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Probate

What is probate?
Probate is a legal proceeding to administer certain kinds of property (called *probate property*) owned by someone who has died (the *decedent*), and to see that claims, expenses and taxes are properly paid, and that the remaining estate is distributed to those entitled to receive it under the decedent's will or Ohio law. Probate property is all property titled in the decedent's name alone. It is distributed only under the decedent's will or according to Ohio law. A probate proceeding takes place in the probate court of the county where the deceased property owner lived. If the deceased also owned real estate in another state, additional proceedings may be necessary in that state.

What property is *not* included in probate?
Property that is *not* probate property, and therefore is not part of the probate proceeding, includes: property held by the decedent and another as *joint tenants with right of survivorship;* property held in a trust; accounts that are *payable on death* (POD) or will *transfer on death* (TOD) to a named beneficiary; and insurance or retirement benefits that are payable to a named beneficiary.

Property that must be included in probate and property that is subject to estate taxes are two different matters. Even if property is not included in probate, it still may be subject to federal or Ohio estate taxes.

Why is probate necessary?
Probate is necessary to give the executor or administrator legal authority to deal with the decedent's probate assets. The executor or administrator has the authority and duty to take control of and safeguard the assets of the decedent's estate. Probate then provides a process for the payment of outstanding debts, taxes and the expenses of administration, and for the distribution of the remainder of the estate to the beneficiaries and heirs.

What does probate involve?
Probating an estate requires the appointment of a person to conduct the administration of the estate. If there is a will, this person usually is named in the will and is called an *executor.* If there is no will or no person is named in the will, this person is appointed by the probate court and is called an *administrator.* The executor or administrator may be an individual, a bank or a trust company.

The executor or administrator takes care of the following tasks:

- caring for all property of the decedent;
- receiving payments due the estate, including interest, dividends and other income;
- collecting debts, claims and notes due the decedent;
- determining the names, ages, addresses and degree of relationship of all heirs;
- determining the names, ages and addresses of all beneficiaries, if there is a will;
- investigating the validity of all claims against the estate and paying all outstanding obligations including federal, state and local estate and income taxes;
- planning for federal and state taxes and preparing and filing estate tax returns when required;
- carrying out the instructions of the probate court pertaining to the estate and distributing the assets of the estate to the heirs.

The probate court judge and support staff supervise the work of the executor or administrator. These actions require the preparation and filing of numerous legal documents, the provision of notices, hearings in court, an appraisal of the assets of the estate, an inventory of the assets, completion of final income tax returns and possibly gift and estate tax returns, an accounting of funds, final transfer of all assets to beneficiaries, termination of the probate proceeding, and discharge of the executor or administrator by the probate court. Because of the complexity of these procedures, the assistance of an attorney usually is needed.

If the total value of all property in the decedent's individual name is $35,000 or less, the estate can be relieved from some of these administrative requirements. Where the decedent's spouse is entitled to receive all of the estate's assets, the amount that can be relieved from formal administration is increased to $100,000.

How much does probate cost?
The costs assessed by the probate court are based on a schedule of charges established by law for each type of document filed in the court. Costs typically are about $200. Attorney fees charged for handling matters of the estate must, in most cases, be approved by the court and typically are based on an hourly rate for the actual services performed by the attorney. The executor or administrator is paid a fee set by Ohio law based on a percentage of the value of the estate assets administered.

How long does probate take?
Claims against the estate may be made up to six months from the date of death. A small estate that does not require the filing of an Ohio estate tax return and has no creditor issues often can be settled within six months of the appointment of the executor or administrator. However, if an Ohio or a federal estate tax return is required, the administration of the estate can last more than a year. (Estate taxes are not due until nine months after the decedent's death.) If there is an audit of an estate tax return, the administration can take up to an additional eyar or more, and an executor or administrator cannot safely distribute all of the estate assets until released from personal liability for estate taxes upon the completion of the audit. An extraordinary administration involving a contested will or complicated tax litigation may take several years to complete. However, in many cases, distributions of most or all estate assets do not necessarily have to wait until all probate matters have been completed.

