located in the state in which this Will is offered for original probate or in any other state or country, and whether or not such investment be secured or unsecured, or shall be unproductive, underproductive, overproductive or of a wasting nature, or shall constitute all or the greater part of the assets of my estate or the particular trust for which such investments are made, and whether or not the investment in the securities, stocks, bonds or notes of any one corporation or association shall constitute all or the greater part of the issued and outstanding securities, stocks, bonds or notes of such corporation or association, and to make or retain any or all of such investments not solely for the preservation of principal or production of income but also for the possibility of an increase in value, and to render liquid the assets held by my fiduciaries, in whole or in part, and to hold cash or readily marketable securities of little or no yield for such period as my fiduciaries may deem advisable;

2. To sell, lease, pledge, mortgage, transfer, exchange, convert, grant options with respect to, or otherwise dispose of, any and all real or personal property or interests therein, at any time forming a part of my estate or any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions, my fiduciaries may deem desirable; and to enter into leases, mortgages or options which extend beyond the period fixed by law for leases and options made by fiduciaries or beyond the term of the trust;

3. To borrow money from any lender for any purpose, and to mortgage or pledge as security upon any terms and conditions any real or personal property held;

4. To take part in the management of any business in which investment is retained or made hereunder and to delegate duties with respect to such management, with the requisite powers, to any employee, manager, partner or associate of such business, without liability for such delegation; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to subject to the risks of any such business any part or all of my estate or any trust estate, for such term or period as my fiduciaries may determine in the exercise of sole and absolute discretion; to advance money or other property to any such business; to make loans, subordinated or otherwise, of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business, either alone or with other persons interested therein, and to secure such loan or loans by a pledge or mortgage of any part of my estate or any trust estate; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners,

associates and officers of any such business either individually or through an officer or officers if any fiduciary be a corporation, and to receive compensation from such business for so acting; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to liquidate, either alone or jointly with others, any such business or any interest in any such business; and generally to exercise any and all powers as my fiduciaries may deem necessary in connection with the management, sale or liquidation of any such business;

5. To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein which may form at any time a part of my estate or any trust estate; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith;

6. To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships, limited liability companies and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of my estate or any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as my fiduciaries may deem advisable;

7. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps which they may deem necessary or proper to obtain the benefits of any such transaction;

8. To rent office space, whether or not from, or in conjunction with any other such space being used by, any beneficiary hereunder, or any relative of mine or of any beneficiary hereunder, or any fiduciary hereunder in his, her or its individual capacity, and to pay the expenses thereof from the principal of my estate or the respective trust estate;

9. To appoint, employ and remove at any time and from time to time any accountants, attorneys, investment or other expert advisers, agents, clerks and employees, including any fiduciary hereunder acting in his, her or its individual capacity or the officer, employee or affiliate of any fiduciary, or any firm, partnership, corporation or other organization in which a fiduciary

may have an interest; and to fix and pay their reasonable compensation and incidental employment benefits from the funds of my estate or any trust estate without reducing the compensation to which any fiduciary is otherwise entitled hereunder;

10. To place and leave all or any part of the funds or securities at any time held by my estate or any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of my **Executor/Executors** or the **Trustee/Trustees** to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account"; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal;

11. To register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; to hold any security in bearer or non-certificated form; and to use a central depository for securities;

12. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which may at any time form part of my estate or any trust estate or which may be liens or charges against any property of my estate or the trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of my estate or any trust estate against others or of others against my estate or the trust upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith, and to abandon any real or personal property which my fiduciaries in the exercise of sole and absolute discretion may determine to be worthless;

13. To divide any trust, into one or more separate trusts for the benefit of one or more of the beneficiaries (to the exclusion of the other beneficiaries) of the trust so divided, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a Subchapter S corporation as described in Section 1361(d)(3) of the Code, or for any other purpose as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine;

14. To make or terminate elections with respect to S corporation stock, and to make such adjustments between income and principal to compensate for the consequences of the trust's ownership of S corporation stock as the **Trustee/Trustees** shall deem just and equitable; provided, however, that if the trust holds S corporation stock, the **Trustee/Trustees** shall immediately take such actions to ensure that the trust qualifies as either an Electing Small

Business Trust within the meaning of Section 1361(e)(1)(A) of the Code or a Qualified Subchapter S Trust within the meaning of Section 1361(d)(3) of the Code and (A) if the **Trustee/Trustees** seeks to qualify the trust as an Electing Small Business Trust, the **Trustee/Trustees** shall have the authority to exclude by an acknowledged written instrument any person or organization from having any interest therein, and (B) if the **Trustee/Trustees** shall seek to qualify the trust as a Qualified Subchapter S Trust, the **Trustee/Trustees** shall not make adjustments that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and no Trustee shall exercise any power conferred under this Article or under this Agreement that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and provided further, during the term of any trust created hereunder, (i) if the **Trustee/Trustees** should sell any interest in a corporation or if the assets of any entity constituting a corporation in which the trust has an ownership interest are sold, and (ii) if that corporation has made an election to be taxed under Subchapter S of the Code, then in the sole and absolute discretion of the **Trustee/Trustees**, the **Trustee/Trustees** may distribute to the income beneficiary such amounts of principal as shall be necessary to pay any income tax caused by that sale, if the income or gain attributable to that sale is taxed directly to the income beneficiary under applicable federal tax law;

15. To permit any one or more of the beneficiaries of any trust, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, to occupy any real property and to use any tangible personal property forming part of the trust on such terms as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, whether for rent, rent-free, in consideration of payment of taxes, insurance, maintenance or ordinary repairs, or otherwise; provided, however, that in the case of any trust hereunder which is eligible for the marital deduction, such occupancy or use shall be rent free and any other condition shall be consistent with my intention that my spouse have that degree of beneficial enjoyment of the trust property during life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, so that my spouse's interest is a qualifying income interest for life for purposes of the marital deduction;

16. To make distributions from my estate or any trust in kind or partially in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and without regard to the income tax basis of such property; and any property distributed in satisfaction of a legacy or a distributive share shall be valued as of its date of distribution;

17. To allocate to income or to principal or partly to each any receipt or disbursement, subject to the provisions of paragraph B of Article SIXTH;



18. To hold the assets of any trusts hereby created for convenience of administration and investment as an undivided whole, provided that no such undivided holding shall be deemed to defer or postpone the vesting or distribution of any property so held in trust;

19. To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country;

20. To make payment from time to time on account of commissions and legal fees without requiring the payment of interest thereon and without obtaining any security for the repayment of the same;

21. To delegate any duties or powers, discretionary or otherwise, to any person or institution for such periods and upon such terms and conditions as may be designated in a written acknowledged instrument delivered to such person or institution (including, but without limitation, to delegate discretionary authority to make changes in investments to investment counsel); and, if any duties or powers are delegated to a co-fiduciary, the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument so delivered at any time provided, however, that no duties or powers described in paragraph 1 of Article TENTH may be delegated to an individual who is prohibited in said paragraph from participating in the exercise of such duties or powers;

22. To execute and deliver any and all instruments as the fiduciaries may deem advisable to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with my estate and any trust estate created hereunder as in their judgment the best interests of my estate or such trust may require.

B. The powers granted to my **Executor/Executors** and the **Trustee/Trustees** hereunder in and by this Article or in and by any other Article of this Will may be exercised in whole or in part and from time to time, and without court authorization, and shall be deemed to be supplemental and not exclusive, it being my intention that my **Executor/Executors** and the **Trustee/Trustees** hereunder shall have all of the general powers of fiduciaries as well as all of the special powers herein expressly granted, and all powers incidental to, reasonably to be implied from or necessary to the proper exercise of, the special powers herein enumerated.

#### THIRTEENTH:

A. In accordance with the provisions of Section 315(5) of New York's Surrogate's Court Procedure Act, in any proceeding involving my estate or any trust estate created hereunder it shall not be necessary to serve process upon or to make a party to any such proceeding any person under a disability where

another party to the proceeding has the same interest as the person under a disability.<sup>14</sup>

B. Except with respect to any trust held in accordance with the provisions of paragraph A of Article SIXTH for the benefit of my **husband/wife**, [*name of spouse*], no trust created under this Will shall be subject to the provisions of Section 11-2.1(k) of New York's Estates, Powers and Trusts Law ("EPTL"), nor shall the **Trustee/Trustees** of any such trust be obliged to make any allocation to income in respect of any property held as a part of any trust created hereunder which at any time is underproductive within the meaning of EPTL § 11-2.1(k)(1).<sup>15</sup>

C. I authorize my **Executor/Executors** (other than any beneficiary of my estate), in the exercise of sole and absolute discretion, to allocate the expenses of administering my estate between the income and principal of my estate, including, but not limited to, all to income or all to principal, but to income otherwise payable to my **husband/wife** or to a qualified charitable organization only to the extent that such allocation does not constitute a material limitation within the meaning of Treas. Reg. Section 20.2056(b)-4(a) so as to cause a reduction in the amount allowable to my estate as a federal estate tax marital or charitable deduction.

D. Any application of principal or income to or for the benefit of any beneficiary may be made by payment to such person or persons (including, but not limited to, other trusts, estates, individuals and institutions) as the **Trustee/Trustees** (other than any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder), in the exercise of sole and absolute discretion, shall determine, and the written receipt of the person or persons so paid shall be a full discharge to the **Trustee/Trustees** from all liability with respect thereto. Any such payment or application may be made without bond, without intervention of any guardian or committee, and without the order of any court.

E. The situs of the property of any trust created hereunder may be maintained in any jurisdiction, in the sole and absolute discretion of the **Trustee/Trustees**, and thereafter transferred at any time or times to any other jurisdiction selected by the **Trustee/Trustees**. Upon any such transfer of situs, the trust

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<sup>14</sup> If non-New York resident, replace this paragraph with the following:

In any proceeding involving my estate or any trust estate created hereunder it shall not be necessary to serve process upon or to make a party to any such proceeding any person under a disability where another party to the proceeding has the same interest as the person under a disability.

<sup>15</sup> If non-New York resident, replace this paragraph with the following:

Except with respect to any trust created under Article SIXTH for the benefit of my husband/wife, [*name of spouse*], and with respect to which the so-called QTIP election under Section 2056(b)(7) of the Code has been made, no trust created under this Will shall be subject to the provisions of any law allocating a portion of proceeds of unproductive or underproductive property to accounting income as delayed income, nor shall the **Trustee/Trustees** of any such trust be obliged to make any allocation to income in respect of any property held as a part of any trust created hereunder which at any time is unproductive or underproductive.

estate may thereafter, at the election of the **Trustee/Trustees** of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. If the Trustee or Trustees of any trust created hereunder elect to change the situs of any such trust, said Trustee or Trustees are hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

**FOURTEENTH:**

**A.** I authorize my **Executor/Executors**, in addition to any rights conferred by law and in the exercise of sole and absolute discretion, to renounce or disclaim, in whole or in part or with reference to specific amounts, parts, fractional shares or assets, any devise, legacy, or interest in or privilege or power over any trust or other disposition provided for my benefit under the will or other instrument of any person at any time within nine (9) months after the date of the transfer, whether by reason of such person's death or otherwise, which created an interest in me.

**B.** I authorize any person, in addition to any rights conferred on him or her by law, at any time within nine (9) months after the date of my death to renounce or disclaim, in whole or in part or with reference to specific amounts, parts, fractional shares or assets, any devise, legacy, interest, right, privilege, or power (hereinafter the "Property") granted to that person by this my Will. Any such renunciation or disclaimer shall be made by duly acknowledged, written instrument executed by that person or by his or her conservator, guardian, committee, executor, or administrator, delivered to my **Executor/Executors** and filed with the clerk of the appropriate court. Any such renunciation or disclaimer made by or on behalf of my **husband/wife** or **his/her** estate (a) shall be effective even though as a result thereof the Property is further disposed of to any extent to or in favor of my **husband/wife** or **his/her** estate and (b) shall not be deemed to be a renunciation or disclaimer of any part of such further disposition.

**C.** I authorize any beneficiary of any trust hereunder holding a power of appointment created hereunder, at any time and from time to time during his or her life, to release such power of appointment with respect to any or all of the property subject to such power or to further limit the persons or organizations in whose favor such power may be exercised.

**FIFTEENTH:**

**A.** If my **husband/wife**, [name of spouse], dies simultaneously with me or in such circumstances as to render it impossible to determine who predeceased the other, I direct that I shall be deemed to have predeceased my **husband/wife** and that the provisions of this Will shall be construed upon that assumption.<sup>16</sup>

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<sup>16</sup> Note that the dispositive provisions (including paragraph C of Article FIFTH) need to be consistent in both husband's and wife's Wills.

B. I intend to take full advantage of the special rule under Section 2651(e) of the Code for transfers to great-grandchildren (and more remote descendants) of my parents who are descendants of a predeceased descendant of my parents with respect to any property transferred to or held in trust hereunder for the benefit of descendants of my parents who are descendants of a predeceased descendant of my parents and the provisions of this Will shall be construed consistent with and to carry out that intent.

In addition, (i) if any person dies within ninety (90) days after my death or the termination of any trust created hereunder or any other event covered by Treas. Reg. § 26.2612-1(a)(2) (or any successor thereto), as the case may be, and (ii) if such person had not, in fact, survived my death or the trust termination, as the case may be, such failure to survive would have caused the special rule relating to a predeceased child or other descendant under Section 2651(e) of the Code to apply to any property passing under this Will, then I direct that such person shall be treated with respect to such property as having predeceased me, the trust termination or other event, as the case may be, so that in accordance with Treas. Reg. § 26.2612-1(a)(2) (or any successor thereto), the special rule under Section 2651(e) of the Code shall apply with respect to such property.

**SIXTEENTH:** No beneficial eligibility or entitlement of any individual beneficiary to receive current distributions of income and/or principal from any trust created under this Will shall be subject to assignment, pledge, sale or transfer in any manner by such beneficiary, and no individual beneficiary of any such trust shall have the power to encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any individual beneficiary of any such trust; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of Section 2518 of the Code with respect to interests herein.<sup>17</sup>

**SEVENTEENTH:**

A. As used in this Will, the terms "child," "children," "descendant" and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.<sup>18</sup>

B. As used in this Will, the term "Code" shall mean the Internal Revenue Code of 1986, as amended, including amendments adopted after the date of this Will.

C. A disposition in this Will to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which

<sup>17</sup> In some cases it may be appropriate to relax the spendthrift provisions. For example, it may be desired to permit the assignment of remainder interests in a trust for estate planning purposes.

<sup>18</sup> The attorney-drafter must ascertain whether this definition is what the client wishes

has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>19</sup>

**EIGHTEENTH:** I direct that the validity and effect of this Will and the testamentary dispositions contained herein shall be governed by the laws of the State of *[applicable law]* in effect from time to time.

IN WITNESS WHEREOF, I, *[name of testator]*, have to this my Last Will and Testament subscribed my name and set my seal this *[date of execution of Will]*.

..... (L.S.)

Subscribed and sealed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by **him/her** to us to be **his/her** Last Will and Testament, and thereupon we, at the request of the said Testator, in **his/her** presence and in the presence of each other, have hereunto subscribed our names as witnesses this *[date of Execution of Will]*.

..... residing at .....

..... residing at .....

..... residing at .....

*[self-proving affidavit omitted]*

<sup>19</sup> An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

**FORM 8**  
**WILL FOR MARRIED PERSON—CHILDREN UNDER AGE 21—NO  
 TAX-DRIVEN DIVISION OF RESIDUE—RESIDUARY ESTATE TO A  
 “CLAYTON” MARITAL TRUST AND TO SPRINKLE TRUST FOR  
 SPOUSE AND DESCENDANTS—SEPARATE SHARE, LONG-TERM  
 TRUSTS FOR DESCENDANTS—COMPLEX PROVISIONS FOR  
 REMOVAL AND REPLACEMENT OF EXECUTORS AND TRUSTEES<sup>1</sup>**

I, [name of testator], of [domicile of testator], do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

**FIRST:**

A. I give and bequeath all furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles and their accessories, and all other tangible personal property (excluding cash and bullion) (owned by me at the time of my death and used primarily in a trade or business at the time of my death) to my **husband/wife**,<sup>2</sup> [name of spouse], if **he/she** survives me, or, if **he/she** does not survive me, to my children who survive me, to be divided **between/among** them by my **Executor/Executors**, in the exercise of sole and absolute discretion, in as nearly equal portions as may be practicable, having due regard for the personal preferences of my children.<sup>3</sup>

B. Notwithstanding the foregoing, if any child of mine who becomes entitled to property pursuant to paragraph A of this Article is under the age of twenty-one (21) years at the time of my death, I direct my **Executor/Executors**, after

<sup>1</sup> This form contemplates a division of the residuary estate into two portions: a Portion A trust which, among other things, pays income to the surviving spouse at least annually (if and only to the extent the Executor/Executors may elect for such property to constitute QTIP property under Section 2056(b)(7) of the Code), and a Portion B Trust, which is a sprinkle trust for the surviving spouse and descendants.

Under Treas. Reg. § 20.2056(b)-7(b)(2)(i), property may qualify for the federal marital deduction under Section 2056(b)(7) of the Code as QTIP property to the extent the executor so elects for it to qualify, even if the portion with respect to which the executor does not so elect does not pass into a trust with respect to which the election could be made. See *Estate of Clayton v. Commissioner*, 976 F.2d 1486, 70 AFTR2d 92-6262, 92-2 USTC ¶ 60,121 (5th Cir. 1992) (NO. 92-4196).

For several reasons, the QTIP election probably should be made exercisable by an independent executor (not the surviving spouse). In particular, the attorney-drafter will want to avoid any possible argument that the surviving spouse makes a taxable gift (in forfeiting the income for life which QTIP property would produce otherwise) by participating in an election for less than the entire net residuary estate to qualify for QTIP treatment.

This form provides for maximum post-mortem flexibility for all entire surviving family members. Note, however, that the attorney-drafter should consider the extent to which use of this form could cause the decedent's estate to lose prior transfer credit.

<sup>2</sup> Boldface type here and throughout this form indicates terms that must be tailored to the specific situation. Only the applicable choice should appear in the final document.

<sup>3</sup> Consider changing this disposition to descendants *per stirpes*, if appropriate.

appropriate consultation with such child and with his or her Guardian or Guardians, if any, or with the person with whom such child resides, to select from the property herein bequeathed to such child such articles, if any, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem appropriate for ownership by such child. Any articles so selected shall be delivered to the Guardian or Guardians or to the person with whom such child resides to be held, without bond, for such child's benefit, and the receipt of such Guardian or Guardians or such person, as the case may be, shall constitute a complete discharge to my **Executor/Executors** with respect to any such articles so delivered. Any articles not so selected shall be sold and the net proceeds of sale shall be held for such child in accordance with the provisions of Article EIGHTH.<sup>4</sup>

C. The bequest of any sculpture, painting or other item of artwork under this Article shall include all applicable copyrights and other rights of reproduction therein. I direct that the decision of my **Executor/Executors** as to the identification and distribution of any property under this Article shall be final and binding on all persons having an interest in my estate. I direct my **Executor/Executors** to pay as an expense of administration of my estate the cost of shipping any item bequeathed in this Article to the legatee thereof.

#### SECOND:

A. I give, devise and bequeath all real property owned by me at the time of my death and used by me or by my family as a place of residence (whether permanent, temporary or seasonal) or held in connection with such use, including all buildings thereon and all rights and easements appurtenant thereto and all policies of insurance relating thereto, to my **husband/wife**, [name of spouse], if he/she survives me, or, if he/she does not survive me, to my descendants who survive me, *per stirpes* as tenants-in-common.<sup>5</sup>

B. I give, devise and bequeath all stock owned by me at the time of my death in any corporation which is the owner of any building in which I have a cooperative apartment, together with any lease to such apartment and all right, title and interest owned by me at the time of my death in and to any agreements relating to said building and the real property on which it is located, together with all policies of insurance relating thereto, to my **husband/wife**, [name of spouse], if he/she survives me, or, if he/she does not survive me, to my descendants who survive me, *per stirpes* as tenants-in-common.<sup>6</sup>

<sup>4</sup> Consider changing this to an authorization as opposed to a direction to sell and/or adding property or proceeds to the trust held under Article SEVENTH, if appropriate

<sup>5</sup> Consider changing this disposition to surviving children, *per capita*, if appropriate. Also consider whether it would be appropriate to dispose of the residential real estate as part of the residue (i.e., in trust), rather than outright to spouse and/or children and descendants. If the spouse does not survive the testator, consider directing a sale of the real estate, if appropriate, with the proceeds added to the residue See Form 6.

<sup>6</sup> See note 5, above

**THIRD:**

A. I give and bequeath the following amounts to the following individuals who survive me:<sup>7</sup>

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee];
4. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee].

B. I give and bequeath the following amounts to the following organizations to be used by each for its general purposes, unless otherwise noted below:

1. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
2. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
3. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution];
4. \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to [name of legatee institution].<sup>8</sup>

**FOURTH:** If at the time of my death I have any power of appointment over any property then held in trust or otherwise, except as provided in paragraph B of Article NINTH, I hereby declare that I intend not to exercise such power and that nothing herein contained shall constitute an exercise thereof in whole or in part.

**FIFTH:** All the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situated, of which I shall die seized or possessed or of which I shall be entitled to dispose of at the time of my death (my "residuary estate"), after the payment therefrom of my funeral expenses, my debts, the expenses of administering my estate and the taxes directed in Article NINTH to be paid from my residuary estate (my "net residuary estate"), shall be disposed of as follows:

- A. 1. If my **husband/wife**, [name of spouse], survives me, and if my **Executor/Executors** (other than my **husband/wife**), in the exercise of sole and absolute discretion, so elect for some or all of my net residuary estate to qualify for the federal estate tax marital deduction under Section 2056(b)(7)

<sup>7</sup> If the spouse survives the testator, consider making these gifts to the spouse with the suggestion that the spouse then give the gifts to the selected individuals and/or charities.

<sup>8</sup> Consider using a charitable remainder trust to receive retirement benefits if analysis shows that a charitable remainder trust would be more beneficial in the event that the spouse does not survive the testator.



of the Code (the "QTIP election"), I direct that my net residuary estate shall be divided into two portions, to be known as Portion A and Portion B.

a. Portion A shall consist of that share of my net residuary estate, if any, with respect to which my **Executor/Executors** have made the QTIP election. I give, devise and bequeath Portion A to the **Trustee/Trustees** hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph A of Article SIXTH.

b. Portion B shall consist of the balance, if any, of my net residuary estate. I give, devise and bequeath my net residuary estate to the **Trustee/Trustees** hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph B of Article SIXTH.

