# **Creating Trust Shares upon the Death of a Trustor**

Our Trustee shall divide the deceased Trustor’s remaining trust property into two separate shares as provided in Section 7.01. This instrument designates one share as the *Marital Share* and the other share as the *Non-Marital Share*.

## Division of the Deceased Trustor’s Remaining Trust Property

Our Trustee shall divide the deceased Trustor’s remaining trust property as provided in this Section.

* + 1. Creation of the Marital Share

Our Trustee shall allocate to the Marital Share a fractional share of the deceased Trustor’s remaining trust property calculated as follows.

* + - 1. The Numerator

Assuming the value qualifies for the federal tax marital deduction, the fraction’s numerator will equal the minimum value sufficient to reduce the federal estate tax to the lowest possible amount. In computing the numerator, our Trustee shall take into account the deceased Trustor’s transfers, including transfers treated as made by the deceased Trustor, and all deductions, exclusions, credits, and reductions in value allowed in computing this tax.

* + - 1. The Denominator

The denominator will be the value of the deceased Trustor’s remaining trust property as finally determined for federal estate tax purposes.

The Marital Share must carry its *pro rata* share of the income, but the Marital Share must not receive less income than that required to be paid to the surviving Trustor under applicable state law.

* + 1. Creation of the Non-Marital Share

Our Trustee shall allocate the balance of the trust property to the Non-Marital Share.

* + 1. Funding the Fractional Share

Our Trustee has complete authority to satisfy the fractional gift by cash contributions, by in-kind contributions, by a combination of cash and in-kind contributions, or by undivided interests in property. If there are insufficient assets qualifying for the federal estate tax marital deduction to fully fund the Marital Share, our Trustee shall reduce the funding to the Marital Share accordingly. We acknowledge that the funding amount may be affected by actions by our Trustee and by the deceased Trustor’s Personal Representative in making certain tax elections.

Once calculated in this way, the fraction is fixed, and may not vary with changes in the property value after the valuation date used for federal estate tax purposes. Because the fractional gift is not intended to be a specified dollar amount or pecuniary in nature, our Trustee shall apply the fraction to the trust assets at their actual value on the effective allocation date, so that the actual value resulting from the application of the fraction will reflect fluctuations in the trust property’s value. Our Trustee may fund the fractional share on a *non* *pro rata* basis if the funding is based on the total fair market value of the assets on the allocation date.

Our Trustee’s allocations of assets are limited as set forth below.

* + - 1. Ineligible Assets

Our Trustee may only allocate property and the proceeds of any property to the Marital Share that qualify for the federal estate tax marital deduction.

* + - 1. Tax Consequences of Certain Allocations

We request that our Trustee always consider the tax consequences of allocating or distributing to the Marital Share any insurance policy that insures the surviving Trustor’s life, property subject to the foreign death credit, property on which a tax credit is available, or property that is income in respect of a decedent under the Internal Revenue Code.

Our Trustee shall administer the Marital Share as provided in Article Nine. Our Trustee shall administer the Non-Marital Share as provided in Article Ten.

## Disposition of Property upon Disclaimer by the Surviving Trustor

The surviving Trustor, the surviving Trustor’s fiduciary, or the surviving Trustor’s agent serving under a power of attorney may disclaim any portion of any interest in or power over property passing from the deceased Trustor to or for the surviving Trustor’s benefit under this instrument. If the surviving Trustor disclaims any property that would otherwise be allocated to the QTIP Trust, our Trustee shall allocate the disclaimed property to the Non-Marital Share.

If the surviving Trustor disclaims the surviving Trustor’s interest in any portion of the Non-Marital Share, our Trustee shall dispose of the disclaimed interest as though the surviving Trustor had predeceased the deceased Trustor.

## Option to Allocate Deceased Trustor Trust Property to the Marital Trust

Our Trustee may waive any allocation to the Marital and Non-Marital Shares and administer all of the trust assets under the provisions of the Marital Trust if:

the combined value of the deceased and surviving Trustors’ assets is less than the exemption equivalent for the deceased Trustor allowed by the Internal Revenue Service; and

all of the then-living current and remainder beneficiaries entitled to the assets of any trusts that would otherwise be created from the Marital Share, Non-Marital Share, or both agree to waive any allocation to those shares or trusts or both in writing.

If any of the beneficiaries is a minor, the minor’s parent or guardian may waive the allocation on behalf of the minor in writing.

# **The Marital Trust**

Our Trustee shall administer the Marital Trust as provided in this Article.

## Trustee of the Marital Trust

The surviving Trustor may serve as sole Trustee of the Marital Trust. The surviving Trustor may remove and replace the Trustee of the Marital Trust at any time, with or without cause. Notwithstanding any other provision in this instrument, the surviving Trustor may appoint any individual or corporate fiduciary to serve as Trustee of the Marital Trust.