Do I need a will?
A properly drawn will assures you that, upon your death, your property will be distributed as you intended. It is important that you review your will periodically with your attorney in order to keep it up to date. A will is also the mechanism for choosing the executor and commonly provides for the nomination of a guardian where there are minor children. A will also can dispense with the requirement of a surety bond, which an administrator might otherwise have to pay.

Wills must be filed in the probate court upon death. The law provides penalties for the withholding or destruction of a will.

If you do not make a will, your property will be distributed according to the Ohio Statute of Descent and Distribution.

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The information contained in this pamphlet is general and should not be applied to specific legal problems without first consulting your own attorney.

Chapter 4

USE OF TRUSTS IN ESTATE PLANNING

Introduction

Trusts are marvelous devices. The mainstay for modern estate planning, nothing serves as many functions for estate planners as trusts. With them settlors literally write their own rules, crafting trustee duties and beneficiary interests that may effect any purpose that is not illegal or against public policy.

> The purposes for which trusts can be created are as unlimited as the imagination of lawyers. There are no technical rules restricting the creation of trusts. . . . Through the trust it is possible to separate the benefits of ownership from the burdens of ownership. . . . It is possible to create successive interests that could not be effectively created by giving successive legal interests . . . [and] to protect the beneficiaries in the enjoyment of their interests by making those interests inalienable and putting them beyond the reach of creditors.

Scott & Fratcher, THE LAW OF TRUSTS §1 at 2 (4th ed. 1987). This Chapter explores the benefits of trusts employed for estate planning purposes and compares the legal consequences of trusts to those of wills or other less useful vehicles.

Because a will almost always is a necessary component in an estate plan that disposes of all of an individual's wealth, this comparison does not anticipate a selection *between* alternatives. Rather, it provides a foundation to determine to what extent trusts effectively may supplement wills for property disposition purposes, and it informs the planning process when both might be useful. Although many trusts are created by wills (testamentary trusts), any comparison should consider the advantages of trusts created during the settlor's life (inter vivos or living trusts) as a supplement to the package of estate planning documents that often includes a will, an advance directive for health care, a living will, an organ donor designation, and perhaps a durable power of attorney for property management.

Trust Uses

Although estate planners often tend to think in tax terms, the nontax oriented reasons for using inter vivos trusts probably are twice as numerous. In addition, as periodic tax reforms continue to illustrate, the nontax reasons are the ones that most likely will endure.

Historically, trusts evolved to accomplish objectives that otherwise were impossible to achieve, such as circumvention of feudal duties or restraints on alienation. They continue to be viable for related purposes today because they allow us to sidestep various wills or estates concepts. For example, as compared to the procedure that must be followed in altering a will, use of any trust format as the settlor's primary estate planning document (coupled with a pour-over will) permits easier amendment of the estate plan during the settlor's continued life. More importantly, state law restrictions on the freedom of testation that apply only to probate assets (for example, in many states the statutory entitlement of a surviving spouse) often may be circumvented by using a trust that avoids probate. In addition, to the extent those restrictions are not avoidable under *one* state's laws they may be circumvented by placing the property in a trust that is subject to more favorable laws of *another* state. Indeed, clients who want interstate or transnational mobility in their affairs find trusts to be more transportable than other forms of property ownership.

Trusts also provide for voluntary property management with more flexibility than is available with other devices, such as durable powers of attorney that preserve the agent's powers beyond the principal's incompetence. Due to their flexibility, trusts also prove to be the answer when more conventional business devices (for example, a bailment or escrow) prove to be too inflexible. The beauty of trusts is that they permit the creation of unique relations and the ability to tailor the agreement to govern the engagement.