2. If my **husband/wife**, [*name of spouse*], survives me, and if my **Executor/Executors** (other than my **husband/wife**), in the exercise of sole and absolute discretion, do not make a QTIP election with respect to some or all of my net residuary estate, I give, devise and bequeath my net residuary estate to the **Trustee/Trustees** hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph B of Article SIXTH.

3. Each of Portion A and Portion B is intended to be a fractional share which participates in appreciation and depreciation occurring in the property disposed of under this Article. Subject to the provisions of paragraph D of Article SIXTH, each portion may be funded with cash or other property, or a combination thereof, and any such other property so used shall be valued as of the date of distribution.

B. If my **husband/wife** does not survive me, but any descendant of mine survives me, my net residuary estate shall be disposed of as follows:

1. My net residuary shall be divided into a sufficient number of equal shares such that there shall be set aside one (1) such share for each child of mine who survives me and one (1) such share for the collective descendants who survive me of each child of mine who shall have predeceased me. Each such share so set aside for the collective descendants of any child of mine who shall have predeceased me shall be further subdivided into *per stirpital* subshares for such descendants who survive me. Each child who survives me for whom a share is set aside and each descendant who survives me of a child of mine who has predeceased me for whom a *per stirpital* subshare is set aside is herein referred to as the "primary beneficiary" of such share or subshare.

My **Executor/Executors** (other than any descendant of mine) shall divide any share or subshare so set aside for a primary beneficiary into two fractional parts: (a) one consisting of that fractional part of the share or subshare of which (i) the numerator is the amount, if any, of my Unused GST

Exemption (as hereinafter defined) which my **Executor/Executors** (other than any descendant of mine), in the exercise of sole and absolute discretion, may elect to allocate to such share or subshare and (ii) the denominator is the value of such share or subshare as finally determined for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of my death, for death tax purposes under the law of the state of my domicile as in effect at the date of my death) (hereinafter referred to as "Portion I"), and (b) the other consisting of the balance of the share or subshare (hereinafter referred to as "Portion II").

3. I give, devise and bequeath Portion I and Portion II to the **Trustee/Trustees** hereinafter named, IN TRUST, each to be held as a separate trust with identical terms and disposed of in accordance with the provisions of Article SEVENTH.

4. In computing Portion I and Portion II, the values and amounts as finally determined for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of my death, for death tax purposes under the law of the state of my domicile as in effect at the date of my death) shall control. Each of Portion I and Portion II is intended to be a fractional share which participates in appreciation and depreciation occurring in the property disposed of under this Article. Each portion may be funded with cash or other property, or a combination thereof, and any such other property so used shall be valued as of the date of distribution.

C. If neither my **husband/wife** nor any descendant of mine survives me, I give, devise and bequeath my net residuary estate, or, if upon the termination of any trust hereunder, there is no effective disposition of the trust property by another provision of this Will, I direct that such trust property and any other property which is directed to be disposed of in accordance with the provisions of this paragraph C, shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to *[name of beneficiary or beneficiaries to receive property if neither spouse nor any descendant survives]*.

#### SIXTH:

A. Portion A and any other property which is directed to be held and disposed of in accordance with the provisions of this Article shall be held as a separate trust by the **Trustee/Trustees** hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income, on a quarterly basis insofar as may be practicable, but at least annually, to or for the benefit of my **husband/wife**, *[name of spouse]*, during **his/her** life. I authorize the **Trustee/Trustees** (other than my **husband/wife**), to pay over to my **husband/wife** or to apply for **his/her** benefit, out of the principal of the trust such portion thereof, including the whole, as the **Trustee/Trustees** (other than my **husband/wife**) may select, in the exercise of sole and absolute discretion.

Upon the death of my **husband/wife**, *[name of spouse]*, the remainder of the principal of the trust, if any, as it is then constituted, subject to the payment of

taxes as provided in paragraph B of Article NINTH, shall be disposed of as provided in paragraph C of this Article.

B. Portion B and any other property which is directed to be held and disposed of in accordance with the provisions of this Article shall be held as a separate trust by the **Trustee/Trustees** hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners, either outright or in trust, as the **Trustee/Trustees** (other than my **husband/wife** or any descendant of mine) may determine, in the exercise of sole and absolute discretion, to or for the benefit of such one or more members of the class consisting of such of my **husband/wife**, [*name of spouse*], and my descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of the others, as the **Trustee/Trustees** may select, in the exercise of sole and absolute discretion. Any net income not so paid or applied, which may consist of the whole of such income, shall be added to the principal of the trust and thereafter be held, administered and disposed of as a part thereof. Upon the death of my **husband/wife**, [*name of spouse*], the remainder of the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of as provided in paragraph C of this Article.

C. Any property which is directed to be disposed of as provided in this paragraph shall be transferred, conveyed, and paid over, and I give, devise and bequeath the same, to or for the benefit of such person or persons or corporation or corporations (other than my **husband/wife**, **his/her** estate, **his/her** creditors or the creditors of **his/her** estate), to such extent, if any, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as my **husband/wife** may, by acknowledged written instrument executed by **him/her** during **his/her** life and delivered to the **Trustee/Trustees**, or by **his/her** Last Will and Testament, appoint by a specific reference to this power. Any such written instrument of appointment shall be revocable by any subsequent instrument or by the Will of my **husband/wife**, by specific reference to such prior instrument, unless pursuant to its terms such prior instrument is specified to be irrevocable. In the event of any inconsistency between any such instrument and a subsequent instrument or **husband/wife's** Will which is not resolved by the terms of such instruments and Will, such instruments and Will shall be applied in the following order of priority: first, any such instrument which pursuant to its terms is specified to be irrevocable; second, my **husband/wife's** Will (regardless of whether executed before or after any such instrument); third, any such instrument executed after any other such instrument. My **husband/wife** may, at any time and from time to time during **his/her** life, release such power of appointment with respect to any or all of the property subject to such power and may further limit the persons or organizations in whose favor such power may be exercised.

If this power of appointment is for any reason not effectively exercised in whole or in part, then any property which is directed to be disposed of as provided in this paragraph, to the extent not effectively appointed by my **husband/wife**, shall, upon **his/her** death, be divided into a sufficient number of equal shares so

that there shall be set aside one (1) such share for each child of mine who is living at the time of such division and one (1) such share for the collective descendants who are then living of each child of mine who shall have previously died leaving one or more descendants who are living at the time of such division. Each such share so set aside for the collective descendants of any child of mine who shall have previously died shall be further subdivided into *per stirpital* subshares for such descendants.

Each child of mine who is then living for whom a share is set aside and each such descendant of mine who is then living for whom a share or subshare is set aside is hereinafter referred to as the "primary beneficiary" of such share or subshare. Each such share or subshare so set aside for a primary beneficiary shall be transferred, conveyed and paid over, and I give, devise and bequeath the same, to the **Trustee/Trustees** hereinafter named, IN TRUST, to be held as a separate trust for the benefit of the primary beneficiary for whom the share or subshare has been set aside, and disposed of in accordance with the provisions of Article SEVENTH.

D. I intend (a) that any trust held under paragraph A of this Article will constitute an interest which is a "qualifying income interest for life" as defined in Section 2056(b)(7) of the Code, and (b) that such property will constitute "qualified terminable interest property" as defined in that Section. To that end, the following provisions shall apply:

1. I direct that this trust shall not be funded with any property or the proceeds of any property (i) which would not qualify for the marital deduction allowable in determining the federal estate tax on my estate, or (ii) which is includible in my gross estate for federal estate tax purposes and also subject by reason of my death to any inheritance tax, succession tax, transfer tax, estate tax or other death duty in any foreign country or political subdivision thereof, except that the property described in this clause (ii) may be allocated to the trust to the extent that other property of my estate which does qualify for the marital deduction is not sufficient to fund the trust in full.

2. If any property forming a part of the principal of this trust is unproductive at the time of its receipt by the **Trustee/Trustees** or thereafter becomes unproductive, the **Trustee/Trustees** may retain the same if the **Trustee/Trustees** shall determine the retention of such property to be in the best interests of the trust estate, provided, however, that the **Trustee/Trustees**, upon written demand of my **husband/wife**, shall make such property productive or convert it to productive property within a reasonable time.

3. I direct that this Will shall be construed and this trust shall be administered in all respects so as to effectuate my intention referred to above, and that the **Trustee/Trustees** shall not exercise any of the general powers conferred elsewhere in this Will or otherwise to the extent such exercise would defeat such intention. Any net income on hand or accrued upon the death of my **husband/wife** shall be paid to **his/her** estate to the extent provided by applicable law and to any greater extent required to make

the interest of my **husband/wife** in such trust a qualifying income interest for life.

**SEVENTH:**

A. Any share or subshare which is directed to be held and disposed of in accordance with the provisions of this Article shall be held by the **Trustee/Trustees**, IN TRUST, as a separate trust, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners either outright or in trust, as the **Trustee/Trustees** may determine in the exercise of sole and absolute discretion, to or for the benefit of such one or more members of the class consisting of the primary beneficiary for whom the share or subshare shall have been set aside and his or her descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of the others, as the **Trustee/Trustees** may select, in the exercise of sole and absolute discretion. Any net income not so paid or applied, which may consist of the whole of such income, shall be added to the principal of the trust and thereafter shall be held, administered and disposed of as a part thereof.

B. 1. Upon the death of the primary beneficiary, the **Trustee/Trustees** shall transfer, convey and pay over the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, to or for the benefit of such person or persons or corporation or corporations (other than such primary beneficiary, his or her estate, his or her creditors or the creditors of his or her estate), to such extent, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust (and including, but without limitation, granting presently exercisable general or non-general powers of appointment), as such primary beneficiary may, by acknowledged written instrument executed by him or her during his or her life and delivered to the **Trustee/Trustees**, or by his or her Last Will and Testament, appoint by a specific reference to this power. Any such written instrument of appointment shall be revocable by any subsequent instrument or by the primary beneficiary's Will, by specific reference to such prior instrument, unless pursuant to its terms such prior instrument is specified to be irrevocable. In the event of any inconsistency between any such instrument and a subsequent instrument or the primary beneficiary's Will which is not resolved by the terms of such instruments and Will, such instruments and Will shall be applied in the following order of priority: first, any such instrument which pursuant to its terms is specified to be irrevocable; second, the primary beneficiary's Will (regardless of whether executed before or after any such instrument); third, any such instrument executed after any other such instrument. The primary beneficiary may, at any time and from time to time during his or her life, release such power of appointment with respect to any or all of the property subject to such power and may further limit the persons or organizations in whose favor such power may be exercised.

2. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary, and if any descendant of the primary beneficiary is then living, the principal of such trust, if any, as it is then constituted, together with any accumulated and undistributed income, to the extent not effectively appointed by the primary beneficiary, shall, upon his or her death, be divided into a sufficient number of equal shares such that there shall be set aside one (1) such share for each child of the primary beneficiary who is then living and one (1) such share for the collective descendants who are then living of each child of the primary beneficiary who is not then living. Each such share so set aside for the collective descendants who are then living of each child of the primary beneficiary who is not then living shall be further subdivided into *per stirpital* subshares for such descendants who are then living. Each child of the primary beneficiary who is then living and for whom a share is set aside and each descendant who is then living of a primary beneficiary who is not then living and for whom a subshare is set aside shall thereafter be the "primary beneficiary" of such share or subshare. Each share or subshare so set aside for a primary beneficiary shall be held as a separate trust in accordance with the provisions of this Article SEVENTH.

3. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary, and if no descendant of the primary beneficiary is then living, but if any descendant of mine is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be divided into shares for the then living descendants *per stirpes* of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary, which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of mine or which ancestor was me. Each descendant for whom a share is set aside shall thereafter be the "primary beneficiary" of such share. Each share so set aside for a primary beneficiary shall be held as a separate trust and disposed of in accordance with the provisions of this Article SEVENTH.

4. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary and if no descendant of mine is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

C. <sup>9</sup>If not sooner terminated pursuant to the foregoing provisions of this Article, each such trust held hereunder shall terminate upon the date which is twenty-one (21) years after the date of death of all the descendants of my parents and my spouse's parents who are living at the time of my death, and thereupon the principal, each such trust, if any, as it is then constituted, together with any

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<sup>9</sup> Modify paragraph C if applicable state law (e.g. Delaware or Alaska) permits perpetual trust, and the trusts are intended to be so.

accumulated and undistributed income, shall be transferred, conveyed and paid over to the primary beneficiary, if he or she is then living, or, if he or she is not then living, to the descendants of such primary beneficiary who are then living, *per stirpes*, or, if none, to the then living descendants, *per stirpes*, of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of mine or which ancestor was me, or, if no descendant of mine is then living, the principal of each such trust, if any, as it then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

D. Notwithstanding the foregoing, if upon the division as provided above of any property disposed of in accordance with the provisions of this Article a separate trust is already being held hereunder for a primary beneficiary, then the separate share or subshare for such primary beneficiary resulting from such division instead may be added, in the sole and absolute discretion of the **Trustee/Trustees**, to the existing trust for such primary beneficiary, thereafter to be held, administered and disposed of as a part thereof.

**EIGHTH:** If any individual under the age of twenty-one (21) years becomes entitled to any property from my estate upon my death or any property from any trust created hereunder, such property shall be held by, and I give, devise and bequeath the same to, the **Trustee/Trustees** hereinafter named, IN TRUST, for the following uses and purposes: To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent, including the whole thereof, for such individual's general use and at such time or times as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, shall determine, until such individual reaches the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before reaching the age of twenty-one (21) years, the **Trustee/Trustees** shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.

If my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, in the exercise of sole and absolute discretion, shall determine at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed, or to the person with whom such individual resides.

Notwithstanding the foregoing, unless sooner terminated as provided above, each trust held under this Article shall terminate on the date which is twenty-one (21) years after the date of death of the last to die of all the descendants of my parents and my spouse's parents who are living at the time of my death, and upon such termination

the trust estate of each such trust shall be transferred, conveyed, and paid over to the individual for whom it is being held, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian, including but not limited to a custodian selected by the **Trustee/Trustees**, for such individual under any Uniform Gifts to Minors Act or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed.

The receipt of such individual, if an adult, or the parent, guardian or custodian or any other person to whom any principal or income is transferred and paid over pursuant to any of the above provisions shall be a full discharge to my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, from all liability with respect thereto.

**NINTH:**

**A.** Subject to the provisions of paragraph B of this Article, all estate, inheritance, legacy, succession, transfer or other death taxes, including any interest and penalties thereon, imposed by any domestic or foreign taxing authority (other than any additional estate tax imposed by Sections 2031(c), 2032A or 2057 of the Code, any generation-skipping transfer tax imposed by Chapter 13 of the Code, or any comparable taxes imposed by any other taxing authority) with respect to all property taxable by reason of my death and which passes under this Will shall be charged against and paid without apportionment out of my residuary estate and without apportionment within my residuary estate; provided, however, that any generation-skipping transfer tax imposed by Chapter 13 of the Code (or by the comparable laws of any other taxing authority) on a direct skip with respect to property passing under Articles FIRST, SECOND or THIRD also shall be charged against and paid without apportionment out of my residuary estate and without apportionment within my residuary estate and provided, further, that if my **husband/wife** survives me and as the result of an election by my **Executor/Executors**, any property is being held in accordance with the provisions of paragraph A of Article SIXTH, such taxes shall be first charged against and paid without apportionment out of such property held in accordance with the provisions of paragraph A of Article SIXTH.<sup>10</sup>

**B.** The tax on any Qualifying Terminable Interest Property ("QTIP Property") included in my gross estate under Section 2044 of the Code held in accordance with the provisions of paragraph A of Article SIXTH, shall be charged, apportioned and paid in the manner as provided in Section 2207A of the Code. If not already provided by applicable law, to the extent that I have power to do so, I direct that state and foreign taxes shall be charged, apportioned to and paid from the property at the marginal rate in the same way federal tax is payable under Section 2207A of the Code, so that QTIP Property shall contribute all the additional tax at

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<sup>10</sup> The tax apportionment clause may need to be changed if there is a mixed residue, either marital and taxable nonmarital residue or charitable and noncharitable residue. Note that if the Will contains a qualified domestic trust ("QDOT"), special tax provisions will be required (as well as special QDOT provisions for the marital trusts, and attention to any outright bequests to the spouse).



the marginal rate caused by its inclusion. I further direct that any provision of my spouse's Will or other governing instrument that provides which portion of a trust, or which of two or more trusts, of QTIP Property should pay taxes shall be followed and I waive any right of reimbursement under Section 2207A of the Code and comparable provision of any other law which are inconsistent with that provision.

C. With respect to any trust which is held for my **husband/wife** in accordance with the provisions of paragraph A of Article SIXTH, upon the death of my **husband/wife**, except to the extent that **his/her** Will shall by specific reference to this provision direct to the contrary, the **Trustee/Trustees** shall pay from the principal of this trust the increase in all estate, inheritance, legacy, succession, transfer or other death taxes (including any interest and penalties thereon) [hereinafter "taxes"], imposed by any domestic or foreign taxing authority on the death of my **husband/wife** by reason of the inclusion in **his/her** gross estate for the purposes of any such tax of all or any part of the principal of such trust (such increase being the difference between all such taxes actually paid by reason of the death of my **husband/wife** and the taxes which would have been payable if such part or all of the principal of such trust had not been included in **his/her** gross estate), provided, however, that such payments shall be made only from the portion of such trust which, without regard to the provisions of this paragraph, shall be includible in the gross estate of my **husband/wife** for federal estate tax purposes. Such payments shall be made either to the legal representative of the estate of my **husband/wife** for payment by such legal representative of such taxes, interest and penalties or directly to such taxing authorities as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, shall determine. The **Trustee/Trustees** may rely solely upon the written certification of the legal representative of the estate of my **husband/wife** as to the amount of such increase payable to each taxing authority, may pay any such increase in one or more installments and shall have no duty or responsibility to make any further inquiry or take part in the determination or apportionment of such taxes, and upon making payment of such increase as the same shall be finally determined the **Trustee/Trustees** shall have no further liability in connection therewith. Payment of such increase in such taxes, interest and penalties shall fully discharge all liability of such trust for such taxes, interest and penalties, it being my intention and direction that my **husband/wife** not have any power to apportion additional taxes, interest or penalties against such trust.

Notwithstanding the foregoing, I direct that if at the death of my **husband/wife**, there shall be a separate portion of a Qualified Trust to which I shall be deemed to be the transferor for generation-skipping transfer tax purposes, then all taxes referred to in the preceding paragraph on such entire Qualified Trust for my **husband/wife** shall first be paid from that portion of the Qualified Trust as to which I am not deemed to be such transferor and from the portion as to which I am deemed to be the transferor only if there is insufficient property in such other portion to pay all such taxes.

D. The following provisions relating to tax elections shall apply:

1. My **Executor/Executors** may, in the exercise of sole and absolute discretion, elect to treat any part or all of any bequest of property passing under this my Will or any other property includible in my estate for federal tax purposes as QTIP within the meaning of Section 2056(b)(7) of the Code, or any successor thereto, and any comparable election granted by any other taxing authority.

2. My **Executor/Executors** may make such other elections under the tax laws, including but not limited to, the election to use the alternate valuation date for estate tax purposes, and the election to treat administrative expenses as deductions against income tax instead of against estate tax, as my **Executor/Executors**, in the exercise of sole and absolute discretion, may deem advisable, regardless of the effect thereof on any of the interests under this Will, and I direct that there shall be no adjustment of such interests by reason of any action taken by my **Executor/Executors** pursuant hereto.

3. I authorize my **Executor/Executors** to allocate any amount of my generation-skipping transfer ("GST") tax exemption under Section 2631(a) of the Code to such property of which I am the transferor as my **Executor/Executors** shall select in the exercise of sole and absolute discretion, whether or not passing under this Will, including property transferred by me during life whether or not I allocated any GST exemption to such property during my life, and without any duty to favor beneficiaries under this Will over beneficiaries of property passing outside this Will.

4. I authorize my **Executor/Executors**, in the exercise of sole and absolute discretion, to make any adjustment to tax basis authorized by law, including but not limited to increasing the basis of any property included in my estate, whether or not passing under this Will, by allocating any amount by which the bases of assets may be increased. My **Executor/Executors** shall be under no duty and shall not be required to allocate basis increase exclusively, primarily, or at all to assets passing under the Will as opposed to other property included in my estate. I waive any such duty that otherwise would exist. My **Executor/Executors** may elect, in the exercise of sole and absolute discretion and without permission of any court or other authority, to allocate basis increase to one or more or all assets that the **Executor/Executors** may receive or in which the **Executor/Executors** may have a personal interest, to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any Executor to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

5. I authorize my **Executor/Executors** or the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to divide (whether before or after any trust is funded and whether before or after any allocation of GST exemption under Section 2631 of the Code is made) any trust or any property used or to be used to fund or augment any trust created under this Will into two or more fractional shares. The shares shall be held and administered by the **Trustee/Trustees** as separate trusts, but may be managed and invested *in solido*. One of the purposes for granting this authority is to provide an

inclusion ratio (within the meaning of Section 2642(a) of the Code) of zero for the separate trust receiving the fractional share to which the allocation of GST exemption is made, and, if that trust is a trust described in Section 2652(a)(3) of the Code, to enable my **Executor/Executors** to make the election described in that section with respect to it as a separate trust.

6. If my **Executor/Executors** shall make the so-called QTIP election under Section 2056(b)(7) of the Code over a portion (but less than all) of any property passing to a trust hereunder, my **Executor/Executors** or the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, divide such property into the portion as to which the election was made and the portion as to which it was not made in the manner prescribed by Treas. Reg. § 20.2056(b)-7(b) or any successor regulation. Those shares shall be held and administered by the **Trustee/Trustees** as separate trusts with identical terms, so that one of said trusts is entirely subject to said election and the other is not subject to it. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

7. Whenever two trusts created under this Will are directed to be combined in a single trust (for example, because property of one trust is to be added to the other trust), whether or not the trusts have different inclusion ratios with respect to any common transferor or have different transferors for generation-skipping transfer tax purposes, the **Trustee/Trustees** may, in the exercise of sole and absolute discretion, instead of combining said trusts, administer them as two separate trusts with identical terms in accordance with the provisions that would have governed the combined trusts. However, the **Trustee/Trustees** may manage and invest such separate trusts *in solido*. If anyone adds or is deemed to add by gift or bequest property to a trust created under this Will, I authorize the **Trustee/Trustees**, in the exercise of sole and absolute discretion, to hold the added property as a separate trust with terms identical to the trust to which it would have been added and the **Trustee/Trustees** may manage and invest such separate trusts *in solido*.

8. The **Trustee/Trustees** may, in the exercise of sole and absolute discretion, combine any one or more trusts with identical terms for an identical beneficiary or beneficiaries created under this Will as a single trust. The **Trustee/Trustees** may also, in the exercise of sole and absolute discretion, later divide such trust as provided above in this paragraph. Without in any way limiting the absolute discretion of the **Trustee/Trustees** granted by this paragraph, I expect that the **Trustee/Trustees** will not elect to combine two or more trusts with different inclusion ratios or different transferors for generation-skipping transfer tax purposes.