## The Surviving Trustor’s Right to Amend

Except as otherwise provided in this Article, the surviving Trustor also has the absolute right to amend the Marital Trust’s terms by restating them in full. The restated Marital Trust must be in writing and signed by the surviving Trustor and the Trustee of the restated Marital Trust.

If the surviving Trustor does not disclaim assets allocated to the Marital Trust (and no Credit Shelter Trust is created), then the Marital Trust may continue to be referred to as the {{ trust\_name }} dated {{ trust\_date }}, and may use the surviving Trustor’s social security number as its Taxpayer Identification Number.

The right to amend by restatement may be exercised only by the surviving Trustor.

## Separate Share for Deceased Trustor’s Trust Property

If the Marital Trust becomes the beneficiary of death benefits under any qualified retirement plan, our Trustee shall hold this property in a separate share of the Marital Trust during the surviving Trustor’s lifetime. Our Trustee shall administer the separate share in accordance with all of this Article’s provisions. But, notwithstanding any other provision of this Article, the surviving Trustor may not amend the terms of the separate share.

The purpose of the separate share is to keep the deceased Trustor’s trust property and its accumulated income separate from the main share during the lifetime of the surviving Trustor, in order to qualify the separate share as a designated beneficiary under qualified retirement plans.

Our Trustee shall distribute as much of the principal and accumulated income of the separate share to the main share of the Marital Trust as the surviving Trustor directs. This right to direct distribution from the separate share to the main account may be exercised only by the surviving Trustor.

## Distribution of Income

Notwithstanding any other provision in this instrument, our Trustee shall distribute all of the net income of the Marital Trust, including net income generated by property held as a separate share of the Marital Trust that was previously the deceased Trustor’s property, to the surviving Trustor at least quarter-annually. Nothing contained in this instrument may limit the right of the surviving Trustor to receive the Marital Trust’s entire net income.

## Distributions of Principal

Notwithstanding any other provision in this instrument, our Trustee shall distribute as much of the principal of the Marital Trust, including property held as a separate share of the Marital Trust that was previously the deceased Trustor’s property, to the surviving Trustor as he or she directs for any reason.

Our Trustee may also distribute as much of the principal of the Marital Trust to the surviving Trustor as our Trustee determines necessary or advisable for any purpose.

## Unproductive Property

At the direction of the surviving Trustor, our Trustee shall convert any unproductive property held in the Marital Trust to productive property.

## Trust Distributions during the Incapacity of the Surviving Trustor

During any time the surviving Trustor is incapacitated, our Trustee shall administer the Marital Trust according to the provisions of Section 4.03.

## General Power of Appointment

Notwithstanding any other provision in this instrument, the surviving Trustor may appoint all or any portion of the principal and undistributed income remaining in the Marital Trust, including property and undistributed income generated by the property held as a separate share of the Marital Trust that was previously the deceased Trustor’s property, at the surviving Trustor’s death among one or more persons or entities, including the creditors of the surviving Trustor’s estate. The surviving Trustor has the exclusive right to exercise this general power of appointment.

## Administration following the Surviving Trustor’s Death

The Marital Trust becomes irrevocable upon the death of the surviving Trustor, and our Trustee shall administer the Marital Trust consistent with the provisions of Article Five for administration following the death of the first of us to die.

Upon completion of the administrative tasks, our Trustee shall satisfy the provisions of Article Ten with respect to any specific distributions to be made from the surviving Grantor's remaining trust property. Our Trustee shall then administer the unappointed balance or remainder of the Marital Trust as provided in Article Ten.

# **The QTIP Trust**

Our Trustee shall administer the Marital Share in trust as provided in this Article. The trust will be referred to as the *QTIP Trust*.

## Distributions of Net Income

Our Trustee shall distribute all of the net income of the QTIP Trust to the surviving Trustor at least quarter-annually during the surviving Trustor’s lifetime. Nothing contained in this instrument limits the right of the surviving Trustor to receive the entire net income of the QTIP Trust.

## Distributions of Principal

Our Independent Trustee may distribute as much of the principal of the QTIP Trust to the surviving Trustor as our Independent Trustee may determine advisable for any purpose. If no Independent Trustee is then serving, our Trustee shall distribute as much principal of the QTIP Trust to the surviving Trustor as our Trustee determines necessary or advisable for the surviving Trustor’s health, education, maintenance, and support.

Our Trustee, in its sole and absolute discretion, may consider the needs of the surviving Trustor and other income and resources available to the surviving Trustor.