A good example of this is tort litigation settlement trusts that allow the parties to lawsuits to settle on favorable terms to each, notwithstanding significant differences of opinion about damage recovery elements such as the plaintiff's life expectancy or expected medical care costs. In cases of disagreement a defendant may fund a trust with a certain amount of money to provide defined benefits for the balance of the plaintiff's life, with a reversion to the defendant at the plaintiff's death. If the funding proves to be excessive, as the defendant may assume, all the defendant has lost is the use of its money until the plaintiff dies. Meanwhile the plaintiff is protected by a fund that potentially is large enough to take care of all anticipated needs, with a sufficient cushion for an optimistic life expectancy or a pessimistic medical cost prognosis. How better could both parties protect their legitimate interests in such a circumstance?

Flexibility and Dead Hand Control

More to the point for estate planning purposes, trusts also permit the imposition of either attractive or reprehensible (depending on who you represent) "dead hand" controls over the future use of property. A settlor essentially may tie the hands of generations of beneficiaries to assure the accomplishment or avoidance of certain uses, or to reward or punish certain conduct. These settlor objectives can be enforced in most cases subject only to the Rule Against Perpetuities (which is being reformed or repealed in more and more states) or prohibitions against restrictions or conditions on use that violate public policy. For example, a total restriction on a beneficiary's first marriage might be invalid, but a lesser restraint or a forfeiture of benefits upon a remarriage may be respected. See RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS §6.2 in particular and §§5.1 through 10.2 with respect to restraints in general (1983). Flexibility to adapt uses to changing conditions also is attainable if coupled with judicious use of powers of appointment, trustee discretion, and trust protector provisions. That flexibility becomes more important the longer an estate plan will last.

Sometimes a settlor's unbending desires should be mandated in a trust that may last multiple generations. In more cases, however, the key to effective estate planning is providing flexibility to adapt to changing circumstances, whether those be family, tax, property management, investment, or other law or circumstantial developments. The most direct mechanism to provide for change is a power to terminate, alter, or amend a trust, which can be reposed in almost anyone (for many tax purposes excluding the settlor, and other than the settlor's spouse if it is appropriate to avoid grantor trust income tax problems). Thus, this power could be retained by the settlor in many cases; in all events it may be given to a committee, to the fiduciary, or to a trust protector. The issues are to what extent and under what kinds of circumstances the power should be granted, what to do with the trust property on a termination, and any tax exposure to the powerholder, especially if that person is a beneficiary.

Trusts have another advantage over wills. A will (or testamentary trust) can be defeated if all the beneficiaries agree not to probate the will in the first instance. On the other hand, trusts can be made more finely adaptable with a number of surgical approaches. For example, common are "small trust" termination provisions, allowing the fiduciary to terminate a trust if the fees are excessive in relation to the income generated by the trust. Less common but more important in long term trusts are provisions permitting termination in the trustee's discretion. This authority may be based on a variety of factors, such as

- impossibility to accomplish the trust purposes (e.g., to prevent trust assets from being counted in determining a beneficiary's need for government entitlements, or creditor protection through an off-shore trust rather than spendthrift trust provisions),
- accomplishment of trust purposes (e.g., providing education, or assuring support for an incapacitated beneficiary),

- a change in the law or circumstances making the trust purpose no longer relevant (e.g., protection of assets from a since repealed wealth transfer tax).

The extent of any permissible change should be made clear. Appropriate parameters may include

- beneficiaries who may be added or affected (e.g., only the settlor's blood relatives and their spouses),
- powers of appointment that may be granted or retracted (e.g., for generation-skipping transfer tax purposes),
- changes to accomplish or preclude certain consequences (e.g., causing grantor trust income tax exposure to the settlor of an inter vivos trust, eliminating or altering a source of wealth transfer taxation to a beneficiary or fiduciary, eliminating a spendthrift clause to permit beneficiaries to transfer their interests, or tinkering with a vesting provision to avoid violation of the Rule Against Perpetuities),
- changes needed to conform to new laws (e.g., increased federal security law reporting requirements).

Moreover, the document must specify those provisions that under no circumstances may be altered (e.g., anything that would cause loss of the marital deduction or of the status of an exempt generation-skipping trust, provisions relating to the identity and accountability of fiduciaries, or the provision under which all these changes are authorized).