9. Although I have authorized my **Executor/Executors** or the **Trustee/Trustees** to divide any property into separate shares or trusts in order to facilitate administration of my estate or of certain trusts created hereunder, I direct that any division made under said powers shall be disregarded for purposes of the commissions allowable to the **Trustee/Trustees**, and each separate trust created as the result of any such division shall bear its *pro rata*

share, based on its then market value, of the commissions which would have been payable from time to time by the original fund or trust if the same had not been divided.

10. Notwithstanding the foregoing, if my **husband/wife** or any other beneficiary disclaims any interest created under this Will within nine (9) months of my death, and my **husband/wife** or such other beneficiary is acting as a fiduciary under this Will, neither my **husband/wife** nor such other beneficiary shall participate in any of the elections (including any allocation and any division of property) hereinabove described which affects any property so disclaimed by such individual.

11. With respect to any trust held for a primary beneficiary under Article SEVENTH, the **Trustee/Trustees** hereunder (other than any beneficiary of such trust) may, in the exercise of sole and absolute discretion, with respect to all or any part of the principal of the trust (including a pecuniary amount), by an instrument filed with the trust records, (a) confer on such primary beneficiary a general power of appointment within the meaning of Section 2041 of the Code (including a power the exercise of which requires the consent of the **Trustee/Trustees** other than any beneficiary) that may be exercised by deed or will but that may take effect only upon the death of such primary beneficiary and may dispose only of the principal as then constituted, (b) eliminate such power for all or any part of such property as to which such power was previously created, (c) irrevocably release the right to create or eliminate such power, and (d) divide the trust property into two fractional shares based upon the portion of the trust that would be includible in the gross estate of the primary beneficiary holding such power if he or she died immediately before such division (in which case the power thereafter shall extend to all of one share and no part of the other), and each such share shall be administered as a separate trust unless the **Trustee/Trustees** (other than any beneficiary), in the exercise of sole and absolute discretion, thereafter shall combine such separate trusts into a single trust, which the **Trustee/Trustees** may do. In authorizing such action it is my hope (but I do not direct) that a general power will be kept in effect when the **Trustee/Trustees** (other than any beneficiary) believe the inclusion of the property affected thereby in the primary beneficiary's gross estate may achieve a significant savings in taxes, for example by having an estate tax rather than a generation-skipping transfer tax imposed on the property subject to the general power, or by permitting a greater use of the primary beneficiary's GST exemption under Section 2631(a) of the Code.

**TENTH:**

A. I appoint [name(s) of Executor(s)] **Executor/Executors** of this, my Last Will and Testament. If [name of Executor] fails to qualify or ceases to act as an Executor, I appoint [name of successor Executor] Executor in his/her place. If [name of Executor] also fails to qualify or ceases to act as Executor hereunder, I appoint [name of successor] Executor in his/her place.

B. I appoint [*name(s) of Trustee(s)*] **Trustee/Trustees** of the trusts hereby created. If [*name of Trustee*] fails to qualify or ceases to act as a Trustee hereunder, I appoint [*name of successor Trustee*] as Trustee in **his/her** place. If [*name of Trustee*] also fails to qualify or ceases to act as Trustee hereunder, I appoint [*name of successor Trustee*] as Trustee in **his/her** place.<sup>11</sup>

C. Notwithstanding any provision herein to the contrary, at no time shall more than one (1) bank or trust company be acting as Executor of this my Will or as Trustee with respect to any single trust hereunder.

D. Subject to the provisions of paragraph C of this Article, I authorize, but do not direct, my **Executor/Executors** and the **Trustee/Trustees** acting hereunder from time to time, in the exercise of sole and absolute discretion, to appoint as a co-Executor or as a co-Trustee, as the case may be, such individual(s), bank or trust company as my **Executor/Executors** or the **Trustee/Trustees**, as the case may be, in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court.

Subject to the provisions of paragraphs A, B and C of this Article, I authorize, but do not direct, each Executor and each Trustee acting hereunder from time to time, in the exercise of sole and absolute discretion, to appoint such individual(s) or such bank or trust company as such Executor or Trustee, as the case may be, in the exercise of sole and absolute discretion, shall select as successor **Executor/Executors** or successor **Trustee/Trustees** to act in his, her or its place if he, she or it should cease to act. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court and may be revoked by the appointing **Executor/Executors** or **Trustee/Trustees**, as the case may be, in the same manner prior to its becoming effective, and succeeded by a later appointment, the last such appointment to control.

Subject to the provisions of paragraphs A, B and C of this Article, if any Executor or any Trustee shall for any reason cease to act without having appointed a successor, then I authorize the remaining Executor or Executors or Trustee or Trustees, as the case may be, to appoint a successor by a written instrument filed with the clerk of the appropriate court. I direct, however, that pending the qualification of such successor, the remaining Executor or Executors or Trustee or Trustees, as the case may be, shall have all the rights, powers and authority herein conferred upon my **Executor/Executors** or the **Trustee/Trustees** generally.

The appointment of any co-Executor or co-Trustee or successor Executor or successor Trustee hereunder shall be on such terms and conditions, including the fixing of compensation, as may be set forth in the instrument effecting such appointment.<sup>12</sup> In particular, without limiting the foregoing, the term of service and duties of a co-Executor or co-Trustee or successor Executor or successor

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<sup>11</sup> Depending on the circumstances, the client may wish to designate different Trustees to act with respect to different trusts

<sup>12</sup> Consider adding provision specifying fiduciary compensation for initial Executor(s) and Trustee(s) and their successors.

Trustee, as the case may be, may be limited if so specified by his, her or its instrument of appointment. The co-Trustees or successor Trustees of different trusts, portions, shares, or subshares created under this Will need not be identical.

E. Any Executor or Trustee may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the clerk of the appropriate court.

F. Should it be necessary for a representative of my estate to qualify in any jurisdiction wherein any Executor named herein cannot or may not desire to qualify as such, any other Executor named herein may, without giving any security, act as Executor in such jurisdiction and shall have therein all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will, or, if such other Executor cannot or does not desire to qualify as Executor in such other jurisdiction, or, if at any time and for any reason there shall be no Executor in office in such other jurisdiction, I appoint as Executor therein such person or corporation as may be designated by my **Executor/Executors** acting hereunder. Such substituted Executor shall, without giving any security, have in such other jurisdiction all the rights, powers, privileges, discretions and duties conferred or imposed upon my **Executor/Executors** by the provisions of this Will.

G. [Name of Trust Protector] is hereby appointed as the Trust Protector.<sup>13</sup> The Trust Protector shall have the power, in the exercise of sole and absolute discretion, (i) to remove any Executor or Trustee (other than .....)<sup>14</sup> acting hereunder at any time (with or without cause) and, subject to the provisions of paragraphs C and D of this Article, to appoint one or more individual(s) and/or a bank or trust company as successor Executor(s) or Trustee(s) in such removed Executor's or Trustee's place and (ii) subject to the provisions of paragraphs A, B and C of this Article, to appoint one or more individual(s) and/or a bank or trust company as successor Executor(s) or Trustee(s) in the event that there is no Executor or Trustee acting hereunder; provided, however, that any Executor or Trustee that is removed by the Trust Protector may be replaced only by an individual other than the Trust Protector, any spouse of the Trust Protector, any descendant of the Trust Protector or any spouse of any descendant of the Trust Protector, or by a bank or trust company.<sup>15</sup> Any action to remove an Executor or

<sup>13</sup> The person named as initial Trust Protector should not be the testator's spouse, any subsequent spouse of the testator's spouse, any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder, any spouse or former spouse of any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder, or any individual who is a related or subordinate party within the meaning of Section 672(c) of the Code with respect to any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder.

<sup>14</sup> List here the Trustees (if any) who the client does not wish to be permitted to be removed by the Trust Protector.

<sup>15</sup> This provision listing who may or may not be appointed as successor Executor or Trustee by the Trust Protector may be modified, if appropriate.

Trustee or appoint a successor Executor or Trustee taken pursuant to this paragraph shall be evidenced by an acknowledged written instrument delivered to the Executor or Trustee so removed and/or appointed, as the case may be, and in the case of an appointment, shall be effective upon acceptance thereof by execution of a written instrument filed with the clerk of the appropriate court by the Executor or Trustee so appointed.

The Trust Protector may at any time relinquish the power to remove Executors and Trustees and/or to appoint successor Executors and Trustees with respect to any one or more trusts hereunder by an acknowledged written instrument delivered to the Executors and Trustees, as the case may be, then in office and filed with the clerk of the appropriate court, which relinquishment shall be irrevocable and binding on all successor Trust Protectors.

I am not imposing any fiduciary responsibility on any Trust Protector to monitor the acts of my **Executor/Executors** or the **Trustee/Trustees**. No Trust Protector shall be liable for failing to remove any Executor or Trustee even if such Executor or Trustee may be guilty of a gross violation of his or her fiduciary duties hereunder and even if any Trust Protector is aware of such violation.

Whenever the term "Trust Protector" is used in this Will, it shall be deemed to refer to the Trust Protector or Trust Protectors acting hereunder from time to time. Different trusts hereunder may, but need not, have different Trust Protectors. More than one person may act collectively as a Trust Protector for any given trust hereunder, in which case decisions of the Trust Protector shall be made by majority vote if more than two (2) persons are so acting collectively. If for any reason any person is acting both as a Trustee and as a Trust Protector, the removal of such person as Trustee shall not result in the removal of such person as a Trust Protector. Any Trust Protector may resign from office with respect to any one or more trusts hereunder at any time by filing a written instrument of resignation with the clerk of the appropriate court. The Trust Protector shall act without compensation hereunder but shall be reimbursed for any expenses in carrying out his or her duties hereunder.

H. If [*Name of Trust Protector*] (or any other Trust Protector) ceases to serve as the Trust Protector, the successor Trust Protector shall be such individual (other than my **husband/wife**, [*name of spouse*], any subsequent spouse of my spouse, any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder, any spouse of any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder, or any individual who is a related or subordinate party within the meaning of Section 672(c) of the Code with respect to any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder) as shall be appointed by the Trust Committee.

Any appointment of a successor Trust Protector pursuant to this paragraph shall be evidenced by an acknowledged written instrument filed with the clerk of the appropriate court by the Trust Committee. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

I. Subject to the provisions of paragraphs A, B, C, D and G of this Article, in the event that any Trustee or Executor acting hereunder is removed and a successor is not otherwise appointed in accordance with the other provisions of

this Article, or in the event that there is no Trustee or Executor acting hereunder, one or more individual(s) and/or a bank or trust company may be appointed as successor Trustee or as successor Executor, as the case, may be by the Trust Committee.

Any action to appoint a Trustee or Executor taken pursuant to this paragraph shall be evidenced by an acknowledged written instrument delivered to the Trustee or Executor so appointed and shall be effective upon acceptance thereof by filing a written instrument with the clerk of the appropriate court by the Executor or Trustee so appointed.

The member or members of the Trust Committee shall be as follows:

1. With respect to Executors and with respect to any trust hereunder (other than any trust under Article SEVENTH), such of my spouse and my children as are then living, adult and competent, by majority vote.<sup>16</sup>

2. With respect to any trust under Article SEVENTH, the primary beneficiary if he or she is then adult and competent, or, if not, the eldest then living beneficiary of the trust who is adult and competent, or, if none, the parent or legal guardian of the primary beneficiary.<sup>17</sup>

Decisions of the members of the Trust Committee shall be made by majority vote if there are more than two (2) such members then acting.

**J.** Except as provided by law, I direct that my **Executor/Executors** shall not be required to file any inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.<sup>18</sup>

**K.** Except as otherwise expressly herein provided, any actions or decisions of the Executors or the Trustees, if more than two (2) shall be acting, shall be determined by a majority of them.

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<sup>16</sup> This provision can be modified, as appropriate.

<sup>17</sup> This provision could be modified, for example, to require the primary beneficiary to be a certain age (such as twenty-five (25)) rather than merely an adult, or to add others, such as the testator's brother, sister, etc., and/or the primary beneficiary's brother, sister, etc., who could act if the primary beneficiary is not of the specified age or is not competent.

<sup>18</sup> If non-New York resident, replace paragraph with the following:

To the extent permitted by law, I direct that my **Executor/Executors** shall not be required to file an inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.



L. Notwithstanding any other provision of this Will, no Trustee who is a current beneficiary of income and/or principal of any trust created hereunder shall ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, accumulations, or uses of income or principal by the **Trustee/Trustees** to or for any beneficiary (including, but without limitation, any power described in subparagraphs 13 through 15 of paragraph A of Article TWELFTH), (ii) as to any trust held in accordance with the provisions of paragraph A of Article SIXTH, the exercise of discretion to allocate receipts or expenses between principal and income or (iii) the exercise of any general power of appointment described in Sections 2041 or 2514 of the Code. No Trustee who is under a duty to support a beneficiary or who is acting as a guardian of any person who is a beneficiary shall participate in the exercise, or the decision not to exercise, any discretion over payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Section 2042(2) of the Code) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall serve as Trustee of any trust which holds property with respect to which such individual has made a qualified disclaimer within the meaning of Section 2518 of the Code.

M. No Executor shall participate in any decision where participation would cause that Executor to be deemed to have made a transfer for estate, gift or generation-skipping transfer tax purposes or cause a renunciation which would otherwise constitute a qualified disclaimer under Section 2518 of the Code to be treated as not so qualified, and if by reason of this limitation there is no Executor then acting who is eligible to participate in such decision, the then-acting **Executor/Executors** shall appoint a co-Executor pursuant to paragraph D of this Article

N. Every act done, power exercised or obligation assumed by any Executor or Trustee pursuant to the provisions of this Will shall be held to be done, exercised or assumed, as the case may be, by the Executor or Trustee acting in a fiduciary capacity and not otherwise, and every person, firm or corporation contracting or otherwise dealing with the Executor or Trustee shall look only to the funds and property of my estate or the trust estate for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and the Executor or Trustee shall not be individually liable therefor even though the Executor or Trustee did not exempt himself, herself or itself from individual liability when entering into any contract, obligation or transaction in connection with or growing out of my estate or the trust estate.

O. No Executor or Trustee acting hereunder shall be liable for any loss which may result by reason of any investment made or retained pursuant to the powers conferred hereunder, except through his, her or its gross negligence or willful misconduct.

P. Whenever the terms "Executor/Executors" and "Trustee/Trustees" are used in this Will, they shall be deemed to refer to the Executor or Executors and the Trustee or Trustees, as the case may be, acting hereunder from time to time. Except as otherwise provided herein, each Executor and each Trustee taking the place of any other Executor or Trustee shall have all the same estates, powers, discretions and duties, including any power hereinabove given to fill vacancies, as if appointed an original Executor of this my Will or an original Trustee of any trust created hereunder.

**ELEVENTH:** I appoint my **husband/wife**, [*name of spouse*], Guardian of the person and property of each minor child of mine, or if **he/she** fails to qualify or ceases to act, then I appoint [*name of successor Guardian*] Guardian in **his/her** place.

**TWELFTH:**

A. In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, I hereby expressly grant to my **Executor/Executors** and to the **Trustee/Trustees** hereunder the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised by my **Executor/Executors** and/or the **Trustee/Trustees** as my **Executor/Executors** and/or the **Trustee/Trustees** may deem advisable, in the exercise of sole and absolute discretion (but subject to the provisions of paragraph D of Article SIXTH):

1. To purchase or otherwise acquire and to retain, whether originally a part of my estate or any trust held hereunder or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property, including, but without limitation, foreign real estate, foreign securities, interests in any business venture (incorporated or unincorporated), securities of any corporate fiduciary (or any successor or affiliated corporation) and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, partnerships, and limited liability companies (participating therein as a general or limited partner or member), whether or not the property so invested in or the entity whose securities are so invested in is located in the state in which this Will is offered for original probate or in any other state or country, and whether or not such investment be secured or unsecured, or shall be unproductive, underproductive, overproductive or of a wasting nature, or shall constitute all or the greater part of the assets of my estate or the particular trust for which such investments are made, and whether or not the investment in the securities, stocks, bonds or notes of any one corporation or association shall constitute all or the greater part of the issued and outstanding securities, stocks, bonds or notes of such corporation or association, and to make or retain any or all of such investments not solely for the preservation of principal or production of income but also for the possibility of an increase in value, and to render liquid the assets held by my fiduciaries, in whole or in part, and to hold cash or readily marketable securities of little or no yield for such period as my fiduciaries may deem advisable;

2. To sell, lease, pledge, mortgage, transfer, exchange, convert, grant options with respect to, or otherwise dispose of, any and all real or personal

property or interests therein, at any time forming a part of my estate or any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions, my fiduciaries may deem desirable; and to enter into leases, mortgages or options which extend beyond the period fixed by law for leases and options made by fiduciaries or beyond the term of the trust;

3. To borrow money from any lender for any purpose, and to mortgage or pledge as security upon any terms and conditions any real or personal property held;

4. To take part in the management of any business in which investment is retained or made hereunder and to delegate duties with respect to such management, with the requisite powers, to any employee, manager, partner or associate of such business, without liability for such delegation; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to subject to the risks of any such business any part or all of my estate or any trust estate, for such term or period as my fiduciaries may determine in the exercise of sole and absolute discretion; to advance money or other property to any such business; to make loans, subordinated or otherwise, of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business, either alone or with other persons interested therein, and to secure such loan or loans by a pledge or mortgage of any part of my estate or any trust estate; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners, associates and officers of any such business either individually or through an officer or officers if any fiduciary be a corporation, and to receive compensation from such business for so acting; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to liquidate, either alone or jointly with others, any such business or any interest in any such business; and generally to exercise any and all powers as my fiduciaries may deem necessary in connection with the management, sale or liquidation of any such business;

5. To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein which may form at any time a part of my estate or any trust estate; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith;

6. To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships, limited liability companies and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of my estate or any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as my fiduciaries may deem advisable;

7. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps which they may deem necessary or proper to obtain the benefits of any such transaction;

8. To rent office space, whether or not from, or in conjunction with any other such space being used by, any beneficiary hereunder, or any relative of mine or of any beneficiary hereunder, or any fiduciary hereunder in his, her or its individual capacity, and to pay the expenses thereof from the principal of my estate or the respective trust estate;

9. To appoint, employ and remove at any time and from time to time any accountants, attorneys, investment or other expert advisers, agents, clerks and employees, including any fiduciary hereunder acting in his, her or its individual capacity or the officer, employee or affiliate of any fiduciary, or any firm, partnership, corporation or other organization in which a fiduciary may have an interest; and to fix and pay their reasonable compensation and incidental employment benefits from the funds of my estate or any trust estate without reducing the compensation to which any fiduciary is otherwise entitled hereunder;

10. To place and leave all or any part of the funds or securities at any time held by my estate or any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of my **Executor/Executors** or the **Trustee/Trustees** to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account"; and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal;

11. To register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; to hold any security in bearer or non-certificated form; and to use a central depository for securities;

12. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which may at any time form part of my estate or any trust estate or which may be liens or charges against any property of my estate or the trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of my estate or any trust estate against others or of others against my estate or the trust upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith, and to abandon any real or personal property which my fiduciaries in the exercise of sole and absolute discretion may determine to be worthless;

13. To divide any trust, into one or more separate trusts for the benefit of one or more of the beneficiaries (to the exclusion of the other beneficiaries) of the trust so divided, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a Subchapter S corporation as described in Section 1361(d)(3) of the Code, or for any other purpose as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine;

14. To make or terminate elections with respect to S corporation stock, and to make such adjustments between income and principal to compensate for the consequences of the trust's ownership of S corporation stock as the **Trustee/Trustees** shall deem just and equitable; provided, however, that if the trust holds S corporation stock, the **Trustee/Trustees** shall immediately take such actions to ensure that the trust qualifies as either an Electing Small Business Trust within the meaning of Section 1361(e)(1)(A) of the Code or a Qualified Subchapter S Trust within the meaning of Section 1361(d)(3) of the Code and (A) if the **Trustee/Trustees** seeks to qualify the trust as an Electing Small Business Trust, the **Trustee/Trustees** shall have the authority to exclude by an acknowledged written instrument any person or organization from having any interest therein, and (B) if the **Trustee/Trustees** shall seek to qualify the trust as a Qualified Subchapter S Trust, the **Trustee/Trustees** shall not make adjustments that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and no Trustee shall exercise any power conferred under this Article or under this Agreement that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and provided further, during the term of any trust created hereunder, (i) if the **Trustee/Trustees** should sell any interest in a corporation or if the assets of any entity constituting a corporation in which the trust has an ownership interest are sold, and (ii) if that corporation has made an election to be taxed under Subchapter S of the Code, then in the sole and absolute discretion of the **Trustee/Trustees**, the **Trustee/Trustees** may distribute to the income

beneficiary such amounts of principal as shall be necessary to pay any income tax caused by that sale, if the income or gain attributable to that sale is taxed directly to the income beneficiary under applicable federal tax law;

15. To permit any one or more of the beneficiaries of any trust, as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, to occupy any real property and to use any tangible personal property forming part of the trust on such terms as the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may determine, whether for rent, rent-free, in consideration of payment of taxes, insurance, maintenance or ordinary repairs, or otherwise; provided, however that, in the case of any trust hereunder which is eligible for the marital deduction, such occupancy or use shall be rent free and any other condition shall be consistent with my intention that my spouse have that degree of beneficial enjoyment of the trust property during life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, so that my spouse's interest is a qualifying income interest for life for purposes of the marital deduction;

16. To make distributions from my estate or any trust in kind or partially in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and without regard to the income tax basis of such property; and any property distributed in satisfaction of a legacy or a distributive share shall be valued as of its date of distribution;

17. To allocate to income or to principal or partly to each any receipt or disbursement, subject to the provisions of paragraph D of Article SIXTH;

18. To hold the assets of any trusts hereby created for convenience of administration and investment as an undivided whole, provided that no such undivided holding shall be deemed to defer or postpone the vesting or distribution of any property so held in trust;

19. To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country;

20. To make payment from time to time on account of commissions and legal fees without requiring the payment of interest thereon and without obtaining any security for the repayment of the same;

21. To delegate any duties or powers, discretionary or otherwise, to any person or institution for such periods and upon such terms and conditions as may be designated in a written acknowledged instrument delivered to such person or institution (including, but without limitation, to delegate discretionary authority to make changes in investments to investment counsel); and, if any duties or powers are delegated to a co-fiduciary, the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable

by a similar instrument so delivered at any time provided, however, that no duties or powers described in paragraph L of Article TENTH may be delegated to an individual who is prohibited in said paragraph from participating in the exercise of such duties or powers;

22. To execute and deliver any and all instruments as the fiduciaries may deem advisable to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with my estate and any trust estate created hereunder as in their judgment the best interests of my estate or such trust may require.