## Effect of Remarriage on Principal Distributions

Upon the remarriage of the surviving Trustor:

if the surviving Trustor is then serving as Trustee of the QTIP Trust, the surviving Trustor is to be removed and replaced under the provisions of Article Three;

the limited power of appointment granted the surviving Trustor under Section 9.05 will terminate and will have no legal force or effect; and

all distributions of principal from the QTIP Trust will terminate unless the surviving Trustor and the surviving Trustor’s fiancé(e) execute a valid prenuptial agreement that complies with the terms set forth below. For purposes of this trust, *remarriage* means any marriage, including a common law marriage, entered into by the surviving Trustor after the death of the first of us to die that is valid in the jurisdiction where it took place.

If the surviving Trustor chooses to remarry after the death of the first of us to die and executes a valid prenuptial agreement not less than 30 days prior to the time of the remarriage that complies with the following terms, then in our judgment, there will be sufficient protection for the other beneficiaries named in this trust. The distributions and limited power of appointment under this Article will not be restricted because of this remarriage, and the surviving Trustor need not be replaced as Trustee. The prenuptial agreement must be in writing and signed by the surviving Trustor and the surviving Trustor’s fiancé(e), with each having been represented by independent legal counsel. Prior to the execution of the agreement, each party must make full disclosure of their then-existing assets. The prenuptial agreement must provide that the surviving Trustor’s fiancé(e) waives any right to any portion of the surviving Trustor’s share of the surviving Trustor’s premarital assets and the surviving Trustor’s share of the QTIP Trust in the event of dissolution of the marriage or the death of the surviving Trustor, with the new spouse surviving the surviving Trustor.

## Unproductive Property

Upon written request of the surviving Trustor, our Trustee shall convert any unproductive property held in the QTIP Trust to productive property. In addition, the surviving Trustor has the right to require that any unproductive property held in any qualified retirement plan, private or commercial annuity, individual retirement annuity, pension, profit-sharing plan, stock-bonus plan, stock ownership plan, or similar arrangement made payable to the QTIP Trust be converted to productive property.

## Testamentary Limited Power of Appointment

The surviving Trustor has the testamentary limited power to appoint all or any portion of the principal and undistributed income remaining in the QTIP Trust among our descendants.

The surviving Trustor may not exercise this power of appointment to appoint trust property to the surviving Trustor, the surviving Trustor’s estate, the surviving Trustor’s creditors, or the creditors of the surviving Trustor’s estate.

We intend to create a testamentary power of appointment that is a limited power of appointment and not a general power of appointment as defined in Internal Revenue Code Section 2041.

## Separate Share for Disclaimed Property

Our Trustee shall hold any property that has become property of the QTIP Trust as a consequence of a disclaimer by the surviving Trustor as a separate share of the QTIP Trust, with provisions identical to those contained in the other Sections of this Article, except that the surviving Trustor will not have the limited power of appointment that is held under Section 9.05 with respect to the property of the separate share.

## Qualified Terminable Interest Property

Our intent is that the QTIP Trust property constitute Qualified Terminable Interest Property (QTIP) for federal and state death tax purposes if and to the extent our Trustee or Personal Representative makes the necessary elections. This trust should be interpreted to accomplish this intent.

## Administration of the QTIP Trust at the Death of the Surviving Trustor

The QTIP Trust will terminate upon the death of the surviving Trustor.

If the surviving Trustor has not fully exercised the testamentary power of appointment over the trust property remaining at the surviving Trustor’s death, our Trustee shall distribute the unappointed balance or remainder of the QTIP Trust as provided in Article Eleven.

# **The Credit Shelter Trust**

Our Trustee shall hold and administer the Non-Marital Share in a separate trust as provided in this Article. This document refers to the trust as the *Credit Shelter Trust*.

## Credit Shelter Trust Beneficiary

The surviving Trustor is the only beneficiary of the Credit Shelter Trust during the surviving Trustor’s lifetime.

## Distribution of Income and Principal

Our Independent Trustee may distribute as much of the income and principal of the Credit Shelter Trust to the surviving Trustor as our Independent Trustee may determine advisable for any purpose. If no Independent Trustee is then serving, our Trustee shall distribute as much income and principal to the surviving Trustor as our Trustee determines necessary or advisable for the surviving Trustor’s health, education, maintenance, and support.

Any undistributed net income must be accumulated and added to principal.

## Guidelines to Our Trustee

The surviving Trustor is the only beneficiary of the Credit Shelter Trust. In making discretionary distributions under this Article, our Trustee should bear in mind that our primary concern and objective is to provide for the well-being of the surviving Trustor, and the preservation of principal is not as important as this objective.

Without limiting our Trustee’s discretion, we recommend that our Trustee not distribute principal from the Credit Shelter Trust to the surviving Trustor until the principal of the Marital Trust is substantially exhausted.

## Termination of the Credit Shelter Trust

The Credit Shelter Trust will terminate upon the death of the surviving Trustor and our Trustee shall administer the balance or remainder of the Credit Shelter Trust as provided in Article Ten.