In addition, procedures for exercise should be established (e.g., only independent fiduciaries may act, only with the approval of a court of competent jurisdiction, and only to accomplish a reduction of taxes or a furtherance of the settlor's objectives). State statutory or judicial authority to reform a trust (particularly the nonadministrative or nonministerial aspects) may be too restrictive.[1] As a consequence, this kind of provision should be considered for inclusion in any trust that will have an extended duration or in which other forms of flexibility (e.g., powers of appointment) will not be effective or appropriate. The point is that trusts permit this kind of engineering for future adaptations.[2]

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1. Reformation may be a growing trend, but it still is quite localized and the circumstances in which it typically is granted are somewhat monochromatic, with many cases making changes seeking only to minimize or avoid generation-skipping transfer taxation. But see Uniform Trust Code §411, which is designed to facilitate trust reformation in the future.

2. RESTATEMENT (THIRD) OF PROPERTY — DONATIVE TRANSFERS §12.2 and the Uniform Trust Code are modeled after various cases or legislative provisions that permit trust alteration. Most reformations do not run afoul of the Claflin doctrine, which precludes premature termination (prior to fulfillment of the settlor's objectives), although at the extreme edges reformation may present that issue. Not incidentally, these authorities come on the heels of the almost total abandonment of the privity defense to malpractice liability of a drafting attorney, which makes reformation a useful protection against exposure. After all, mistakes *do* happen, and disappointed beneficiaries may sue. It also follows behind the mass marketing of poorly drafted trusts by "trust mill" operators, with postmortem efforts

The document also should provide standards or criteria that guide the exercise of discretion, if qualified individuals are expected to exercise powers to terminate, alter, or amend a trust. The trust document also should include exoneration and indemnification from liability to any disgruntled beneficiary because the powerholder either did act or chose not to. And the fiduciary should be protected from liability for following the dictates of a committee or protector acting in this capacity. The document also should establish that the holder of any power to terminate, alter, or amend may relinquish the power if appropriate or necessary, and a provision should govern the appointment of successors to ensure that someone always is in a position to exercise the powers that exist.[3]

Many lesser powers also may be appropriate in a given case in addition to or instead of the dramatic power to terminate, alter, or amend an otherwise irrevocable trust. For example, authority to divide or consolidate trusts can be essential for effective, efficient, and equitable administration. Changes also may be desirable for tax purposes, such as allocation of generation-skipping transfer tax exemption, partial marital deduction qualified terminable interest property elections or reverse elections, disclaimers, income tax avoidance of the §643(f) multiple trust rule, or to permit an S Corporation election with respect to shares held in trust.

Consolidation may be relevant with respect to trusts created by different transferors for the same beneficiary and with the same trustee, as to which virtual identity of provisions might exist. In many cases consolidation is precluded because the applicable period of the Rule Against Perpetuities differs with respect to each trust. Thus, the ability to round 'em up may require authority in a trustee to distribute trust assets to another trust, created specifically for consolidation, rather than to just merge the assets from various trusts or shares. In this respect, the issue is the extent of the trustee's discretion in selecting appropriate vehicles for distribution or to create a new trust to be the recipient of a distribution from one or more other trusts. The trustee would effectively alter the terms of any of the trusts, to make terminating distributions to a newly created trust and then go out of existence.

Again, the point is that flexibility is important the longer an estate plan will last. Various mechanisms exist to provide it if a trust is the primary vehicle in the plan, including powers of appointment, flexible trust distribution provisions, and powers to terminate, alter, or amend trust provisions. It ought to be possible in any case to provide whatever degree

to rectify the messes left behind. See generally Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We don't Have to Think of England Anymore*, 62 ALBANY L. REV. 543, 565 (1998).

3. For help in drafting provisions that permit the alteration of existing document, see McBryde & Keydel, *Back to the Future for the Estate Planner: Building Flexibility in Estate Planning Documents*, 30 U. MIAMI INST. EST. PLAN. ¶1200 (1996), abridged and reprinted as *Building Flexibility in Estate Planning Documents*, 135 TRUSTS & ESTATES 56 (Jan. 1996).

of flexibility the settlor wants or feels comfortable providing, all depending on the confidence the settlor has in the beneficiaries, the fiduciary, trust committees, or protectors.