The powers granted to my **Executor/Executors** and the **Trustee/Trustees** hereunder in and by this Article or in and by any other Article of this Will may be exercised in whole or in part and from time to time, and without court authorization, and shall be deemed to be supplemental and not exclusive, it being my intention that my **Executor/Executors** and the **Trustee/Trustees** hereunder shall have all of the general powers of fiduciaries as well as all of the special powers herein expressly granted, and all powers incidental to, reasonably to be implied from or necessary to the proper exercise of, the special powers herein enumerated.

B. <sup>19</sup> I expressly authorize, but do not direct, my **Executor/Executors** and the **Trustee/Trustees** to acquire and retain investments not regarded as traditional for trusts, including investments that would be forbidden or would be regarded as imprudent, improper or unlawful by the "prudent person" rule, "prudent investor" rule, or any other rule of law which restricts a fiduciary's capacity to invest. My **Executor/Executors** and the **Trustee/Trustees**, in the exercise of sole and absolute discretion, may invest in any type of property, wherever located, including any type of security or option, improved or unimproved real property, and tangible or intangible personal property, and in any manner, including direct purchase, joint ventures, partnerships, limited partnerships, limited liability companies, corporations, mutual funds, business trusts or any other form of participation or ownership whatsoever. In making investments, my **Executor/Executors** and the **Trustee/Trustees** may disregard any or all of the following factors:

1. Whether a particular investment, or the trust investments collectively, will produce a reasonable rate of return or result in the preservation of principal.

2. Whether the acquisition or retention of a particular investment or the trust investments collectively are consistent with any duty of impartiality as to the different beneficiaries. I intend that no such duty shall exist, and hereby waive any such duty which otherwise would exist.

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<sup>19</sup> The attorney-drafter must ascertain if this paragraph is in keeping with the client's intention and applicable state law.

3. Whether the trust is diversified. I intend that no duty to diversify shall exist, and hereby waive any such duty which otherwise would exist.

4. Whether any or all of the trust investments would traditionally be classified as too risky or speculative for trusts. The entire trust may be so invested. I intend my **Executor/Executors** and the **Trustee/Trustees** to have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy.

My purpose in granting the foregoing authority is to modify the "prudent person" rule, "prudent investor" rule, or any other rule or law which restricts a fiduciary's ability to invest insofar as any such rule or law would prohibit an investment or investments because of one or more factors listed above, or any other factor relating to the nature of the investment itself. I do this because I believe it is in the best interests of the beneficiaries of the trusts created hereunder to give my **Executor/Executors** and the **Trustee/Trustees** broad discretion in managing the assets of the trusts created hereunder.

C. <sup>20</sup>In addition to all other powers granted to my **Executor/Executors** and the **Trustee/Trustees** hereunder, I authorize my **Executor/Executors** and the **Trustee/Trustees**, at any time and from time to time, to sell, lease, lend or otherwise dispose of at fair market value any property or any interest therein held as part of any trust or estate created under any other Will, (i) to any one or more persons who may be beneficially interested (whether their interest is present or contingent) in my estate or any trust created under this Will, (ii) to any fiduciary of any trust or estate created hereunder or under any other Will or trust instrument (including, without limitation, the estate of my spouse) in his, her or its fiduciary capacity without regard to whether such fiduciary is also beneficially interested in, or acting as a fiduciary of, my estate or any trust created under this Will, and/or (iii) to any person who may be acting as **Executor/Executors** or **Trustee/Trustees** hereunder in his or her individual capacity, and to purchase, exchange, borrow or otherwise acquire at fair market value any property held by any one or more of the persons or entities listed in (i), (ii) or (iii) of this paragraph and with whom any transaction is authorized by the foregoing provisions of this paragraph, and any such sale, lease, loan, disposition, purchase, exchange, borrowing or other transaction in accordance with the foregoing provisions of this paragraph shall be as absolute and effectual as though the other party or parties were not acting in any fiduciary capacity or beneficially interested hereunder. Any transaction authorized by this paragraph may be engaged in by my **Executor/Executors** or the **Trustee/Trustees** without approval or authorization from any court or any beneficiary hereunder and notwithstanding that such transaction may constitute an act of self-dealing. No **Executor/Executors** or **Trustee/Trustees** shall be surcharged, removed or denied any portion of the commissions to which he, she or it is otherwise entitled solely by reason of entering a transaction or transactions authorized by this paragraph.

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<sup>20</sup> See note 19, above



D. <sup>21</sup>Neither my **Executor/Executors** nor the **Trustee/Trustees** shall be under a duty to liquidate any assets forming any part of any trust estate upon the termination of a trust hereunder or any assets of my estate upon my death or otherwise. All powers granted hereunder authorizing my **Executor/Executors** or the **Trustee/Trustees** to invest and reinvest shall continue until my estate or any trust estate of any trust hereunder is finally distributed.

E. <sup>22</sup>I am cognizant of the fact that the individuals I named as my **Executor/Executors** and the **Trustee/Trustees** may also serve as directors, officers, and/or employees with respect to corporations which may form a substantial part of my estate and that their interests as **Executor/Executors** or **Trustee/Trustees** hereunder may conflict with their individual interests as such directors, officers, and/or employees. Notwithstanding the foregoing, I wish these individuals to serve as **Executor/Executors** or **Trustee/Trustees** because of my confidence in their individual skills and because they are the most appropriate individuals as a result of their involvement with the corporations to manage and operate the corporations including making decisions related to the sale of any property held by any such corporation. In addition, I expressly authorize any **Executor/Executors** or **Trustee/Trustees** to act as director, officer, and/or employee with respect to the said corporations and to receive from the said corporations compensation for his or her services.

**THIRTEENTH:**

A. In accordance with the provisions of Section 315(5) of New York's Surrogate's Court Procedure Act, in any proceeding involving my estate or any trust estate created hereunder it shall not be necessary to serve process upon or to make a party to any such proceeding any person under a disability where another party to the proceeding has the same interest as the person under a disability.<sup>23</sup>

B. Except with respect to any trust held under Article SEVENTH for the benefit of my **husband/wife**, [name of spouse], no trust created under this Will shall be subject to the provisions of Section 11-2.1(k) of New York's Estates, Powers and Trusts Law ("EPTL"), nor shall the **Trustee/Trustees** of any such trust be obliged to make any allocation to income in respect of any property held as a part of any trust created hereunder which at any time is underproductive within the meaning of EPTL § 11-2.1(k)(1).<sup>24</sup>

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<sup>21</sup> See note 19, above.

<sup>22</sup> See note 19, above.

<sup>23</sup> If non-New York resident, replace this paragraph with the following:

In any proceeding involving my estate or any trust estate created hereunder it shall not be necessary to serve process upon or to make a party to any such proceeding any person under a disability where another party to the proceeding has the same interest as the person under a disability.

<sup>24</sup> If non-New York resident, replace this paragraph with the following:

C. I authorize my **Executor/Executors** (other than any beneficiary of my estate), in the exercise of sole and absolute discretion, to allocate the expenses of administering my estate between the income and principal of my estate, including, but not limited to, all to income or all to principal, but to income otherwise payable to my **husband/wife** or to a qualified charitable organization only to the extent that such allocation does not constitute a material limitation within the meaning of Treas. Reg. § 20.2056(b)-4(a) so as to cause a reduction in the amount allowable to my estate as a federal estate tax marital or charitable deduction.

D. Any application of principal or income to or for the benefit of any beneficiary may be made by payment to such person or persons (including, but not limited to, other trusts, estates, individuals and institutions) as the **Trustee/Trustees** (other than any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder), in the exercise of sole and absolute discretion, shall determine, and the written receipt of the person or persons so paid shall be a full discharge to the **Trustee/Trustees** from all liability with respect thereto. Any such payment or application may be made without bond, without intervention of any guardian or committee, and without the order of any court.

E. The situs of the property of any trust created hereunder may be maintained in any jurisdiction, in the sole and absolute discretion of the **Trustee/Trustees**, and thereafter transferred at any time or times to any other jurisdiction selected by the **Trustee/Trustees**. Upon any such transfer of situs, the trust estate may thereafter, at the election of the **Trustee/Trustees** of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. If the Trustee or Trustees of any trust created hereunder elect to change the situs of any such trust, said Trustee or Trustees are hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

#### FOURTEENTH:

A. I authorize my **Executor/Executors**, in addition to any rights conferred by law and in the exercise of sole and absolute discretion, to renounce or disclaim, in whole or in part or with reference to specific amounts, parts, fractional shares or assets, any devise, legacy, or interest in or privilege or power over any trust or other disposition provided for my benefit under the will or other instrument of any person at any time within nine (9) months after the date of the transfer,

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Except with respect to any trust created under Article SIXTH for the benefit of my **husband/wife**, [name of spouse], and with respect to which the so-called QTIP election under Section 2056(b)(7) of the Code has been made, no trust created under this Will shall be subject to the provisions of any law allocating a portion of proceeds of unproductive or underproductive property to accounting income as delayed income, nor shall the **Trustee/Trustees** of any such trust be obliged to make any allocation to income in respect of any property held as a part of any trust created hereunder which at any time is unproductive or underproductive.

whether by reason of such person's death or otherwise, which created an interest in me.

B. I authorize any person, in addition to any rights conferred on him or her by law, at any time within nine (9) months after the date of my death to renounce or disclaim, in whole or in part or with reference to specific amounts, parts, fractional shares or assets, any devise, legacy, interest, right, privilege, or power (hereinafter the "Property") granted to that person by this my Will. Any such renunciation or disclaimer shall be made by duly acknowledged, written instrument executed by that person or by his or her conservator, guardian, committee, executor, or administrator, delivered to my **Executor/Executors** and filed with the clerk of the appropriate court. Any such renunciation or disclaimer made by or on behalf of my **husband/wife** or **his/her** estate (a) shall be effective even though as a result thereof the Property is further disposed of to any extent to or in favor of my **husband/wife** or **his/her** estate and (b) shall not be deemed to be a renunciation or disclaimer of any part of such further disposition.

C. I authorize any beneficiary of any trust hereunder holding a power of appointment created hereunder, at any time and from time to time during his or her life, to release such power of appointment with respect to any or all of the property subject to such power or to further limit the persons or organizations in whose favor such power may be exercised.

#### FIFTEENTH:

A. If my **husband/wife**, [*name of spouse*], dies simultaneously with me or in such circumstances as to render it impossible to determine who predeceased the other, I direct that I shall be deemed to have predeceased my **husband/wife** and that the provisions of this Will shall be construed upon that assumption.<sup>25</sup>

B. I intend to take full advantage of the special rule under Section 2651(e) of the Code for transfers to great-grandchildren (and more remote descendants) of my parents who are descendants of a predeceased descendant of my parents with respect to any property transferred to or held in trust hereunder for the benefit of descendants of my parents who are descendants of a predeceased descendant of my parents and the provisions of this Will shall be construed consistent with and to carry out that intent.

In addition, (i) if any person dies within ninety (90) days after my death or the termination of any trust created hereunder or any other event covered by Treas. Reg. § 26.2612-1(a)(2) (or any successor thereto), as the case may be, and (ii) if such person had not, in fact, survived my death or the trust termination, as the case may be, such failure to survive would have caused the special rule relating to a predeceased child or other descendant under Section 2651(e) of the Code to apply to any property passing under this Will, then I direct that such person shall be treated with respect to such property as having predeceased me, the trust termination or other event, as the case may be, so that in accordance with Treas.

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<sup>25</sup> Note that the dispositive provisions (including paragraph C of Article FIFTH) need to be consistent in both husband's and wife's Wills.

Reg. § 26.2612-1(a)(2) (or any successor thereto), the special rule under Section 2651(e) of the Code shall apply with respect to such property.

**SIXTEENTH:** No beneficial eligibility or entitlement of any individual beneficiary to receive current distributions of income and/or principal from any trust created under this Will shall be subject to assignment, pledge, sale or transfer in any manner by such beneficiary, and no individual beneficiary of any such trust shall have the power to encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any individual beneficiary of any such trust; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of Section 2518 of the Code with respect to interests herein.<sup>26</sup>

**SEVENTEENTH:**

**A.** As used in this Will, the terms "child," "children," "descendant" and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.<sup>27</sup>

**B.** As used in this Will, the term "Code" shall mean the Internal Revenue Code of 1986, as amended, including amendments adopted after the date of this Will.

**C.** A disposition in this Will to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>28</sup>

**D.** As used in this Will, the term "Unused GST Exemption" shall mean the maximum exemption against federal generation-skipping transfer ("GST") tax allowed at the time of my death under Section 2631(a) of the Code as shall be unused at the time of my death.

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<sup>26</sup> In some cases it may be appropriate to relax the spendthrift provisions. For example, it may be desired to permit the assignment of remainder interests in a trust for estate planning purposes.

<sup>27</sup> The attorney-drafter must ascertain whether this definition is what the client wishes.

<sup>28</sup> An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

**EIGHTEENTH:** I direct that the validity and effect of this Will and the testamentary dispositions contained herein shall be governed by the laws of the State of *[applicable law]* in effect from time to time.

IN WITNESS WHEREOF, I, *[name of testator]*, have to this my Last Will and Testament subscribed my name and set my seal this *[date of execution of Will]*.

\_\_\_\_\_  
(L.S.)

Subscribed and sealed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by him/her to us to be his/her Last Will and Testament, and thereupon we, at the request of the said Testator, in his/her presence and in the presence of each other, have hereunto subscribed our names as witnesses this *[date of execution of Will]*.

\_\_\_\_\_  
residing at \_\_\_\_\_

\_\_\_\_\_  
residing at \_\_\_\_\_

\_\_\_\_\_  
residing at \_\_\_\_\_

*[self-proving affidavit omitted]*

**FORM 9**  
**HEALTH CARE PROXY<sup>1</sup>**

I, *[name of Principal]*, currently residing at *[address of Principal]*, hereby appoint *[name of Health Care Agent]*, currently residing at *[address of Health Care Agent]* and whose current home telephone number is *[telephone number of Health Care Agent]*, to be my Health Care Agent to make any and all health care decisions in accordance with my wishes and instructions as made known to my Health Care Agent, including, without limitation (i) the decision to consent to an order not to attempt cardio-pulmonary resuscitation, and (ii) any decision that I myself could make with respect to any consent, refusal of consent, or withdrawal of consent (whether originally given by me or by my Health Care Agent), to any care, treatment, medication, service, or surgical or other procedure, including artificial nutrition and hydration, to maintain, diagnose, or treat a physical or mental condition, and I hereby specifically authorize my Health Care Agent to sign on my behalf all documents, waivers, or releases in connection with such decisions, including, without limitation, a waiver or release from liability required by any health care provider or physician.

In the event the person I appoint above is unable, unwilling, or unavailable to act as my Health Care Agent, I hereby appoint *[name of alternate Health Care Agent]*, currently residing at *[address of alternate Health Care Agent]* and whose current home telephone number is *[telephone number of alternate Health Care Agent]*, as my Health Care Agent.

This health care proxy shall take effect in the event that I become unable to make my own health care decisions and shall not be affected by any disability or incapacity occurring after I have signed this instrument. I hereby revoke any prior health care proxy given by me to the extent it purports to confer the authority herein granted. I understand that, unless I revoke it, this health care proxy will remain in effect indefinitely.

Although I do not know today the exact circumstances that will exist if and when my Health Care Agent is called upon to make a decision or decisions in my behalf, I have selected my Health Care Agent with the confidence that my Agent understands my feelings in these matters, and will make the decisions I will want made considering the circumstances as they exist at the time. It is my intention, therefore, that the decision of my Health Care Agent be taken as a final and binding decision of mine, and will be the conclusive interpretation of the wishes I have made known in this document.

**WAIVER AND INDEMNITY**

To the extent permitted by law, I, for myself and for my heirs, executors, legal representatives, and assigns, hereby release and discharge and agree to indemnify and hold harmless my Health Care Agent from and against any claim or liability whatsoever resulting from or arising out of my Agent's reliance on my wishes and directions as made known to my Agent. To induce any third party to act in accordance with the decisions of my Health Care Agent, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument may so act, and that

<sup>1</sup> The attorney-drafter should consult the specific requirements of the applicable state law relating to health care proxies.

revocation or termination by me hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such revocation shall have been received by such third party, and to the extent permitted by law, I, for myself and for my heirs, executors, legal representatives, and assigns, hereby release and discharge and agree to indemnify and hold harmless any such third party from and against any claims or liability whatsoever that may arise against such third party by reason of such third party having relied on the provisions of this instrument.

#### SEVERABILITY

If any portion of this instrument is invalid, ineffective, or unenforceable, I direct that the balance of this instrument shall not be affected and shall continue in full force and effect.

IN WITNESS WHEREOF, I have signed this instrument on

\_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
[name of Principal]

Each of the undersigned witnesses declares: that I personally know the person who signed this instrument or have received convincing evidence of such person's identity; that such person appears to be over the age of eighteen (18) years, of sound mind, and acting willingly and free from duress; that such person signed this instrument in my presence and in the presence of the other witness; and that I am not the person appointed as agent by this instrument.

\_\_\_\_\_ residing at \_\_\_\_\_

\_\_\_\_\_ residing at \_\_\_\_\_

The Principal today has executed sufficient counterparts hereof to provide one for each Health Care Agent herein named; one for the Principal's attorney, [*name and address*]; and one for each of the following:

☐ The Principal's regular physician:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☐ The Principal's \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☐ The Principal's \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[*notary clause omitted*]



**FORM 10**  
**LIVING WILL<sup>1</sup>**

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TO MEMBERS OF MY FAMILY, MY PHYSICIAN, MY LAWYER, ANY MEDICAL FACILITY IN WHOSE CARE I HAPPEN TO BE, AND ANY INDIVIDUAL WHO MAY BECOME RESPONSIBLE FOR MY HEALTH, WELFARE, OR AFFAIRS:

**I.**  
**Living Will Including Statement**  
**Concerning Right to Die**

Death is as much a reality as birth, growth, maturity, and old age—it is the one certainty of life. If the time comes when I [*name of Principal*], currently residing at [*address of Principal*], can no longer take part in decisions for my own future, let this statement stand as an expression, while I am still of sound mind, of my wishes and directions to be followed with respect to my medical care. I hereby revoke any prior living will made by me.

If the situation should arise in which there is no reasonable expectation of my recovery from extreme physical or mental disability (including, but not limited to, a circumstance where there is no reasonable expectation that I will recover consciousness, commonly referred to as "brain dead"), I request and direct that I be allowed to die and not be kept alive by medications, artificial means, including artificial nutrition and hydration, or "heroic measures." Without limiting the generality of the foregoing, I hereby consent in such situation to an order not to attempt cardiopulmonary resuscitation. I do, however, ask that medication be mercifully administered to me to alleviate suffering, even though this may shorten my remaining life and/or retard my consciousness. Also, I would prefer to live out my last days at home rather than in a hospital, even if this may shorten my remaining life, as long as my being at home is not an undue burden on my family and does not hinder the alleviation of pain.

I impose no limits or restrictions in carrying out the directions and intentions outlined in this document. These directions and requests are made after careful consideration, and are in accordance with my strong convictions and beliefs. It is my desire that the directions contained herein be carried out to the fullest extent permitted by law. To the extent these directions may not be legally enforceable, it is my hope that those who care for me and make decisions on my behalf will feel morally bound to follow these directions. I recognize that this appears to place a heavy responsibility on those persons, but it is with the intention of relieving them of such responsibility and of placing it on myself in accordance with my strong convictions, that this statement is made.

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<sup>1</sup> The attorney-drafter should consult the specific requirements of applicable state law relating to living wills.

**II.**  
**Waiver and Indemnity**

To the extent permitted by law, I, for myself and for my heirs, executors, legal representatives, and assigns, hereby release and discharge and agree to indemnify and hold harmless any provider of care, any medical facility, and any other person from and against any claim or liability whatsoever resulting from or arising out of reliance by such provider or facility or other person on my wishes and directions as expressed herein. To induce anyone to act in accordance with my wishes and directions expressed herein, I hereby agree that any person receiving a duly executed copy or facsimile of this instrument may so act, and that revocation or termination by me hereof shall be ineffective as to such person unless and until actual notice or knowledge of such revocation shall have been received by such person.

**III.**  
**Severability**

If any portion of this instrument is invalid, ineffective, or unenforceable, I direct that the balance of this instrument shall not be affected and shall continue in full force and effect.

IN WITNESS WHEREOF, I have signed this instrument on [date].

.....  
[name of Principal]

Each of the undersigned witnesses declares: that I personally know the person who signed this instrument or have received convincing evidence of such person's identity; that such person appears to be over the age of eighteen (18) years, of sound mind, and acting willingly and free from duress; that such person signed this instrument in my presence and in the presence of the other witness; and that I am not the person appointed as agent by this instrument.

..... residing at .....

..... residing at .....

The Principal today has executed sufficient counterparts hereof to provide one for each Health Care Agent named in the Principal's Health Care Proxy dated [date]; one for the Principal's attorney, [name and address]; and one for each of the following:

☐ The Principal's regular physician:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☐ The Principal's \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

☐ The Principal's \_\_\_\_\_:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[notary clause omitted]

**FORM 11**  
**POUR-OVER WILL TO PRE-FUNDED INTERVIVOS TRUST**

I, *[name of Testator]*, of *[domicile of Testator]*, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

**FIRST:** I give and bequeath all furniture, furnishings, rugs, pictures, books, silver, plate, linen, china, glassware, objects of art, wearing apparel, jewelry, automobiles and their accessories, and all other tangible personal property (excluding cash, bullion and any tangible personal property used primarily in a trade or business at the time of my death) owned by me at the time of my death to the Trustee or Trustees in office at the time of my death of an Agreement of Trust initially executed immediately prior to this Will by me, as Grantor, and *[names and addresses of trustees]*, as Trustees, as amended and restated from time to time, including amendments after the date of this Will (the "*[name of trust]*" Intervivos Trust"), to be held, administered and disposed of in accordance with the provisions of said Agreement of Trust.

**SECOND:**

**A.** I give and devise all real property owned by me at the time of my death, and used by me at the time of my death and used by me or by my family as a place of residence (whether permanent, temporary or seasonal) or held in connection with such use, including all buildings thereon and all rights and easements appurtenant thereto and all policies of insurance relating thereto, to the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust, to be held, administered and disposed of in accordance with the provisions of said Agreement of Trust.

**B.** I give, devise and bequeath all stock owned by me at the time of my death in any corporation which is the owner of any building in which I have a cooperative apartment which is used by me at the time of my death as a residence (whether permanent, temporary or seasonal), together with any lease to such apartment and all right, title and interest owned by me at the time of my death in and to any agreements relating to said building and the real property on which it is located, and all policies of insurance relating thereto to the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust, to be held, administered and disposed of in accordance with the provisions of said Agreement of Trust.