Bifurcated Enjoyment

Trusts also permit a sharing or bifurcation of enjoyment in myriad contexts. For example, a group or "pot" trust for descendants provides flexibility and fairness, reflecting the way the settlor would use money if still alive (plus important generation-skipping transfer tax minimization and deferral opportunities). In such a trust distributions are made in the trustee's discretion among the class of beneficiaries until some specified time or event (e.g., when all the settlor's children have received an education), followed by division of what remains into equal shares.

In a different setting, use of a trust to provide lifetime support of a settlor's surviving spouse while guaranteeing ultimate receipt of the remainder by children of a former marriage is especially important. In this way all or a substantial part of a settlor's property may be held for the spouse without disinheriting the ultimate natural objects of the settlor's bounty. Without the ability to control final distribution of this gift, the settlor would be forced to choose between the surviving spouse and the children. The "handcuff" feature of a §2056(b)(7) qualified terminable interest property marital deduction trust permits lifetime enjoyment by the surviving spouse while assuring that designated remainder beneficiaries ultimately will receive the property.

Bifurcation between present and future interest beneficiaries is not unique to trusts (a legal life estate and remainder disposition could be used instead). But trusts are more elegant and the remainder beneficiaries enjoy better protections while the life tenant is freed from uncertainties that surround the permissible consumption or enjoyment of property subject to a legal life estate. In addition, property held in trust (rather than commingled with the beneficiary's other assets) is more likely to generate the beneficiary's respect as wealth that is meant to pass to the next generation, even if the plan gives the beneficiary nearly unlimited control and enjoyment during life.

Other uses of trusts that involve dead hand control include

- providing support to a dependent beneficiary only until marriage, remarriage, or some other event that terminates the need for benefits;
- guaranteeing the support or education of various beneficiaries but providing for charity once those needs have been met;
- protecting a child's surviving spouse (the forgotten family members) after a child's death without diverting ultimate ownership from lineal descendants;

- permitting enjoyment by successive generations without fear of dissipation through profligacy, improvidence, or inexperience;
- creating incentives to encourage or discourage certain conduct;[4]
- providing benefits to individual beneficiaries whose financial peccadilloes or litigation exposure (such as the potential professional malpractice of a doctor or lawyer) make it likely that outright ownership would expose the wealth to the claims of predators.

Property Management

Trusts also permit expert management, assuming a competent trustee (which need not mean a corporate fiduciary) is involved. Sometimes trusts also facilitate administration of property. To illustrate, consider the hassles of several beneficiaries' concurrent ownership of a life insurance policy or income producing property. Numerous problems that could paralyze joint tenants or tenants in common are easily avoided if a sole trustee administers that property on behalf of several trust beneficiaries. Fiduciary administration is especially useful in the context of a split purchase or ownership of property that normally would not be easy to administer if held in legal life estate and remainder form by two different parties. A good example might be commercial real estate or mineral interests that should be leased over a longer period than a term of years or the present interest beneficiary's life expectancy.

Trust administration also produces better management if the beneficiary either lacks the desire, experience, or ability to manage property, or is immature or improvident and cannot (yet) be trusted to manage property. At the other end of the spectrum, as the elderly get older and live beyond their most active years, management of assets may be a relevant concern for the settlor as well as for the ultimate beneficiaries. An individual may reach a stage in life when day-to-day management of investment properties or business interests (particularly involving record keeping and management decision making) is more work or inconvenience than the individual wishes to assume. Especially if the individual currently uses some other form of asset management arrangement, such as an investment advisory or stock depository service, the same management benefits are available through the use of a durable power of attorney or a revocable living trust.