**THIRD:** If at the time of my death I have any power of appointment over any property then held in trust or otherwise, I hereby declare that I intend not to exercise such power and that nothing herein contained shall constitute an exercise thereof in whole or in part.

**FOURTH:** I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situated, of which I shall die seized or possessed or of which I shall be entitled to dispose at the time of my death (my "residuary estate") to the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust, to be held, administered and disposed of in accordance with the provisions of said Agreement of Trust.

**FIFTH:** If for any reason the *[name of trust]* Intervivos Trust is not in existence at the time of my death, then any disposition in this Will to the Trustee or Trustees of said trust shall be made to the persons who would be the Trustee or Trustees of said Trust if it were in existence at my death, IN TRUST, to be held and disposed of as provided in the said Agreement of Trust as in effect as of the date of this Will.

**SIXTH:**

A. All estate, inheritance, legacy, succession, transfer or other death taxes, including any interest thereon, imposed by any domestic or foreign taxing authority on my death (including any additional estate tax imposed by Sections 2031(c), 2032A or 2057 of the Code, any generation-skipping transfer tax imposed by Chapter 13 of the Code, or any comparable tax imposed by any other taxing authority) with respect to (1) the property disposed of under this my Will (including any property passing to the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust), (2) any property otherwise passing to the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust, and (3) all property held by the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust shall be paid by the Trustee or Trustees in office at the time of my death of the *[name of trust]* Intervivos Trust.

B. No amounts shall be paid pursuant to this Article out of any property in the *[name of trust]* Intervivos Trust or added to the *[name of trust]* Intervivos Trust as a result of my death which is not includible in my gross estate for purposes of the federal estate tax, or, if there is no federal estate tax in effect at the time of my death, for purposes of the death tax under the law of the state of my domicile as in effect at the date of my death.

**SEVENTH:**

A. I appoint *[name of Executor]*, if **he/she**<sup>1</sup> survives me, and *[name of Executor]*, if **he/she** survives me, Executors of this my Last Will and Testament. If *[name of Executor]* for any reason fails to qualify or ceases to act as Executor hereunder, I appoint *[name of successor Executor]*, Executor in **his/her** place. If *[name of Executor]* for any reason fails to qualify or ceases to act as Executor hereunder, I appoint *[name of successor Executor]*, Executor in **his/her** place.

B. I authorize, but do not direct, my Executors in the exercise of sole and absolute discretion, to appoint as a co-Executor such individual or such bank or trust company as my Executors, in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by an instrument in writing filed with the clerk of the appropriate court.

Subject to the foregoing appointments, I authorize each Executor acting hereunder from time to time to appoint such individual or such bank or trust company as he, she or it in the exercise of sole and absolute discretion, shall select as successor Executor to act in his, her or its place if he, she or it should

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<sup>1</sup> Boldface type here and throughout this form indicates terms that are to be tailored to the specific situation. Only the applicable choice should appear in the final document.

cease to act. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court, and may be revoked by such Executor prior to its becoming effective and succeeded by a later appointment, the last such appointment to control.

C. Any Executor may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the clerk of the appropriate court.

D. Should it be necessary for an Executor of my estate to qualify in any jurisdiction wherein any Executor named herein cannot or may not desire to qualify as such, any Executor named herein shall, without giving any security, act as Executor in such jurisdiction and shall have therein all the rights, powers, privileges, discretions and duties conferred or imposed upon my Executors by the provisions of this my Will, or, if such Executor cannot or does not desire to qualify as Executor in such other jurisdiction, or, if at any time and for any reason there shall be no Executor in office in such other jurisdiction, I appoint as Executor therein such person or corporation as may be designated by my Executors acting hereunder. Such substituted Executor shall, without giving any security, have in such other jurisdiction all the rights, powers, privileges, discretions and duties conferred or imposed upon my Executors by the provisions of this my Will.

E. Whenever the term "Executors" is used in this Will, it shall be deemed to refer to the Executors or Executor acting hereunder from time to time.

**EIGHTH:**

A. Except as provided by law, I direct that my Executors shall not be required to file any inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.<sup>2</sup>

B. My Executors may, in the exercise of sole and absolute discretion, disclaim or renounce any interest which I or my estate may have under any other will, under any trust agreement or otherwise.

C. My Executors may, in the exercise of sole and absolute discretion, elect to treat (i) any part or all of any bequest of property passing under this Will, (ii) any other property includable in my estate for federal tax purposes or (iii) none of the property includible in my estate for federal tax purposes as "qualified terminable

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<sup>2</sup> If non-New York resident, replace this paragraph with "To the extent permitted by law, I direct that my Executor shall not be required to file an inventory or render an accounting of my estate and that no Executor, Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon."

interest property" within the meaning of section 2056(b)(7) of the Code, or any successor thereto, and any comparable election granted by any other taxing authority.

D. My Executors shall be authorized to charge estate management expenses within the meaning of Treas. Reg. § 20.2056(b)-4 against any marital or any charitable share.

E. My Executors may make (or not make) such other elections under the tax laws (including, but without limitation, any election under Chapter 13 of the Code) as my Executors, in the exercise of sole and absolute discretion, deem advisable, regardless of the effect thereof on any of the interests under this Will, and I direct that there shall be no adjustment of such interests by reason of any action taken by my Executors pursuant hereto. I acknowledge that decisions by my Executors (including, but not limited to, the selection of dates to value property for estate tax purposes and whether to deduct expenses for income or estate tax purposes) may affect beneficial interests under this Will and I intend that no equitable or other adjustment shall be made by reason of such decisions and that no claim may be made against my Executors for making or not making such decisions.

F. My Executors are authorized, in the exercise of sole and absolute discretion, to make any adjustment to basis authorized by law, including, but not limited to, increasing the basis of any property included in my estate, whether or not passing under this Will, by allocating any amount by which the bases of assets may be increased. My Executors shall be under no duty and shall not be required to allocate basis increase exclusively, primarily or at all to assets passing under this Will as opposed to other property included in my estate. I waive any such duty that otherwise would exist. My Executors may elect, in the exercise of sole and absolute discretion and without permission of any court or other authority, to allocate basis increase to one or more of all assets that my Executors may receive or in which any Executor has a personal interest to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any Executor to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

G. The determination of my Executors with respect to all elections, disclaimers and renunciations referred to in this Article shall be final and conclusive upon all persons.

**NINTH:** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, I hereby expressly grant to my Executors with respect to my estate the powers hereinafter enumerated, all of such powers so conferred or granted to be exercised by my Executors as my Executors may deem advisable in the exercise of sole and absolute discretion:

1. To purchase or otherwise acquire, and to retain, whether originally a part of my estate or subsequently acquired, any and all stocks, bonds, notes or other securities, or any variety of real or personal property, including securities of any corporate fiduciary, or any successor or affiliated corporation, interests in common trust funds and securities of or other interests in investment companies and

investment trusts, whether or not such investments be of the character permissible for investments by fiduciaries; and to make or retain any such investment without regard to degree of diversification.

2. To sell, lease, pledge, mortgage, transfer, exchange, convert or otherwise dispose of, or grant options with respect to, any and all property at any time forming a part of my estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions; and to enter into leases which extend beyond the period fixed by statute for leases made by fiduciaries.

3. To borrow money from any lender, including any corporate fiduciary, for any purpose connected with the protection, preservation or improvement of my estate, and as security to mortgage or pledge upon any terms and conditions any real or personal property of which I may die seized or possessed.

4. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps proper to obtain the benefits of any such transaction

5. To the extent permitted by law, to register any security in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity; and to hold any security in bearer form.

6. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which I may owe or to which I may be a party or which may be liens or charges against any of my property, or against my estate, although I may not be liable thereon; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of my estate against others or of others against my estate upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages; and to make any payments in connection therewith.

7. To make distributions in kind (including in satisfaction of pecuniary bequests) and to cause any distribution to be composed of cash, property or undivided fractional shares in property different in kind from any other distribution without regard to the income tax basis of the property distributed to any beneficiary and any property so distributed shall be valued as of its date of distribution.

8. Whenever no corporate fiduciary is acting hereunder, to place all or any part of the securities which at any time are held by my estate in the care and custody of any bank or trust company with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company; to have all stocks and registered securities placed in the name of such bank or trust company or in the name of its nominee; to appoint such bank or trust company agent and attorney to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian" account; and to allocate the



charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal.

9. To appoint, employ and remove, at any time and from time to time, any accountants, attorneys, investment counselors, expert advisers, agents, clerks and employees; and to fix and pay their compensation from income or principal or partially from income and partially from principal.

10. Whenever permitted by law, to employ a broker-dealer as custodian for all or any part of the securities at any time held by my estate and to register such securities in the name of such broker-dealer.

11. To execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to inquire into its validity or to see to the application of any money or other property paid or delivered pursuant to the terms of any such instrument.

**TENTH:** I appoint my **husband/wife**, [name of spouse], Guardian of the person and property of each minor child of mine. If my **husband/wife**, [name of spouse], fails to qualify or ceases to act as such Guardian, I appoint [name of successor Guardian], in his/her place.

**ELEVENTH:**

A. As used in this Will, the terms "child," "children," "descendant" and "descendants" are intended to include adopted persons and the descendants of adopted persons, whether of the blood or by adoption.<sup>2</sup>

B. As used in this Will, the term "Code" shall mean the Internal Revenue Code of 1986, as amended, and any successor thereto, including amendments adopted after the date of this Will.

C. A disposition in this Will to the descendants of a person *per stirpes*<sup>3</sup> shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.

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<sup>2</sup> NOTE: The attorney-drafter must ascertain whether this definition is what the client wishes

<sup>3</sup> NOTE: The attorney-drafter must ascertain whether this definition is what the client wishes. An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

**TWELFTH:** I direct that the validity of this Will and the testamentary dispositions contained herein shall be governed by the laws of the State of New York in effect from time to time.

IN WITNESS WHEREOF, I, [*name of Testator*], have to this my Last Will and Testament subscribed my name and set my seal this [*date of execution of Will*].

(L.S.)

Subscribed and sealed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by **him/her** to us to be **his/her** Last Will and Testament, and thereupon we, at the request of the said Testator, in **his/her** presence and in the presence of each other, have hereunto subscribed our names as witnesses this [*date of execution*].

residing at

residing at

residing at

[*self-proving affidavit omitted*]

**FORM 12**  
**INTERVIVOS TRUST<sup>1</sup>**

THIS AGREEMENT made [date] between [name and address of grantor] (the "Grantor") and [names and addresses of trustees] (the "Trustees").<sup>2</sup>

**WITNESSETH:**

WHEREAS, the Grantor desires to create a trust of the property hereinafter specified for the purposes hereinafter set forth and the Trustees have consented to accept and perform said trust in accordance with such terms,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Grantor does hereby assign, convey, transfer and deliver to the Trustees the property set forth in the Schedule hereto annexed, receipt of which the Trustees do hereby acknowledge,

TO HAVE AND TO HOLD the same and any other property which the Trustees may hereafter at any time hold or acquire hereunder (hereinafter referred to as the "trust" or the "trust estate"), IN TRUST, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

**FIRST: Name of Trust.** This trust shall be known as "The [name of trust] Intervivos Trust."

**SECOND: Trust During Grantor's Life.**

A. During the life of the Grantor, the Trustees shall hold, manage, invest and reinvest the trust estate, shall collect the income thereof, and shall pay over or apply the net income and principal thereof to such extent, including the whole thereof, and in such amounts or proportions, equal or unequal, including all to one to the exclusion of the others, at such time or times, and in such manner, either outright or in trust, as the Trustees, in the exercise of sole and absolute discretion, may determine, to or for the benefit of such one or more members of the class consisting of the Grantor, the Grantor's spouse, and the Grantor's descendants living from time to time as the Trustees, in the exercise of sole and absolute discretion, shall select.

B. The Grantor hereby expressly reserves the right at any time or from time to time by a notice in writing signed by the Grantor specifically referring to this Article and delivered to the Trustees by hand or by certified mail:

<sup>1</sup> This form contemplates a disposition similar to that provided in Form 8: a Portion A "Clayton" marital trust, to the extent the Grantor's Executors so elect, and a Portion B sprinkle trust for the surviving spouse and descendants. Ongoing trusts for descendants are separate share, long-term trusts. There are complex provisions for the removal and replacement of Trustees. See note 1 to Form 8 for a more detailed discussion.

<sup>2</sup> If permitted by applicable state law, consider revising to provide that the Grantor will serve as sole Trustee during the Grantor's lifetime.

1. To withdraw any or all of the property held hereunder or to revoke the trust hereby created in whole or in part, subject to the payment of any compensation or expense reimbursement due the Trustees, Trust Protector or member of the Trust Committee and subject to the payment of any expenses of terminating the trust.

2. To amend this Agreement in any and every respect, provided, however, that the duties, responsibilities and compensation or expense reimbursement of the Trustees, Trust Protector and/or the Trust Committee shall not be changed without the written consent of the Trustees, Trust Protector and/or the Trust Committee, as the case may be.

3. To remove any Trustee, Trust Protector, or member of the Trust Committee, subject to the payment of any compensation or expense reimbursement due.

C. During the life of the Grantor, the Trustees are also authorized, subject to the veto of the Grantor (including that of any conservator, guardian or committee of the Grantor or any attorney-in-fact expressly authorized in the power of attorney to do so):

1. To make gifts, grants, distributions or other transfers (including the forgiveness of indebtedness) without consideration (hereinafter "transfer") either outright or in trust, to or for the benefit of such one or more members of the class consisting of the Grantor's spouse, the Grantor's descendants and such one or more organizations described in Sections 170(c) and 2522(c) of the Code, as the Trustees shall select and that the Trustees believe reflect what would be the wishes of the Grantor; provided, however, that no Trustee (other than the Grantor) who is authorized to participate in decisions under this subparagraph 1 shall make any gifts to himself or herself, his or her estate, his or her creditors or the creditors of his or her estate, or to any person he or she has any obligation to support;

2. To prepare, execute and file any gift tax return required by any such gift and to pay from the trust estate any gift tax that may arise by reason of any such gift; and

3. To make any such gift in accordance with subparagraph 1 by the transfer of property from this trust either directly to such recipient or to the Grantor or to the Grantor's attorney-in-fact (who may or may not be a Trustee) who may decide on behalf of the Grantor to complete or not to complete such transfer, as the Trustees may determine, in the exercise of sole and absolute discretion.

D. In addition to all other powers herein granted to the Trustees, the Trustees are specifically authorized to hold and maintain any real property used by the Grantor as a personal residence or residences and transferred to the trust, for the Grantor's use and benefit. If the Trustees, in the exercise of sole and absolute discretion, determine that it would be in the best interests of the Grantor to maintain one or more residences for the Grantor's use but that the residences

then held in the trust should not be used for such purpose, the Trustees are authorized to sell any such real property and to apply the net proceeds of sale to the purchase of such other real property, condominium and/or cooperative apartment or to make such other arrangements as the Trustees, in the exercise of sole and absolute discretion, deem suitable for the purpose. Any proceeds of sale not needed for reinvestment in a residence or residences as provided above shall be added to the principal of the trust and thereafter held, administered and disposed of as a part thereof.

The Trustees are authorized to pay all carrying charges of such residences, including but not limited to any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of domestic servants and other expenses incident to the running of a household or households for the benefit of the Grantor. Having in mind the extent to which funds will be available for expenditure for the benefit of the Grantor, the Trustees are authorized to expend such amounts as the Trustees, in the exercise of sole and absolute discretion, shall determine to maintain the then current lifestyle of the Grantor including, but not limited to, complete authority to provide for the Grantor's personal care and comfort in any manner whatsoever. The Trustees are specifically authorized but not required to engage the services of any individuals or organizations to provide for the personal care and comfort of the Grantor.

**THIRD: Disposition Upon Death of Grantor—Payments for Debts, Expenses and Taxes.**

A. Upon the death of the Grantor, the Trustees are authorized, but not directed, to transfer, convey and pay over the principal of the trust; if any, as it is then constituted, together with any accrued and undistributed income, to the Executor or Executors of the Grantor's Last Will and Testament admitted to probate (the "Grantor's Will"), to such extent as the Trustees may determine appropriate for the payment of expenses of administration of the Grantor's estate, his/her debts and his/her funeral expenses (excluding any "death taxes" as hereinafter defined in paragraph B of this Article). The Trustees shall have no duty or obligation to inquire as to the correctness of any amount so certified by the said Executor or Executors, and the payment of such amount either directly by the Trustees or to said Executor or Executors shall be a full and complete discharge to the Trustees with respect to such payment.

B. Subject to the provisions of paragraph C of this Article, the Grantor directs the Trustees to pay, either directly to the applicable taxing authorities or to the Executor or Executors of the Grantor's Will for payment by the Executor or Executors to the applicable taxing authorities, any estate, inheritance, legacy, succession, transfer or other death taxes including any interest or penalties thereon, imposed by any domestic or foreign taxing authority on the Grantor's death (other than any additional estate tax imposed by Sections 2031(c), 2032A or 2057 of the Code, any generation-skipping transfer tax imposed by Chapter 13 of the Code, or any comparable tax imposed by any other taxing authority) (herein "death taxes") with respect to (1) the property disposed of under the Grantor's Will (including any property passing to the Trustees under the Grantor's Will), (2) any

property otherwise passing to the Trustees by reason of the Grantor's death, and (3) all property held by the Trustees under this Agreement at the Grantor's death.

The Trustees are authorized, but not directed, to transfer, convey and pay over to the Executor or Executors of the Grantor's Last Will and Testament out of the trust estate such amount as the said Executor or Executors shall certify in writing to the Trustees is needed for the payment of any death taxes as hereinabove defined. Notwithstanding anything herein to the contrary, if the Grantor's spouse survives the Grantor and if, as a result of an election by the Grantor's **Executor/Executors**, any property is being held in accordance with the provisions of paragraph A of Article SIXTH, such taxes shall be first charged against and paid without apportionment out of such property held in accordance with the provisions of paragraph A of Article SIXTH.

**C.** Any amounts paid by the Trustees pursuant to this Article shall be charged against and paid without apportionment out of any property passing under Article FIFTH of this Agreement, and without apportionment within such property, provided, however, that any generation-skipping transfer tax imposed by Chapter 13 of the Code (or by the comparable laws of any other taxing authority) on a direct skip with respect to property passing under Article FOURTH also shall be charged against and paid without apportionment within the property passing under Article FIFTH of this Agreement, and provided further that if subparagraph 1a of paragraph A of Article FIFTH applies, amounts under paragraph B of this Article shall be paid first out of the property passing under subparagraph 1b of paragraph A of Article FIFTH.<sup>3</sup>

**D.** No amounts shall be paid pursuant to this Article out of any property in this trust or added to this trust as a result of the Grantor's death which is not includable in the Grantor's gross estate for purposes of the federal estate tax, or, if there is no federal estate tax in effect at the time of the Grantor's death, for purposes of the death tax under the law of the state of the Grantor's domicile as in effect at the date of the Grantor's death.

**FOURTH: Disposition Upon Death of the Grantor—Specific Bequests.** Upon the death of the Grantor, after the transfers, distributions and payments provided for in Article THIRD, the Trustees shall make the following distributions out of the trust estate, including any property passing to the Trustees pursuant to the terms of the Grantor's Last Will and Testament or otherwise, and that are not specifically directed to be held and disposed of pursuant to any other Article of this Agreement:

**A.** If the Grantor's spouse, [*name of spouse*], survives the Grantor, the Trustees shall transfer and distribute to the Grantor's spouse all tangible personal

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<sup>3</sup> The tax apportionment clause may need to be changed if there is a mixed residue, either marital and taxable nonmarital residue or charitable and noncharitable residue. Note that if the Agreement contains a qualified domestic trust ("QDOT"), special tax provisions will be required (as well as special QDOT provisions for the marital trust, and attention to any outright bequests to the spouse).

property held in this trust. The Grantor requests that **his/her**<sup>4</sup> spouse will transfer such item or items of this property to such person or persons as the Grantor may have indicated to **his/her** spouse from time to time during **his/her** life.

If the Grantor's spouse, [name of spouse], does not survive the Grantor, the Trustees shall transfer and distribute to the Grantor's spouse all tangible personal property held in this trust to such of the Grantor's children as survive the Grantor, in as nearly equal shares as may be practicable.<sup>5</sup>

B. The Trustees shall distribute all right, title and interest in and to any real estate held in the trust at the death of the Grantor, including all improvements thereon and all rights and easements appurtenant thereto, to the Grantor's spouse, [name of spouse], if **he/she** is then living, or if not, the Trustees shall sell such real estate and dispose of the net proceeds of sale as provided in Article FIFTH below.<sup>6</sup>

C. The Trustees shall distribute the following amounts to the following individuals who survive the Grantor:

1. .... Dollars (\$.....) to [name of legatee];
2. .... Dollars (\$.....) to [name of legatee];
3. .... Dollars (\$.....) to [name of legatee];

D. The Trustees shall distribute the following amounts to the following organizations that are in existence at the Grantor's death, to be used by each for its general purposes, unless otherwise noted below:

1. .... Dollars (\$.....) to [name of legatee institution];
2. .... Dollars (\$.....) to [name of legatee institution];
3. .... Dollars (\$.....) to [name of legatee institution];<sup>9</sup>

<sup>4</sup> Boldface type here and throughout this form indicates terms that are to be tailored to the specific situation. Only the applicable choice should appear in the final document.

<sup>5</sup> Consider changing this disposition to descendants *per stirpes*, if appropriate.

<sup>6</sup> Consider changing to the Grantor's children then living or descendants then living *per stirpes*, if appropriate. Also consider changing this to an authorization as opposed to a direction to sell and/or adding property or proceeds to any trust held under Article SEVENTH, if appropriate.

<sup>7</sup> If the spouse survives the testator, consider making these gifts to the spouse with the suggestion that the spouse then give the gifts to the selected individuals.

<sup>8</sup> If the spouse survives the testator, consider making these gifts to the spouse with the suggestion that the spouse then give the gifts to the selected charities.

<sup>9</sup> Consider using a charitable remainder trust to receive retirement benefits if analysis shows that a charitable remainder trust would be more beneficial in the event that the spouse does not survive the testator.

**FIFTH: Disposition Upon Death of Grantor.** Upon the death of the Grantor, the balance of the trust estate, after the transfers, distributions and payments provided for in Articles THIRD and FOURTH (the "trust balance"), shall be disposed of as follows:

**A.** 1. If the Grantor's spouse, [name of spouse], survives the Grantor, and if the Grantor's **Executor/Executors** (other than the Grantor's spouse), in the exercise of sole and absolute discretion, elect for some or all of the trust balance to qualify for the federal estate tax marital deduction under Section 2056(b)(7) of the Code (the "QTIP election"), the trust balance shall be divided into two portions, to be known as Portion A and Portion B.

a. Portion A shall consist of that share of the trust balance, if any, with respect to which the Grantor's **Executor/Executors** have made the QTIP election. Portion A shall be transferred, conveyed and paid over to the Trustees hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph A of Article SIXTH.

b. Portion B shall consist of the remainder, if any, of the trust balance. Such property, if any, shall be transferred, conveyed and paid over to the Trustees hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph B of Article SIXTH.

2. If the Grantor's spouse [name of spouse], survives the Grantor, and if the Grantor's **Executor/Executors** (other than the Grantor's spouse), in the exercise of sole and absolute discretion, do not make a QTIP election with respect to some or all of the trust balance, the entire trust balance shall be transferred, conveyed and paid over to the Trustees hereinafter named, IN TRUST, to be held as a separate trust and disposed of in accordance with the provisions of paragraph B of Article SIXTH.

3. Each of Portion A and Portion B is intended to be a fractional share which participates in appreciation and depreciation occurring in the property disposed of under this Article. Subject to the provisions of paragraph D of Article SIXTH, each portion may be funded with cash or other property, or a combination thereof, and any such other property so used shall be valued as of the date of distribution.

**B.** If the Grantor's spouse [name of spouse] does not survive the Grantor, but any descendant of the Grantor survives the Grantor, the trust balance shall be disposed of as follows:

1. The trust balance shall be divided into a sufficient number of equal shares such that there shall be set aside one (1) such share for each child of the Grantor who survives the Grantor and one (1) such share for the collective descendants who survive the Grantor of each child of the Grantor who shall have predeceased the Grantor. Each such share so set aside for the collective descendants of any child of the Grantor who shall have predeceased the Grantor shall be further subdivided into *per stirpital* sub-



shares for such descendants who survive the Grantor. Each child who survives the Grantor for whom a share is set aside and each descendant who survives the Grantor of a child of the Grantor who has predeceased the Grantor for whom a *per stirpital* subshare is set aside is herein referred to as the "primary beneficiary" of such share or subshare.

2. The Trustees (other than any descendant of the Grantor) shall divide any share or subshare so set aside for a primary beneficiary into two fractional parts: (a) one consisting of that fractional part of the share or subshare of which (i) the numerator is the amount, if any, of the Grantor's Unused GST Exemption (as hereinafter defined) which the Grantor's **Executor/Executors** (other than any descendant of the Grantor), in the exercise of sole and absolute discretion, may elect to allocate to such share or subshare and (ii) the denominator is the value of such share or subshare as finally determined for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of the Grantor's death, for death tax purposes under the law of the state of the Grantor's domicile as in effect at the date of my death) (hereinafter referred to as "Portion I"), and (b) the other consisting of the balance of the share or subshare (hereinafter referred to as "Portion II").

3. Portion I and Portion II shall be transferred, conveyed and paid over to the Trustees hereinafter named, IN TRUST, each to be held as a separate trust with identical terms and disposed of in accordance with the provisions of Article SEVENTH.

4. In computing Portion I and Portion II, the values and amounts as finally determined for federal estate tax purposes (or, if there is no federal estate tax in effect at the time of the Grantor's death, for death tax purposes under the law of the state of the Grantor's domicile as in effect at the date of the Grantor's death) shall control. Each of Portion I and Portion II is intended to be a fractional share which participates in appreciation and depreciation occurring in the property disposed of under this Article. Each portion may be funded with cash or other property, or a combination thereof, and any such other property so used shall be valued as of the date of distribution.

C. If neither the Grantor's spouse, [name of spouse] nor any descendant of the Grantor survives the Grantor, the trust balance, or, if upon the termination of any trust hereunder, there is no effective disposition of the trust property by another provision of this Agreement, such trust property and any other property which is directed to be disposed of in accordance with the provisions of this paragraph C, shall be transferred, conveyed and paid over to [name of beneficiary or beneficiaries to receive property if neither spouse nor any descendant survives].

#### **SIXTH: Trusts for Certain Family Members.**

A. Portion A and any other property which is directed to be held and disposed of in accordance with the provisions of this paragraph A of this Article shall be held as a separate trust by the Trustees hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay

over or apply the net income, on a quarterly basis insofar as may be practicable, but at least annually, to or for the benefit of the Grantor's spouse [*name of spouse*], during **his/her** life. The Trustees (other than the Grantor's spouse), are authorized to pay over to the Grantor's spouse or to apply for **his/her** benefit, out of the principal of the trust such portion thereof, including the whole, as the Trustees (other than the Grantor's spouse) may select, in the exercise of sole and absolute discretion.

Upon the death of the Grantor's spouse, [*name of spouse*], the remainder of the principal of the trust, if any, as it is then constituted, subject to the payment of taxes as provided in paragraph B of Article NINTH, shall be disposed of as provided in paragraph C of this Article.

**B.** Portion B and any other property which is directed to be held and disposed of in accordance with the provisions of this Article shall be held as a separate trust by the Trustees hereinafter named, IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners, either outright or in trust, as the Trustees (other than the Grantor's spouse or any descendant of the Grantor) may determine, in the exercise of sole and absolute discretion, to or for the benefit of such one or more members of the class consisting of such of the Grantor's spouse [*name of spouse*], and the Grantor's descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of the others, as the Trustees may select, in the exercise of sole and absolute discretion. Any net income not so paid or applied, which may consist of the whole of such income, shall be added to the principal of the trust and thereafter be held, administered and disposed of as a part thereof.

Upon the death of the Grantor's spouse, [*name of spouse*], the remainder of the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of as provided in paragraph C of this Article.

**C.** Any property which is directed to be disposed of as provided in this paragraph shall be transferred, conveyed, and paid over, to or for the benefit of such person or persons or corporation or corporations (other than the Grantor's spouse, **his/her** estate, **his/her** creditors or the creditors of **his/her** estate), to such extent, if any, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as the Grantor's spouse may, by acknowledged written instrument executed by **him/her** during **his/her** life and delivered to the Trustees, or by **his/her** Last Will and Testament, appoint by a specific reference to this power. Any such written instrument of appointment shall be revocable by any subsequent instrument or by the Will of the Grantor's spouse, by specific reference to such prior instrument, unless pursuant to its terms such prior instrument is specified to be irrevocable. In the event of any inconsistency between any such instrument and a subsequent instrument or the Grantor's spouse Will of which is not resolved by the terms of such instruments and Will, such instruments and Will shall be applied in the following order of priority: first, any such instrument which pursuant to its terms is specified to be irrevocable; second, the Grantor's spouse Will (regardless of whether executed before or after

any such instrument); third, any such instrument executed after any other such instrument. The Grantor's spouse may, at any time and from time to time during **his/her** life, release such power of appointment with respect to any or all of the property subject to such power and may further limit the persons or organizations in whose favor such power may be exercised.

If this power of appointment is for any reason not effectively exercised in whole or in part, then any property which is directed to be disposed of as provided in this paragraph, to the extent not effectively appointed by the Grantor's spouse, shall, upon **his/her** death, be divided into a sufficient number of equal shares so that there shall be set aside one (1) such share for each child of the Grantor who is living at the time of such division and one (1) such share for the collective descendants who are then living of each child of the Grantor who shall have previously died leaving one or more descendants who are living at the time of such division. Each such share so set aside for the collective descendants of any child of the Grantor who shall have previously died shall be further subdivided into *per stirpital* subshares for such descendants.

Each child of the Grantor who is then living for whom a share is set aside and each such descendant of the Grantor who is then living for whom a share or subshare is set aside is hereinafter referred to as the "primary beneficiary" of such share or subshare. Each such share or subshare so set aside for a primary beneficiary shall be transferred, conveyed and paid over, to the Trustees hereinafter named, IN TRUST, to be held as a separate trust for the benefit of the primary beneficiary for whom the share or subshare has been set aside, and disposed of in accordance with the provisions of Article SEVENTH.

D. It is the Grantor's intention (a) that any trust held under paragraph A of this Article will constitute an interest which is a "qualifying income interest for life" as defined in Section 2056(b)(7) of the Code, and (b) that such property will constitute "qualified terminable interest property" as defined in that Section. To that end, the following provisions shall apply:

1. The Grantor directs that this trust shall not be funded with any property or the proceeds of any property (i) which would not qualify for the marital deduction allowable in determining the federal estate tax on the Grantor's estate, or (ii) which is includible in the Grantor's gross estate for federal estate tax purposes and also subject by reason of my death to any inheritance tax, succession tax, transfer tax, estate tax or other death duty in any foreign country or political subdivision thereof, except that the property described in this clause (ii) may be allocated to the trust to the extent that other property of my estate which does qualify for the marital deduction is not sufficient to fund the trust in full.

2. If any property forming a part of the principal of this trust is unproductive at the time of its receipt by the Trustees or thereafter becomes unproductive, the Trustees may retain the same if the Trustees shall determine the retention of such property to be in the best interests of the trust estate, provided, however, that the Trustees, upon written demand of the Grantor's spouse, shall make such property productive or convert it to productive property within a reasonable time.

3. The Grantor directs that this Agreement shall be construed and this trust shall be administered in all respects so as to effectuate the Grantor's intention referred to above, and that the Trustees shall not exercise any of the general powers conferred elsewhere in this Will or otherwise to the extent such exercise would defeat such intention. Any net income on hand or accrued upon the death of the Grantor's spouse shall be paid to **his/her** estate to the extent provided by applicable law and to any greater extent required to make the interest of the Grantor's spouse in such trust a qualifying income interest for life.

4. With respect to any trust which is held for the Grantor's **husband/wife** in accordance with the provisions of paragraph A of Article SIXTH, upon the death of the Grantor's **husband/wife**, except to the extent that **his/her** Will shall by specific reference to this provision direct to the contrary, the Trustees shall pay from the principal of this trust the increase in all estate, inheritance, legacy, succession, transfer or other death taxes (including any interest and penalties thereon) [hereinafter "taxes"], imposed by any domestic or foreign taxing authority on the death of the Grantor's **husband/wife** by reason of the inclusion in **his/her** gross estate for the purposes of any such tax of all or any part of the principal of such trust (such increase being the difference between all such taxes actually paid by reason of the death of the Grantor's **husband/wife** and the taxes which would have been payable if such part or all of the principal of such trust had not been included in **his/her** gross estate), provided, however, that such payments shall be made only from the portion of such trust which, without regard to the provisions of this paragraph, shall be includible in the gross estate of the Grantor's **husband/wife** for federal estate tax purposes. Such payments shall be made either to the legal representative of the estate of the Grantor's **husband/wife** for payment by such legal representative of such taxes, interest and penalties or directly to such taxing authorities as the Trustees, in the exercise of sole and absolute discretion, shall determine. The Trustees may rely solely upon the written certification of the legal representative of the estate of the Grantor's **husband/wife** as to the amount of such increase payable to each taxing authority, may pay any such increase in one or more installments and shall have no duty or responsibility to make any further inquiry or take part in the determination or apportionment of such taxes, and upon making payment of such increase as the same shall be finally determined the **Trustee/Trustees** shall have no further liability in connection therewith. Payment of such increase in such taxes, interest and penalties shall fully discharge all liability of such trust for such taxes, interest and penalties, it being the Grantor's intention and direction that the Grantor's **husband/wife** not have any power to apportion additional taxes, interest or penalties against such trust.

Notwithstanding the foregoing, the Grantor directs that if at the death of the Grantor's **husband/wife**, there shall be a separate portion of a QTIP trust to which the Grantor shall be deemed to be the transferor for generation-skipping transfer tax purposes, then all taxes referred to in the preceding paragraph on such entire QTIP trust for the Grantor's **husband/wife** shall first be paid from that portion of the QTIP trust as to which the Grantor is not

deemed to be such transferor and from the portion as to which the Grantor is deemed to be the transferor only if there is insufficient property in such other portion to pay all such taxes.

**SEVENTH: Trusts for Descendants.**

A. Any share or subshare which is directed to be held and disposed of in accordance with the provisions of this Article shall be held by the Trustees, IN TRUST, as a separate trust, to manage, invest and reinvest the same, to collect the income thereof, and to pay over or apply the net income and principal thereof, to such extent, if any, including the whole thereof, at such time or times and in such manner or manners either outright or in trust, as the Trustees may determine, in the exercise of sole and absolute discretion, to or for the benefit of such one or more members of the class consisting of the primary beneficiary for whom the share or subshare shall have been set aside and his or her descendants living from time to time, in such amounts and proportions, equal or unequal, including all to one to the exclusion of the others, as the Trustees may select, in the exercise of sole and absolute discretion. Any net income not so paid or applied, which may consist of the whole of such income, shall be added to the principal of the trust and thereafter shall be held, administered and disposed of as a part thereof.

B. 1. Upon the death of the primary beneficiary, the Trustees shall transfer, convey and pay over the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, to or for the benefit of such person or persons or corporation or corporations (other than such primary beneficiary, his or her estate, his or her creditors or the creditors of his or her estate), to such extent, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust (and including, but without limitation, granting presently exercisable general or non-general powers of appointment), as such primary beneficiary may, by acknowledged written instrument executed by him or her during his or her life and delivered to the Trustees, or by his or her Last Will and Testament, appoint by a specific reference to this power. Any such written instrument of appointment shall be revocable by any subsequent instrument or by the primary beneficiary's Will, by specific reference to such prior instrument, unless pursuant to its terms such prior instrument is specified to be irrevocable. In the event of any inconsistency between any such instrument and a subsequent instrument or the primary beneficiary's Will which is not resolved by the terms of such instruments and Will, such instruments and Will shall be applied in the following order of priority: first, any such instrument which pursuant to its terms is specified to be irrevocable; second, the primary beneficiary's Will (regardless of whether executed before or after any such instrument); third, any such instrument executed after any other such instrument. The primary beneficiary may, at any time and from time to time during his or her life, release such power of appointment with respect to any or all of the property subject to such power and may further limit the persons or organizations in whose favor such power may be exercised.

2. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary, and if any descendant of the primary beneficiary is then living, the principal of such trust, if any, as it is then constituted, together with any accumulated and undistributed income, to the extent not effectively appointed by the primary beneficiary, shall, upon his or her death, be divided into a sufficient number of equal shares such that there shall be set aside one (1) such share for each child of the primary beneficiary who is then living and one (1) such share for the collective descendants who are then living of each child of the primary beneficiary who is not then living. Each such share so set aside for the collective descendants who are then living of each child of the primary beneficiary who is not then living shall be further subdivided into *per stirpital* subshares for such descendants who are then living. Each child of the primary beneficiary who is then living and for whom a share is set aside and each descendant who is then living of a primary beneficiary who is not then living and for whom a subshare is set aside shall thereafter be the "primary beneficiary" of such share or subshare. Each share or subshare so set aside for a primary beneficiary shall be held as a separate trust in accordance with the provisions of this Article SEVENTH.

3. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary, and if no descendant of the primary beneficiary is then living, but if any descendant of the Grantor is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be divided into shares for the then living descendants *per stirpes* of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary, which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of the Grantor or which ancestor was the Grantor. Each descendant for whom a share is set aside shall thereafter be the "primary beneficiary" of such share. Each share so set aside for a primary beneficiary shall be held as a separate trust and disposed of in accordance with the provisions of this Article SEVENTH.

4. If this power of appointment is for any reason not effectively exercised in whole or in part by the primary beneficiary and if no descendant of the Grantor is then living, the principal of the trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

C. <sup>10</sup>If not sooner terminated pursuant to the foregoing provisions of this Article, each such trust held hereunder shall terminate upon the date which is twenty-one (21) years after the date of death of all the descendants of the Grantor's parents and the Grantor's spouse's parents who are living at the time of

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<sup>10</sup> Modify paragraph C if applicable state law (e.g. Delaware or Alaska) permits perpetual trusts, and the trusts are intended to be so

the Grantor's death, and thereupon the principal, each such trust, if any, as it is then constituted, together with any accumulated and undistributed income, shall be transferred, conveyed and paid over to the primary beneficiary, if he or she is then living, or, if he or she is not then living, to the descendants of such primary beneficiary who are then living, *per stirpes*, or, if none, to the Grantor's then living descendants, *per stirpes*, of the lineal ancestor of the primary beneficiary having the closest degree of consanguinity to the primary beneficiary which ancestor has descendants who are then living and which ancestor is (or was) a lineal descendant of the Grantor or which ancestor was the Grantor, or, if no descendant of the Grantor is then living, the principal of each such trust, if any, as it then constituted, together with any accumulated and undistributed income, shall be disposed of in accordance with the provisions of paragraph C of Article FIFTH.

D. Notwithstanding the foregoing, if upon the division as provided above of any property disposed of in accordance with the provisions of this Article a separate trust is already being held hereunder for a primary beneficiary, then the separate share or subshare for such primary beneficiary resulting from such division instead may be added, in the sole and absolute discretion of the Trustees, to the existing trust for such primary beneficiary, thereafter to be held, administered and disposed of as a part thereof.

**EIGHTH: Additional Contributions.** The Grantor or any other person may, at any time or from time to time, by Last Will and Testament or otherwise, devise, bequeath, transfer and deliver to the Trustees cash or other property acceptable to the Trustees that shall thereupon become a part of the trust estate and shall be held and disposed of by the Trustees in all respects subject to the provisions of this Agreement.

**NINTH: Trustee Provisions.**

A. If ..... [name of Trustee] should cease to act as Trustee .....  
..... [name of successor trustee] shall be appointed as successor  
Trustee. If ..... [name of Trustee] should cease to act as Trustee .....  
..... [name of successor trustee] shall be appointed as successor  
Trustee.<sup>11</sup>

B. The Grantor shall have the right at any time and from time to time during his/her lifetime to remove any Trustee acting hereunder by written notice to such Trustee and to appoint a successor to the Trustee so removed.

C. Notwithstanding any provision herein to the contrary, at no time shall more than one (1) bank or trust company be acting as a Trustee with respect to any single trust hereunder.

D. Subject to the provisions of paragraphs A, B and C of this Article, the Trustees acting hereunder from time to time, in the exercise of sole and absolute discretion, are authorized, but not directed, to appoint as a co-Executor or as a co-Trustee, as the case may be, such individual(s), bank or trust company as the

<sup>11</sup> Depending on the circumstances, the client may wish to designate different Trustees to act with respect to different trusts

Trustees, in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by a written instrument filed with the clerk of the appropriate court.

Subject to the provisions of paragraphs A, B and C of this Article, each Trustee acting hereunder from time to time, in the exercise of sole and absolute discretion, is authorized, but not directed, to appoint such individual(s) or such bank or trust company as such Trustee, as the case may be, in the exercise of sole and absolute discretion, shall select as successor Trustee to act in his, her or its place if he, she or it should cease to act. Any such appointment shall be made by a written instrument delivered to the Trust Protector, if any, or if not, to the Trust Committee of with respect to which the Trustee is acting. Any such appointment may be revoked by the appointing Trustee in the same manner prior to its becoming effective, and succeeded by a later appointment, the last such appointment to control.

Subject to the provisions of paragraphs A, B and C of this Article, if any Trustee shall for any reason cease to act without having appointed a successor, then the remaining Trustee or Trustees, as the case may be, are authorized to appoint a successor by a written instrument delivered to the Trust Protector, if any, or if not, to the Trust Committee of the trust with respect such Trustee or Trustees are acting. Pending the qualification of such successor, however, the remaining Executor or Executors or Trustee or Trustees, as the case may be, shall have all the rights, powers and authority herein conferred upon the Trustees generally.

The appointment of any or co-Trustee or successor Executor or successor Trustee hereunder shall be on such terms and conditions, including the fixing of compensation, as may be set forth in the instrument effecting such appointment.<sup>12</sup> In particular, without limiting the foregoing, the term of service and duties of a co-Trustee or successor Trustee may be limited if so specified by his, her or its instrument of appointment. The co-Trustees or successor Trustees of different trusts, portions, shares, or subshares created under this Will need not be identical.

**E.** Any Trustee may resign from office without leave of court at any time and for any reason by filing a written instrument of resignation with the Trust Protector, if any, or if not, with the Trust Committee. If any Trustee (including the Grantor) shall ever become incapacitated (as hereinafter defined), he, she or it shall automatically cease to act as Trustee.

**F.** [*Name of Trust Protector*] is hereby appointed as the Trust Protector.<sup>13</sup> The Trust Protector shall have the power, in the exercise of sole and absolute

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<sup>12</sup> Consider adding provision specifying fiduciary compensation for initial Trustee(s) and their successors.

<sup>13</sup> The person named as initial Trust Protector should not be the Grantor's spouse, any subsequent spouse of the Grantor's spouse, any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder, any spouse or former spouse of any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder, or any individual who is a related or subordinate party within the meaning of Section



discretion, (i) upon the death of the Grantor or if the Grantor is incapacitated (as hereinafter defined), to remove any Executor or Trustee (other than .....)<sup>14</sup> acting hereunder at any time (with or without cause) and, subject to the veto of the Grantor during such time he/she is living and is not incapacitated (as hereinafter defined) and the provisions of paragraphs A, B, C and D of this Article, to appoint one or more individual(s) and/or a bank or trust company as successor Executor(s) or Trustee(s) in such removed Executor's or Trustee's place and (ii) subject to the veto of the Grantor during such time he/she is living and is not incapacitated (as hereinafter defined) and subject to the provisions of paragraphs A, B and C of this Article, to appoint one or more individual(s) and/or a bank or trust company as successor Trustee(s) in the event that there is no Trustee acting hereunder; provided, however, that any Trustee that is removed by the Trust Protector may be replaced only by an individual other than the Trust Protector, any spouse of the Trust Protector, any descendant of the Trust Protector or any spouse of any descendant of the Trust Protector, or by a bank or trust company.<sup>15</sup> Any action to remove an Executor or Trustee or appoint a successor Executor or Trustee taken pursuant to this paragraph shall be evidenced by an acknowledged written instrument delivered to the Executor or Trustee so removed and/or appointed, as the case may be, and in the case of an appointment, shall be effective upon acceptance thereof by execution of a written instrument filed with the clerk of the appropriate court by the Executor or Trustee so appointed.

The Trust Protector may at any time relinquish the power to remove Trustees and/or to appoint successor Trustees with respect to any one or more trusts hereunder by an acknowledged written instrument delivered to the Trustees then in office and to the Trust Committee, which relinquishment shall be irrevocable and binding on all successor Trust Protectors.

The Grantor is not imposing any fiduciary responsibility on any Trust Protector to monitor the acts of the Trustees. No Trust Protector shall be liable for failing to remove any Trustee even if such Trustee may be guilty of a gross violation of his or her fiduciary duties hereunder and even if any Trust Protector is aware of such violation.