Thus, in a complex investment and economic environment, an individual with substantial assets may need management assistance available through a revocable living trust that provides proper and professional asset management and application of funds for the individual's benefit. And, although durable powers of attorney can be useful in many cases, often third parties are not as willing to deal with a

4. See McCue, *Planning and Drafting to Influence Behavior*, 34 U. MIAMI INST. EST. PLAN. ¶600 (2000).

powerholder as they are with a trustee, particularly if greater amounts of wealth are involved.

Individuals who need professional assistance need not relinquish control of their property. In a revocable living trust the settlor may act as trustee while able, with a seamless change of administration when the need arises for a successor trustee to take over. Indeed, with a durable power of attorney the agent's powers may not become effective until certain conditions have occurred, such as the principal's incapacity. And unlike the durable power of attorney, living trusts created for the settlor's own benefit may continue after the settlor's death.

Both living trusts and durable powers of attorney can be amended, modified, or revoked at any time, and each is way more desirable than the alternatives: conservatorships or guardianships (which require court supervision and may limit the individuals who may be appointed); or statutory arrangements (including the Uniform Transfers to Minors Act or its predecessor Uniform Gifts to Minors Act, which cannot be tailored to fit specific needs). For example, the state law ability of a guardian, conservator, or other personal representative to deal with the property of an incompetent ward usually is severely restricted, relative to the authority that may be granted to either a durable power holder or a trustee. State law will vary on questions such as the ability to exercise or relinquish powers of the ward, to alter the ward's existing estate plan, or to make gifts of the ward's property, usually determined under the state law substituted judgment doctrine. Trusts and their less powerful durable power counterparts simply have no equal in that regard.

An individual who is not yet ready to undertake the trust approach also could nominally fund a trust created currently and later transfer assets to the trust as the individual becomes more comfortable with it (or less capable of dealing with the property). Such an inter vivos trust gives the trustee a trial run, allowing the settlor to assess the trustee's performance and to advise the trustee with respect to difficult administrative questions created by unusual assets. The key to this standby trust plan is for some other person to have a durable power of attorney to transfer assets to the trust if the settlor becomes incompetent before the trust is fully funded. In this regard the trust and durable power of attorney need not be treated or viewed as alternatives. Both may be useful.

Living trusts also can be used in management of realty. For example, a property owner may be liable for the cost to clean up polluted property, even if the owner had nothing to do with the contamination and knew nothing of it when the property was acquired. See Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601-9657. Because this liability may extend to fiduciaries, many knowledgeable professionals refuse to accept property in an estate or trust unless an environmental audit has been conducted and a clean report has been received. If a landowner dies with probate realty and a will naming a professional personal representative, the lack of adequate notice and time to conduct an audit may cause the fiduciary to reject the appointment rather than be appointed and later learn it has a contaminated asset and liability on its hands. Thus, it may be wise to create a living trust to hold property that the decedent wants to be held in a fiduciary capacity, to better guarantee that a fiduciary will accept the appointment after adequate notice and an opportunity to inspect the property. In this regard, however, it may be wise to consider whether it is possible to extinguish CERCLA claims under a nonclaim statute by allowing the property to pass through probate.[5]

In addition, CERCLA §9607(n) exempts most garden-variety fiduciaries from most sources of personal liability attributable to contaminated assets held in a fiduciary capacity. The full quantum of assets of the fiduciary entity are subject to liability, but the fiduciary's liability is limited to those assets held in the fiduciary entity unless the fiduciary negligently caused or contributed to the environmental contamination. Although the original property holder's entire estate may be liable for the costs of any remediation, it may be possible to minimize liability with proper planning, such as by placing the potential risk property in a separate trust that insulates other assets in the settlor's estate and does not expose the fiduciary to personal liability. These precautions may be the only way to guard against a knowledgeable fiduciary's cautious rejection of a needed appointment.

Asset Protection

A related but substantially more troublesome element of liability for toxic torts is the issue whether a landowner who is responsible for a CERCLA mandated clean up can insulate *other* assets from the risk of seizure to pay for that compliance. And this raises a related question: whether any property owner may insulate assets from potential future liability to any claimant, such as trade or financial creditors or judgment holders from tort recoveries (such as malpractice or hazardous business endeavors). Spendthrift trusts generally are effective to protect trust assets from the creditors of the trust beneficiaries and from other claimants.[6]

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5. See *Witco Corp. v. Beekhuis* discussed in note 28.