Whenever the term "Trust Protector" is used in this Will, it shall be deemed to refer to the Trust Protector or Trust Protectors acting hereunder from time to time. Different trusts hereunder may, but need not, have different Trust Protectors. More than one person may act collectively as a Trust Protector for any given trust hereunder, in which case decisions of the Trust Protector shall be made by majority vote if more than two (2) persons are so acting collectively. If for any reason any person is acting both as a Trustee and as a Trust Protector, the removal of such person as Trustee shall not result in the removal of such person as a Trust Protector. Any Trust Protector may resign from office with respect to

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672(c) of the Code with respect to any person who is eligible for or entitled to a distribution of income and/or principal from any trust hereunder.

<sup>14</sup> List here the Trustees (if any) who the client does not wish to be permitted to be removed by the Trust Protector.

<sup>15</sup> This provision listing who may or may not be appointed as successor Trustee by the Trust Protector may be modified, if appropriate.

any one or more trusts hereunder at any time by filing a written instrument of resignation with the Trustees then in office and to the Trust Committee. The Trust Protector shall act without compensation hereunder but shall be reimbursed for any expenses in carrying out his or her duties hereunder.

G. If [*Name of Trust Protector*] (or any other Trust Protector) ceases to serve as the Trust Protector, the successor Trust Protector shall be such individual (other than the Grantor's **husband/wife**, [*name of spouse*], any subsequent spouse of the Grantor's spouse, any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder, any spouse of any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder, or any individual who is a related or subordinate party within the meaning of Section 672(c) of the Code with respect to any person who is eligible for or entitled to a distribution from income and/or principal from any trust held hereunder) as shall be appointed by the Trust Committee.

Any appointment of a successor Trust Protector pursuant to this paragraph shall be evidenced by an acknowledged written instrument filed with the Trustees then in office. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

H. Subject to the veto of the Grantor during such time he/she is living and is not incapacitated (as hereinafter defined) and subject to the provisions of paragraphs A, B, C, D and F of this Article, in the event that any Trustee acting hereunder is removed and a successor is not otherwise appointed in accordance with the other provisions of this Article, or in the event that there is no Trustee acting hereunder, one or more individual(s) and/or a bank or trust company may be appointed as successor Trustee by the Trust Committee.

Any action to appoint a Trustee taken pursuant to this paragraph shall be evidenced by an acknowledged written instrument delivered to the Trustee so appointed and shall be effective upon acceptance thereof by filing a written instrument with the Trust Protector by the Trustee so appointed.

The member or members of the Trust Committee shall be as follows:

1. With respect to any trust hereunder (other than any trust under Article SEVENTH), such of the Grantor's spouse and the Grantor's children as are then living, adult and competent, by majority vote.<sup>16</sup>

2. With respect to any trust under Article SEVENTH, the primary beneficiary if he or she is then adult and competent, or, if not, the eldest then living beneficiary of the trust who is adult and competent, or, if none, the parent or legal guardian of the primary beneficiary.<sup>17</sup>

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<sup>16</sup> This provision can be modified, as appropriate.

<sup>17</sup> This provision could be modified, for example, to require the primary beneficiary to be a certain age (such as twenty-five (25)) rather than merely an adult, or to add others, such as the testator's brother, sister, etc., and/or the primary beneficiary's brother, sister, etc., who could act if the primary beneficiary is not of the specified age or is not competent.

Decisions of the members of the Trust Committee shall be made by majority vote if there are more than two (2) such members then acting.

I. Except as otherwise expressly herein provided, any actions or decisions of the Trustees, if more than two (2) shall be acting, shall be determined by a majority of them.

J. Notwithstanding any other provision of this Agreement, no Trustee who is a current beneficiary of income and/or principal of any trust created hereunder shall ever participate as Trustee of that trust in (i) the exercise, or decision not to exercise, any discretion over beneficial payments, distributions, applications, accumulations, or uses of income or principal by the Trustees to or for any beneficiary (including, but without limitation, any power described in subparagraphs L through subparagraph N of the Standard Provisions set forth in Annex A, (ii) as to any trust held in accordance with the provisions of paragraph A of Article SIXTH, the exercise of discretion to allocate receipts or expenses between principal and income or (iii) the exercise of any general power of appointment described in Sections 2041 or 2514 of the Code. No Trustee who is under a duty to support a beneficiary or who is acting as a guardian of any person who is a beneficiary shall participate in the exercise, or the decision not to exercise, any discretion over payments, distributions, applications or uses of trust property in discharge of any obligation of support. No Trustee shall participate in the exercise of any discretion (including, but without limitation, any discretion which would constitute an "incident of ownership" within the meaning of Section 2042(2) of the Code) with respect to any insurance policy on his or her life held hereunder. In each case, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. In addition, no individual shall serve as Trustee of any trust which holds property with respect to which such individual has made a qualified disclaimer within the meaning of Section 2518 of the Code.

K. Whenever the term "Trustees" is used in this Agreement, it shall be deemed to refer to the Trustee or Trustees acting hereunder from time to time. Except as otherwise provided herein, each Trustee taking the place of any other Trustee shall have all the same estates, powers, discretions and duties, including any power hereinabove given to fill vacancies, as if appointed an original Trustee of any trust created hereunder.

**TENTH: Governing Law.** This instrument shall be construed in accordance with the laws of [state] applicable to contracts to be wholly performed in such State, and all questions involving the validity and administration of any trust hereby created shall be determined in accordance with said laws.

**ELEVENTH: Revocability of Trust Agreement.** The Grantor reserves the right at any time and from time to time to amend this Agreement and the trusts hereby created in any respect whatsoever and also to revoke the same either in whole or in part without the consent of any person and without notice to any person, by delivering to the Trustee or Trustees then acting hereunder a written notice of such amendment or revocation signed by the Grantor, provided that the duties and responsibilities of

any Trustee acting hereunder shall not be expanded without the written consent of said Trustee.

**TWELFTH: Standard Provisions.** Except as otherwise provided in this Agreement, the Standard Provisions set forth in Annex A shall apply to this Agreement and to the administration and management of each trust created under this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

.....  
Grantor

.....  
Trustee

[.....  
Trustee]

[notary clauses omitted]

**SCHEDULE**

Trust Agreement between [*name of grantor*], as Grantor, and [*names of trustees*], as Trustees

Cash	\$10.00
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## ANNEX A

## Standard Provisions

The following provisions shall apply to the Trust Agreement to which they are attached as an Annex, except as otherwise provided in the Agreement.

**1. Definitions.**

**A.** As used in this Agreement, the terms "child," "children," "descendant" and "descendants" shall include adopted persons and the descendants of such persons, whether of the blood or by adoption.<sup>18</sup>

**B.** A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one (1) such share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.<sup>19</sup>

**C.** As used in this Agreement, the term "Code" shall mean the Internal Revenue Code of 1986, as amended, including applicable amendments after the date of this Agreement.

**D.** As used in this Agreement, the term "incapacitated" with respect to any individual shall refer to a judgment in writing certified by two (2) licensed physicians, at least one (1) of which shall be such individual's personal physician, that such individual is substantially unable to attend to his or her financial affairs and such inability is not expected to be temporary or short-term.

**E.** As used in this Agreement, the term "GST Exemption" shall mean the exemption against federal generation-skipping transfer ("GST") tax allowed at the time of the Grantor's death under Section 2631(a) of the Code.

**2. Spendthrift Trust Provision.** Except as provided in Articles SECOND, and FOURTH, no beneficial interest in any trust created hereunder (other than a beneficial interest of the Grantor), whether in income or in principal, shall be subject to anticipation, assignment, pledge, sale or transfer in any manner, and no beneficiary of any such trust or other person interested therein shall have the power to anticipate,

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<sup>18</sup> The attorney-drafter must ascertain whether this definition is what the client wishes.

<sup>19</sup> An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any beneficiary of any such trust or other person interested therein; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of Section 2518 of the Code, with respect to interests herein.<sup>20</sup>

**3. Application of Income or Principal.** Any application of income or principal pursuant to any provision of this Agreement may be either by way of payment of bills rendered to or for the person for whose benefit such application is being made or by payment of income or principal to such person or persons as the Trustees shall, in the exercise of absolute discretion, deem best. The receipt of any such payee shall be a full and complete discharge to the Trustees therefor. Nothing in this Agreement shall be construed to permit an application of income and principal other than for the benefit of a person who is an eligible beneficiary of income or principal under other Articles of this Agreement.

**4. Accrued Interest and Dividends.** The Trustees shall be entitled to all interest accrued and unpaid on any securities at the time of their receipt. No dividend whose record date is prior to the delivery to the Trustees of the shares on which such dividend is declared shall become property of the trust estate.

**5. Trustees' Administrative Powers.** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, the Grantor hereby expressly authorizes the Trustees with respect to each of the trusts herein created, in the exercise of sole and absolute discretion, but subject to the provisions of paragraph D of Article SIXTH:

**A.** To purchase or otherwise acquire and to retain, whether originally a part of any trust held hereunder or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property, including, but without limitation, foreign real estate, foreign securities, any business venture (incorporated or unincorporated), and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, and partnerships (participating therein as a general or limited partner), whether or not the property so invested in or the entity whose securities are so invested in is located in the state in which this trust is administered or in any other state or country, and whether or not such investment is deemed to be speculative or of the character permissible for investments by fiduciaries under the present or any future laws applicable thereto, and whether or not any such investment could subject any trust created hereunder to liabilities or losses greater than the amount or amounts of the funds devoted to such investment and whether or not such investments be secured or unsecured, or shall be unproductive, underproductive, overproductive or of a wasting nature, or shall constitute all

<sup>20</sup> In some cases it may be appropriate to relax the spendthrift provisions. For example, it may be desired to permit the assignment of remainder interests in a trust for estate planning purposes.

or the greater part of the assets of the particular trust for which such investments are made, and whether or not the investment in the securities, stocks, bonds or notes of any one corporation, association or partnership shall constitute all or the greater part of the issued and outstanding securities, stocks, bonds or notes of such corporation, association or partnership, and to make or retain any or all of such investments not solely for the preservation of principal or production of income but also for the possibility of an increase in value, and to render liquid the assets held in any trust estate, in whole or in part, and to hold cash or readily marketable securities of little or no yield for such period as the Trustees may deem advisable;

B. To sell, lease, pledge, mortgage, transfer, exchange, convert, grant options with respect to, or otherwise dispose of, including sale to any members of the family of the Grantor, or to any person who may be acting as a fiduciary hereunder, any and all property or interests therein, at any time forming a part of any trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions the Trustees may deem desirable; and to enter into leases, mortgages or options that extend beyond the period fixed by law for leases and options made by fiduciaries or beyond the term of the trust;

C. To borrow money from any lender, including any fiduciary hereunder or any member of the family of the Grantor, for any purpose, and to mortgage or pledge as security upon any terms and conditions any real or personal property held;

D. To take part in the management of any business in which investment is retained or made hereunder and to delegate duties with respect to such management, with the requisite powers, to any employee, manager, partner or associate of such business, without liability for such delegation; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to subject to the risks of any such business any part or all of any trust estate, for such term or period as the Trustees, in the exercise of absolute discretion, may determine; to advance money or other property to any such business; to make loans, subordinated or otherwise, of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business, either alone or with other persons interested therein, and to secure such loan or loans by a pledge or mortgage of any part of any trust estate; to select and vote for directors, partners, associates and officers of any such business; to act as a director, general or limited partner, associate and officer of any such business either individually or through an officer or officers of the Trustees, and to receive compensation from such business for so acting without reducing the compensation otherwise due the fiduciaries hereunder; to enter into stockholders' agreements with corporations in which any trust estate has an interest and/or with the stockholders of such corporations; to liquidate, either alone or jointly with others, any such business or any interest in any such business; and generally to exercise any and all powers as the Trustees may deem necessary with respect to the continuance, management, sale or liquidation of any such business;



E. To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein that may form at any time a part of any trust estate; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith;

F. To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships, limited liability companies, and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as the Trustees may deem advisable;

G. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps that the Trustees may deem necessary or proper to obtain the benefits of any such transaction;

H. To rent office space, whether or not from, or in conjunction with any other such space being used by, any beneficiary hereunder, or any relative of the Grantor, or any fiduciary hereunder in its individual capacity, and to pay the expenses thereof from the principal of the trust estate;

I. To appoint, employ and remove at any time and from time to time any accountants, attorneys, investment or other expert advisers, agents, clerks and employees, including any fiduciary hereunder acting in its, his or her individual capacity or the officer, employee or affiliate of any fiduciary, or any firm, partnership, corporation or other organization in which a fiduciary may have an interest; and to fix and pay their reasonable compensation and incidental employment benefits from the funds of the trust estate without reducing the compensation to which any fiduciary is otherwise entitled hereunder; and without in any way limiting the purposes for which such persons may be appointed and employed, to appoint and employ one or more attorneys or agents to perform any or all of the following acts, among others: (i) to have free access to any safe deposit box or vault containing any property of any trust estate, and to open the same and to take any property therefrom, the safe deposit company or other person or corporation having control of the access to such box or vault to have no responsibility or liability for any act of any such attorney or agent with respect to any property therein; (ii) to have free access to any such property held in custody or for safekeeping by any bank or trust company, and to examine and inventory the

same; (iii) to take delivery and receipt for any property; and (iv) to sign checks on funds belonging to any trust estate;

**J.** To place and leave all or any part of the funds or securities at any time held by any trust estate in the care and custody of any bank or trust company, with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company or its nominee; to appoint such bank or trust company the agent and attorney of the Trustees to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian account", and to allocate the charges and expenses of such bank or trust company to income or to principal or partially to income and partially to principal;

**K.** To register any security in the name of a nominee without the addition of words indicating that such security is held in a fiduciary capacity; to hold any security in bearer or non-certificated form; and to use a central depository for securities;

**L.** To divide any trust, into one or more separate trusts for the benefit of one or more of the beneficiaries (to the exclusion of the other beneficiaries) of the trust so divided, as the Trustees, in the exercise of sole and absolute discretion, may determine and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a Subchapter S corporation as described in Section 1361(d)(3) of the Code, or for any other purpose as the Trustees, in the exercise of sole and absolute discretion, may determine;

**M.** To make or terminate elections with respect to S corporation stock, and to make such adjustments between income and principal to compensate for the consequences of the trust's ownership of S corporation stock as the Trustees shall deem just and equitable; provided, however, that if the trust holds S corporation stock, the Trustees shall immediately take such actions to ensure that the trust qualifies as either an Electing Small Business Trust within the meaning of Section 1361(e)(1)(A) of the Code or a Qualified Subchapter S Trust within the meaning of Section 1361(d)(3) of the Code and (A) if the Trustees seek to qualify the trust as an Electing Small Business Trust, the Trustees shall have the authority to exclude by an acknowledged written instrument any person or organization from having any interest therein, and (B) if the Trustees shall seek to qualify the trust as a Qualified Subchapter S Trust, the Trustees shall not make adjustments that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and no Trustee shall exercise any power conferred under this paragraph or under this Agreement that would have the effect of denying to the income beneficiary the net income of the trust to which the beneficiary must be entitled in order for the trust to qualify as a Qualified Subchapter S Trust under Section 1361(d) of the Code; and provided further, during the term of any trust created hereunder, (i) if the Trustees should sell any interest in a corporation or if the assets of any entity constituting a corporation in which the trust has an ownership interest are sold, and (ii) if that corporation has made an election to be taxed

under Subchapter S of the Code, then in the sole and absolute discretion of the Trustees, the Trustees may distribute to the income beneficiary such amounts of principal as shall be necessary to pay any income tax caused by that sale, if the income or gain attributable to that sale is taxed directly to the income beneficiary under applicable federal tax law;

N. To permit any one or more of the beneficiaries of any trust, as the Trustees, in the exercise of sole and absolute discretion, may determine, to occupy any real property and to use any tangible personal property forming part of the trust on such terms as the Trustees, in the exercise of sole and absolute discretion, may determine, whether for rent, rent-free, in consideration of payment of taxes, insurance, maintenance or ordinary repairs, or otherwise; provided, however that, in the case of any trust hereunder which is eligible for the marital deduction, such occupancy or use shall be rent free and any other condition shall be consistent with my intention that my spouse have that degree of beneficial enjoyment of the trust property during life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust, so that my spouse's interest is a qualifying income interest for life for purposes of the marital deduction;

O. To make distributions from any trust in kind or partially in kind and to cause any distributive share to be composed of cash, property or undivided fractional shares in property different in kind from any other distributive share, and without regard to the income tax basis of such property; and any property distributed in satisfaction of a distributive share shall be valued as of its date of distribution;

P. To allocate to income or to principal or partly to each any receipt or disbursement for which no express provision is made under applicable law;

Q. To hold the assets of any trusts hereby created for convenience of administration and investment as an undivided whole, provided that no such undivided holding shall be deemed to defer or postpone the vesting or distribution of any property so held in trust;

R. To settle accounts as Trustees whether judicially or otherwise without service upon or consent by any person under disability where a party to the settlement or proceeding who is not under disability has the same interest as such person under disability;

S. To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country;

T. To make payment from time to time on account of commissions and legal fees without requiring the payment of interest thereon and without obtaining any security for the repayment of the same;

U. To delegate any duties or powers, discretionary or otherwise, to a co-fiduciary for such periods and upon such terms and conditions as may be designated in a written instrument acknowledged in such form as would entitle a

deed of real property to be recorded and delivered to such co-fiduciary; and the fiduciary so delegating any duties or powers hereunder shall have no further responsibility with respect to the exercise of such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument so delivered at any time;

V. To execute and deliver any and all instruments the Trustees may deem advisable to carry out any of the foregoing powers, no party to any such instrument being required to inquire into the validity of any such instrument, and generally to deal with any trust estate created hereunder as in the Trustees' judgment the best interests of such trust may require.

The powers granted to the Trustees hereunder in and by this paragraph or in and by any other paragraph or Article or of the attached Agreement may be exercised in whole or in part and from time to time, and without court authorization, and shall be deemed to be supplemental and not exclusive, it being the Grantor's intention that the Trustees hereunder shall have all of the general powers of fiduciaries as well as all of the special powers herein expressly granted, and all powers incidental to, reasonably to be implied from or necessary to the proper exercise of, the special powers herein enumerated.

**6. Power to Divide and Combine Trusts.** In addition to the other powers conferred herein, the Trustees, in the exercise of sole and absolute discretion, shall have the following powers to divide and combine trusts created or held hereunder:

A. The Trustees may divide any trust created hereunder into one or more separate trusts for the benefit of one or more of the beneficiaries of the trust so divided, as the Trustees, in the exercise of absolute discretion, may determine and to allocate to such divided trust some or all of the assets of the trust estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of a subchapter S corporation as described in Section 1361(c)(2)(A)(i) or Section 1361(d)(3) of the Code, as the case may be, or for any other purpose.

B. The Trustees may divide (whether before or after any trust is funded and whether before or after any allocation of GST exemption under Section 2631 of the Code is made) any trust or any property used or to be used to fund or augment any trust created hereunder into two or more fractional shares. The shares shall be held and administered by the Trustees as separate trusts, but may be managed and invested *in solido*. One of the purposes for granting this authority is to provide an inclusion ratio (within the meaning of Section 2642(a) of the Code) of zero for the separate trust receiving the fractional share to which the allocation of GST exemption is made, and, if that trust is a trust described in Section 2652(a)(3) of the Code, to enable the Grantor's **Executor/Executors** to make the election described in that section with respect to it as a separate trust.

C. If the so-called QTIP election under Section 2056(b)(7) of the Code is made over a portion (but less than all) of any property passing to a trust hereunder, the Trustees are authorized, in the exercise of absolute discretion, to divide such property into the portion as to which the election was made and the portion as to which it was not made in the manner prescribed by Treasury

Regulation § 20.2056(b)-7(b) or any successor regulation. Those portions shall be held and administered by the Trustees as separate trusts with identical terms, so that *one of said trusts is entirely subject to said election and the other is not* subject to it. However, the Trustees may manage and invest such separate trusts *in solido*. One of the purposes in authorizing such division is to enable the separate allocation of GST exemption to one or both of said trusts.

D. Whenever two trusts created under this Agreement are directed to be combined into a single trust (for example, because property of one trust is to be added to the other trust), whether or not the trusts have different inclusion ratios with respect to any common transferor or have different transferors for generation-skipping transfer tax purposes, the Trustees are authorized, in the exercise of absolute discretion, instead of combining said trusts, to administer them as two separate trusts with identical terms in accordance with the provisions that would have governed the combined trusts. However, the Trustees may manage and invest such separate trusts *in solido*. If anyone adds or is deemed to add by gift or bequest property to a trust created under this Will, the Trustees are authorized, in the exercise of absolute discretion, to hold the added property as a separate trust with terms identical to the trust to which it would have been added and the Trustees may manage and invest such separate trusts *in solido*.

E. The Trustees may combine any one or more trusts hereunder with identical terms for an identical beneficiary or beneficiaries whether created hereunder or elsewhere as a single trust, and the Trustees are also authorized, in the exercise of absolute discretion, later to divide such trust as provided above in this paragraph.

Without in any way limiting the absolute discretion of the Trustees granted by this paragraph, it is expected that the Trustees will not generally elect to combine two or more trusts with different inclusion ratios or different transferors for generation-skipping transfer tax purposes;

F. To make any adjustment to tax basis authorized by law, including but not limited to increasing the basis of any property included in the Grantor's estate, whether or not passing under this Agreement, by an allocation of any amount by which the bases of assets may be increased. There shall be no duty to do so and there shall not be a requirement to allocate basis increase exclusively, primarily, or at all to assets passing under the Agreement as opposed to property passing under my Will or other property included in the Grantor's estate. The Grantor waives any such duty that otherwise would exist. Basis increase may be allocated, without permission of any court or other authority, to one or more or all assets that the Trustees may receive or in which the Trustees may have a personal interest, to the partial or total exclusion of other assets with respect to which the election could be made. Any such allocation shall not cause any fiduciary to be liable to any person or to be subject to removal or forfeiture of commissions or other compensation.

**7. Trustee Liability.** No Trustee shall be liable for any loss that may result by reason of any investment made or retained pursuant to the foregoing powers, except through gross negligence or willful misconduct.

**8. Trustee Actions in Fiduciary Capacity.** Every act done, power exercised, or obligation assumed by a Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Trustee acting in a fiduciary capacity and not otherwise, and every person, firm or corporation contracting or otherwise dealing with such Trustee shall look only to the funds and property of the trust estate for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and no Trustee shall be personally liable therefor even though the Trustee did not exempt itself, herself, or himself from personal liability when entering into any contract, obligation or transaction in connection with or growing out of the trust estate.

**9. Accounting Provisions.** Any Trustee may at any time and from time to time render to each person, if any, then entitled to receive income from the trust who is not under any legal disability, and each person, if any, who is not under any legal disability who would be entitled to a share of the principal of the trust if the trust were to terminate at the time (such persons being referred to collectively in this Article as the "Beneficiaries"), an account of the acts and transactions of the Trustees with respect to the income and principal of any trust hereunder from the date of its creation or from the date of the last previous account of the Trustees as the case may be; and the Beneficiaries shall have full power and authority on behalf of all persons interested in the trust finally to settle and adjust such account; and upon such account's being settled and adjusted to the satisfaction of the Beneficiaries, it shall be final and conclusive upon each and every person (whether or not then living or then ascertainable) who shall then or thereafter be or become interested in either the income or the principal of the trust, with like effect as a judgment of the court having jurisdiction judicially settling such account in an action in which the Trustees and all persons having or claiming an interest in the trust were parties; and the approval of such account by the Beneficiaries shall constitute a full and complete discharge and release of the Trustees from all further liability, responsibility, and accountability for or with respect to the acts and transactions of the Trustees as set forth in said account, both as to the income and as to the principal of the trust.

Except as provided by law, the Trustees shall not be required to file any inventory or render an accounting of my estate and that no Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under Sections 2310 and 2311 of New York's Surrogate's Court Procedure Act or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.<sup>21</sup>

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<sup>21</sup> If non-New York resident, replace paragraph with the following:

To the extent permitted by law, I direct that the Trustees shall not be required to file an inventory or render an accounting of the trust and that no Trustee, donee of a power in trust, life tenant or Guardian shall be required to give any bond, whether in connection with any advance payment of fiduciary compensation under any statute or otherwise. If, notwithstanding the foregoing direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

Nothing contained in this Article shall preclude a Trustee from having its, his or her accounts judicially settled or from filing periodic accounts if the Trustee shall deem such an accounting to be advisable.

**10. Change of Trust Situs.** The situs of the property of any trust created hereunder may be maintained in any jurisdiction, in the Trustees' sole and absolute discretion, and thereafter transferred at any time or times to any jurisdiction selected by the Trustees. Upon any such transfer of situs, the trust estate may thereafter, at the election of the Trustees of said trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. If the Trustees of any trust created hereunder elect to change the situs of any such trust, said Trustees are hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

**11. Minority Trust Provisions.** If any individual under the age of twenty-one (21) years becomes entitled to any payment from or portion of a trust estate hereunder, whether upon the termination thereof or otherwise, such payment or portion shall be held for the following uses and purposes:

To manage, invest and reinvest the same, to collect the income thereof and to apply the net income and principal to such extent, including the whole thereof for such individual's general use and at such time or times as the Trustees, in the exercise of sole and absolute discretion, shall determine, until such individual attains the age of twenty-one (21) years, and thereupon to transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual. Any net income not so applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of such individual before attaining the age of twenty-one (21) years, the Trustees shall transfer, convey and pay over the principal of the trust, as it is then constituted, to such individual's executors or administrators.

If the Trustees, in the exercise of absolute discretion, determine at any time not to transfer in trust or not to continue to hold in trust, as the case may be, any part or all of such property, the Trustees shall have full power and authority to transfer and pay over such property, or any part thereof, without bond, to such individual, if an adult under the law of the state of his or her domicile at the time of such payment, or to his or her parent, the guardian of his or her person or property, or to a custodian for such individual under any Uniform Gifts or Uniform Transfers to Minors Act pursuant to which a custodian is acting or may be appointed, or to a person with whom such individual resides.

Any trust created hereunder for an individual who is not in being on the date this Agreement becomes irrevocable shall terminate in all events, and the Trustees shall thereupon transfer, convey and pay over the principal thereof to such individual or to his or her legal representatives, upon the earlier of (i) the expiration of the term of said trust as hereinabove provided in this Article and (ii) the expiration of twenty-one (21) years following the death of the last survivor of all the descendants of the individual's grandparents who are in being on the date this Agreement becomes irrevocable.

The receipt of such individual, if an adult, or the receipt of the parent, Guardian or custodian or any other person to whom any principal or income is transferred and paid

over pursuant to any of the above provisions shall be a full discharge to the Trustees from all liability with respect thereto.

Notwithstanding anything to the contrary contained herein, the Trustees are requested to give careful consideration before exercising any discretionary power to pay or apply income or principal pursuant to this Article in discharge of any person's duty to support any individual for whom a trust is held hereunder.

**12. Survivorship Provisions.** If the Grantor's spouse, *[name of spouse]*, dies simultaneously with the Grantor or in such circumstances as to render it impossible to determine who predeceased the other, the Grantor shall be deemed to have predeceased his/her spouse and that the provisions of this Agreement shall be construed upon that assumption.<sup>22</sup>

The Grantor intends to take full advantage of the special rule under Section 2651(e) of the Code for transfers to great-grandchildren (and more remote descendants) of the Grantor's parents who are descendants of a predeceased descendant of the Grantor's parents with respect to any property transferred to or held in trust hereunder for the benefit of descendants of the Grantor's parents who are descendants of a predeceased descendant of the Grantor's parents and the provisions of this Agreement shall be construed consistent with and to carry out that intent.

If (i) any person dies within ninety (90) days after the Grantor's death, the termination of any trust created hereunder, or any other event covered by Treasury Regulation § 26.2612-1(a)(2), as the case may be, and if (ii) such person had not, in fact, survived the Grantor's death, the trust termination, or the other event, as the case may be, and such failure to survive would have caused the special rule relating to a predeceased child or other descendant under Section 2651(e) of the Code to apply to any property passing under this Agreement, then such person shall be deemed with respect to such property to have predeceased the Grantor, the termination of the trust, or such other event, as the case may be, so that in accordance with Treasury Regulation § 26.2612-1(a)(2), the special rule under Section 2651(e) of the Code shall apply with respect to such property.

**13. Application to Successors.** This Agreement shall extend to and be binding upon the executors, administrators and assigns of the Grantor and upon the successors to the Trustees.

**14. Counterparts.** This Agreement may be executed in one or more counterparts each of which shall be an original and when taken together shall constitute one and the same instrument.

**15. Headings.** The headings used in this Agreement and this Annex are for convenience only and shall not be relied on in order to construe this Agreement.

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<sup>22</sup> Note that the dispositive provisions of both husband's and wife's Wills and Intervivos Trusts (including paragraph C of Article FIFTH hereof) need to be consistent



**FORM 13**  
**GRANTOR RETAINED ANNUITY TRUST<sup>1</sup>**

THIS AGREEMENT made [date], by and between [name and address of grantor] (the "Grantor") and [name and address of trustee] (the "Trustee").

**WITNESSETH:**

WHEREAS, the Grantor desires to create a trust of the property hereinafter specified for the purposes hereinafter set forth,

NOW, THEREFORE in consideration of the premises and of the mutual covenants herein contained, the Grantor does hereby assign, convey, transfer and deliver to the Trustee the property referred to in the attached schedule, receipt of which the Trustee does hereby acknowledge,

TO HAVE AND TO HOLD the same and any other property which the Trustee may hereafter at any time hold or acquire as provided hereunder (the "trust estate") IN TRUST, to manage, invest and reinvest the same, to collect the income thereof, and to dispose of the net income and principal thereof for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

**ARTICLE I**  
**Grantor's Annuity**

**1. Annuity to Grantor.** The Trustee shall pay the "annuity amount" (as herein-after defined) to the Grantor, if the Grantor is then living, or, if the Grantor is not then living, to the Grantor's estate, for a period commencing on the date of this Agreement and ending on the [insert ordinal number corresponding to term of years] anniversary of the date of this Agreement (the "Fixed Term"). The annuity amount shall be paid annually on the day preceding the anniversary of the date of this Agreement each year until the termination of the trust held under this Article as herein provided.

The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal.

The annuity amount for each year shall be ..... percent (.....%) of the net fair market value of the trust assets determined as of the date of this Agreement.

**2. Incorrect Valuation of Trust Assets.** If the net fair market value of the trust assets is incorrectly determined, then within a reasonable period after the value is finally determined for federal gift tax purposes, the Trustee shall pay to the Grantor or the Grantor's estate, as the case may be (in the case of an undervaluation), or shall receive from the Grantor or the Grantor's estate, as the case may be (in the case of an overvaluation), an amount equal to the difference between the annuity amounts properly payable and the annuity amounts actually paid.

<sup>1</sup> NOTE: This form contemplates that the trust will be "zeroed out" for gift tax purposes under *Walton v. Commissioner*, 115 TC 589, Tax Ct. Rep. Dec. (RIA) 115-41 (2000).

**3. Taxable Year.** The taxable year of the trust shall be the calendar year.

**4. Additional Section 2702 Requirements.** Until the termination of the trust, the Trustee shall not pay over or apply any portion of the income or principal of the trust to or for the benefit of any person other than the Grantor, if the Grantor is then living, or if not, the Grantor's estate. The interest of the Grantor or the Grantor's estate in the trust shall not be commuted. No additional contributions shall be made to the trust, and the Trustee shall not accept any such contributions.

Notwithstanding anything herein contained to the contrary, although no additional contributions may be made to the trust, if any transfer is deemed made to the Trustee for any reason by any person such transfer shall be held by the Trustee in a separate trust upon the same terms and conditions as the original contribution to the trust created hereunder and such transfer shall not form a part of the original trust.

**5. Substitution Power.** The Grantor shall have the power, at any time and from time to time, acting in a nonfiduciary capacity, without the approval or consent of any person, to acquire the assets of any trust held under this Article I hereof by substituting other property of an equivalent value. The Grantor may release such power at any time by delivery of an acknowledged written instrument to the Trustee, any such release to be irrevocable.

**6. Grantor Trust.** It is the Grantor's intention that during the term of any trust held under this Article I, the Grantor be treated as the owner of the entire trust under this Article I under the so-called "grantor trust" income tax rules of subpart E of part I of subchapter J of subtitle A ("Grantor Trust Rules") of the Internal Revenue Code of 1986 as amended, or any successor thereto ("Code"), and the Grantor directs that this Agreement shall be construed and the trusts hereunder administered accordingly.

**7. Disposition Upon Expiration of Fixed Term.** The trust shall terminate upon the expiration of the Fixed Term, and thereupon the trust estate shall be disposed of as follows:

**A.** If the Grantor is living upon the expiration of the fixed term, the trust estate shall be transferred, conveyed and paid over to *[name of beneficiary or beneficiaries to receive property]*.

**B.** If the Grantor is not living upon the expiration of the Fixed Term, then, upon the expiration of the Fixed Term, the trust estate shall be disposed of in accordance with the provisions of Article II.

## ARTICLE II Disposition After Fixed Term

Any property which is directed to be disposed in accordance with the provisions of this Article II shall be transferred, conveyed and paid over to *[name of alternate beneficiary or beneficiaries]*.

### ARTICLE III Grantor's Intent

This Agreement shall be construed, payments shall be made to the Grantor or the Grantor's estate, as the case may be, and the trusts created hereunder shall be administered, in all respects so that the interest of the Grantor or the Grantor's estate, as the case may be, constitutes a qualified annuity interest within the meaning of Section 2702(b)(1) of the Code and the regulations thereunder. If such section or regulations, or any successor section or regulations, or any ruling, notice or other administrative pronouncement issued thereunder, at any time requires that a qualified annuity interest must contain provisions that are not expressly set forth herein, such provisions shall be incorporated into this Agreement by reference and shall be deemed to be a part of this Agreement to the same extent as though they had been expressly set forth herein. The Trustee shall have the power, acting alone, to amend any trust created under Article I hereof in any manner required for the sole purpose of ensuring that the interest of the Grantor or the Grantor's estate, as the case may be, constitutes a qualified annuity interest within the meaning of Section 2702(b)(1) of the Code and the regulations thereunder.

It is the further intent of the Grantor that if the Grantor survives the Fixed Term, *thereafter no portion of any trust created hereunder be includible in the Grantor's gross estate for estate tax purposes and, accordingly, the Grantor directs that this Agreement shall be construed and the trusts hereunder administered in accordance with and to carry out that intent.*

### ARTICLE IV Trustee's Powers

**1. General Powers of Trustee.** In addition to, and not by way of limitation of, the powers conferred by law upon fiduciaries, the Trustee is expressly granted the powers hereinafter enumerated, subject, however, to the provisions of Article III above, to be exercised by the Trustee in the Trustee's sole and absolute discretion and without court authorization:

**A.** To purchase or otherwise acquire, and to retain, whether originally a part of any trust held hereunder or subsequently acquired, any and all common or preferred stocks, bonds, notes or other securities, or any variety of real or personal property whatsoever, whether within or without the United States, including (but without limitation) foreign real estate, foreign securities, interests in any business venture (incorporated or unincorporated), and interests in entities formed principally for the commingling of assets for investment, such as common trust funds, investment companies, mutual funds, real estate and other investment trusts, partnerships (participating therein as a general or limited partner), securities of any corporate fiduciary or any affiliate, interests in common trust funds administered by any corporate fiduciary, participation in any mutual fund or other investment for which a corporate trustee or an affiliate is acting as an investment advisor or rendering any other service, or the creation of a money market or similar account with a corporate fiduciary, and to make or retain any *such investment without regard to whether such investment is unproductive or underproductive and without regard to degree of diversification.*

B. To sell, lease, pledge, mortgage, transfer, exchange, convert or otherwise dispose of, or grant puts, calls or options with respect to, any and all property at any time forming a part of any trust, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions; and to enter into leases that extend beyond the period fixed by statute for leases made by fiduciaries and beyond the duration of any trust.

C. To borrow money from any lender, including any corporate fiduciary, for any purpose connected with the protection, preservation or improvement of any trust, and as security to mortgage or pledge upon any terms and conditions any real or personal property forming a part of any trust.

D. To vote in person or by general or limited proxy with respect to any shares of stock or other security; directly or through a committee or other agent, to oppose or consent to the reorganization, consolidation, merger, dissolution or liquidation of any corporation, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and take any steps proper to obtain the benefits of any such transaction.

E. To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations that may be liens or charges against any trust; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of any trust against others or of others against any trust upon any terms and conditions, including the acceptance of deeds to real property in satisfaction of bonds and mortgages; and to make any payments in connection therewith.

F. To place all or any part of the securities that at any time are held by any trust in the care and custody of any bank or trust company with no obligation while such securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank or trust company; to have all stocks and registered securities placed in the name of such bank or trust company or in the name of its nominee; and to appoint such bank or trust company agent and attorney to collect, receive, receipt for and disburse any income, and generally to perform the duties and services incident to a so-called "custodian" account.

G. To appoint, employ and remove, at any time and from time to time, any accountants, attorneys, investment counselors, expert advisers, brokers, agents, clerks and employees, and to fix and pay their reasonable compensation; and to delegate to investment counsel discretionary authority to make changes in investments.

H. To employ a broker-dealer as custodian for all or any part of the securities at any time held by any trust and to register such securities in the name of such broker-dealer; to register securities in the name of a nominee with or without the addition of words indicating that such security is held in a fiduciary capacity, or to hold securities in bearer form, or in uncertificated form.

I. To drill, test, explore, maintain, develop and otherwise exploit, either alone or jointly with others, any and all property in which any trust created hereunder

may have any rights and interests of whatsoever kind or nature with respect to oil, gas, minerals, timber or other natural resources, whether originally a part of any such trust or subsequently acquired; to enter into operation, farm-out, pooling or unitization agreements in connection with any or all of such rights and interests; and to extract, remove, process, convert, retain, store, sell or exchange such rights and interests and the production therefrom, all in any manner, to any extent, on any terms and for any consideration.

**J.** To manage, insure against loss, subdivide, partition, develop, improve, mortgage, lease or otherwise deal with any real property or interests therein that may form at any time a part of any trust; to satisfy and discharge or extend the term of any mortgage thereon; to demolish, rebuild, improve, repair and make alterations from time to time in any of the structures upon any such real property; to plat into lots and prepare any such real property for building purposes; to construct and equip buildings and other structures upon any such real property and to make any and all other improvements of any kind or character whatsoever in connection with the development and improvement thereof; to execute the necessary instruments and covenants to effectuate the foregoing powers, including the granting of options in connection therewith.

**K.** To form or cause to be formed, alone or with others, such corporations, partnerships, limited partnerships, investment trusts and other business organizations organized under the laws of any state or country and to transfer and convey to such business organizations all or any part of the assets, real or personal, of any trust estate in exchange for such stocks, bonds, notes, other securities or interests of such business organizations as the Trustee may deem advisable.

**L.** To keep assets held hereunder or the physical evidence of their ownership in any state or country whatsoever, and from time to time to move the same to any other state or country.

**M.** To make distributions in kind and to cause any distribution to be composed of cash, property or undivided fractional shares in property different in kind from any other distribution without regard to the income-tax basis of the property distributed to any beneficiary or any trust.

**N.** To delegate any duties, discretionary or otherwise, to any person for such periods and upon such terms and conditions as may be designated in an acknowledged written instrument delivered to such person (other than any person who is precluded from exercising such duties under another provision of this Agreement); and if the delegation is to a co-Trustee, the Trustee so delegating any duties or powers hereunder shall have no further responsibility with respect to such duties or powers so long as such delegation shall remain in effect; and any such delegation shall be revocable by a similar instrument delivered at any time.

**O.** To execute and deliver any and all instruments to carry out any of the foregoing powers, no party to any such instrument being required to inquire into its validity or to see to the application of any money or other property paid or delivered pursuant to the terms of any such instrument.

**2. Investment of Trust Assets.** Nothing in this Agreement shall be construed to restrict the Trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

**3. Payments to Grantor.** The Trustee shall not pay to the Grantor or the Grantor's executors any income or principal of any trust held under this Agreement on account of or in discharge of the income tax liability of the Grantor or the Grantor's estate, as the case may be (whether federal, state or otherwise), if any, in respect of property held in any trust held under this Agreement and taxable to the Grantor or the Grantor's estate, as the case may be, including, but without limitation, tax on realized capital gains.

#### ARTICLE V Trust Is Irrevocable

The Grantor has been advised of the difference between revocable and irrevocable trusts and hereby declares that this Agreement and the trust created hereby is irrevocable.

#### ARTICLE VI Governing Law

This Agreement shall be construed in accordance with the laws of the State of [state] and all questions involving the validity, construction, administration and effect of any trust hereby created shall be determined in accordance with said laws.

#### ARTICLE VII Definitions

**1. Children and Descendants.** The words "child," "children," "descendant" and "descendants"<sup>2</sup> as used are intended to include any adopted persons and the descendants of adopted persons, whether of the blood or by adoption.

**2. Per Stirpes.** A disposition in this Agreement to the descendants of a person *per stirpes*<sup>3</sup> shall be deemed to require a division into a sufficient number of equal

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<sup>2</sup> NOTE: The attorney-drafter must ascertain whether this definition is what the client wishes.

<sup>3</sup> NOTE: The attorney-drafter must ascertain whether this definition is what the client wishes. An alternative definition of "*per stirpes*" is as follows:

A disposition in this Agreement to the descendants of a person *per stirpes* shall be deemed to require a division into a sufficient number of equal shares to make one share for each child of such person living at the time such disposition becomes effective and one share for each then deceased child of such person having one or more descendants then living, regardless of whether any child of such person is then living, with the same principle to be applied in any required further division of a share at a more remote generation.

shares to make one (1) share for each member living at the time such disposition becomes effective of the class consisting of the first generation below such person which has members living at the time such disposition becomes effective, with the same principle to be applied in any required further division of a share at a more remote generation.

#### ARTICLE VIII Trustees

**1. Removal.** *The Grantor reserves the right at any time and from time to time to remove any Trustee acting hereunder by written notice to that effect delivered in person or by registered mail to the Trustee, and to designate by written notice an individual, bank or trust company to act as a successor Trustee.*

**2. Resignation.** Any Trustee may resign from office without leave of court at any time and for any reason. Such resignation shall be made by instrument in writing, duly acknowledged, and delivered in person or by registered mail to the remaining Trustee(s), or if there is no remaining Trustee, to the Grantor if the Grantor is then living, or, if the Grantor is not then living, to the legal representatives of the Grantor's estate.

**3. Successor Trustee.** The Grantor hereby authorizes but does not direct each Trustee acting from time to time hereunder to appoint such individual or such bank or trust company, as such Trustee in the exercise of sole and absolute discretion, shall select as successor Trustee to act in his, her or its place if he, she or it should cease to act. Any such appointment shall be made by an acknowledged written instrument delivered in person or by registered mail to the Grantor if the Grantor is then living, or, if the Grantor is not then living, to the legal representatives of the Grantor's estate, and may be revoked in the same manner by such Trustee prior to its becoming effective and succeeded by a later appointment, the last such appointment to control.

**4. Co-Trustee.** The Grantor hereby authorizes but does not direct the Trustee (or, if more than one, the Trustees unanimously) acting from time to time hereunder to appoint as an additional co-Trustee(s) such individual or individuals or such bank or trust company as the Trustee or Trustees in the exercise of sole and absolute discretion, shall select. Any such appointment shall be made by an acknowledged written instrument and shall be effective upon acceptance thereof by the co-Trustee(s) so appointed.

**5. Bond and Accounting.** No Trustee shall be required to give any bond. If, notwithstanding the foregoing, any bond is required by any law, statute or rule of court, no sureties shall be required thereon. Any Trustee may render an account at any time if the Trustee so desires, but no Trustee shall be required to render any account.

**6. Compensation.** By executing this Agreement the Trustee named above agrees to act as Trustee hereunder with such compensation as may be determined from time to time by mutual agreement between the Trustee and the Grantor. Any other Trustee shall be compensated as provided in his, her or its instrument of appointment.

**7. Trustee Acts in Fiduciary Capacity.** Every act done, power exercised or obligation assumed by the Trustee pursuant to the provisions of this Agreement shall be held to be done, exercised or assumed, as the case may be, by the Trustee acting in a fiduciary capacity and not otherwise, and every person, firm or corporation contracting or otherwise dealing with the Trustee shall look only to the funds and property of the trust estate for payment under such contract or payment of any money that may become due or payable under any obligation arising under this Agreement, in whole or in part, and no Trustee shall be personally liable therefor even though the Trustee did not exempt himself, herself or itself from personal liability when entering into any contract, obligation or transaction in connection with or growing out of the trust estate.

**ARTICLE IX  
Successors**

This Agreement shall extend to and be binding upon the executors, administrators, successors and assigns of the Grantor and upon the successors to the Trustee.

**ARTICLE X  
Headings**

The headings used in this Agreement are for convenience only and shall not be used to construe this Agreement.

**ARTICLE XI  
Counterparts**

This Agreement may be executed in counterparts and such counterparts taken together shall constitute a single instrument.

IN WITNESS WHEREOF, the undersigned Grantor and Trustee have executed this Agreement as of the date first above written.

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Grantor

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Trustee

*[signatures, notary clauses, and schedule omitted]*



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