6. See 2A Scott & Fratcher, THE LAW OF TRUSTS §151 et seq. (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS §151 et seq. (1959). In §157.5 of the former and §157 Reporter's Comment (a) of the latter, Professor Scott advocated an involuntary tort creditors' exception to any spendthrift protection otherwise available. Both Sligh v. First Nat'l Bank, 704 So. 2d 1020 (Miss. 1997) (the plaintiff was severely and permanently injured by the habitually and criminally negligent beneficiary of a discretionary trust), and *In re* Estate of Nagel, 580 N.W.2d 810 (Iowa 1998) (tortfeasors were settlors of a revocable trust that became irrevocable when the settlors died during their tort that resulted in a judgment), allowed recovery of tort claim judgments against spendthrift trusts. Miss. Code Ann. §91-9-507 (1998) codified judicial spendthrift protection in Mississippi shortly after *Sligh* was decided, prompting speculation that it reverses that decision (because it does not distinguish between types of creditors), and *Nagel* is not much of an inroad: had the settlors lived until the judgment was presented the trust would not have been immune. RESTATEMENT (THIRD) OF TRUSTS §59 (2003) is the corresponding provision to §157.

However, a spendthrift clause usually cannot protect a *settlor* who is a beneficiary of the trust, at least to the extent of any retained interest or power in a domestic trust.[7]

Therefore, to protect a settlor from the settlor's creditors probably requires either that the trust be located beyond the jurisdiction of courts that would respect the creditor's claims, or that the trust be made irrevocable and the settlor retain no enjoyment that can be attached.[8] Making the trust irrevocable would entail potential gift tax on creation of the trust. Worse, it is possible for a settlor to relinquish sufficient enjoyment to incur a gift tax, and preclude creditor attachment, but still be regarded as having retained enough enjoyment or control to be regarded as the trust's owner for income tax grantor trust purposes. Furthermore, irrevocability, creditor protection, and gift taxation would not necessarily preclude inclusion of the value of the trust property in the settlor's gross estate at death.

Thus, as a practical matter, protection from improvidence probably is effective only (1) with respect to beneficiaries other than the settlor, (2) to the limited extent that the settlor wishes to put the trust property beyond the settlor's indiscreet adventures but not beyond the reach of the settlor's creditors (which is not likely the settlor's desire), (3) to the extent the settlor is willing to incur gift tax with no guaranteed protection from subsequent income or estate tax, or (4) to the extent the settlor creates an effective offshore asset protection trust.

In addition, a handful of American jurisdictions purport to provide the same asset protection benefits of a spendthrift clause for a third party or an offshore trust, to insulate a settlor's own interests in an onshore trust, provided that creation of the trust was not a fraudulent transfer or otherwise intended to hinder, delay, or defraud creditors existing at the time of creation. See Alaska Stat. §34.40.110; Del. Code Ann. tit. 12, §§3570-3576; Mo. Rev. Stat. §456.080; Nev. Rev. Stat. §166.040; R.I. Gen. Laws §18-9.2; Utah Code Ann. §25-6-14.[9] It is too early to determine whether creditors will be able to obtain judgments against a trust that a court in one of these states would respect and insulate from liability. Under the full faith and credit provisions of the United States Constitution it is questionable whether onshore asset protection trust planning will succeed to insulate the trust settlor's own property from the settlor's own creditors *if* the settlor has retained an interest in the trust.

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7. 2A Scott & Fratcher, *id.* §156.3; Restatement (Second) of Trusts §156 (1959). Restatement (Third) of Trusts §§58(2), 60 (2003) are the corresponding provisions to §156.

8. 4 Scott & Fratcher, *id.* §330.12; Restatement (Second) of Trusts §330 (1959). Restatement (Third) of Trusts §63 (2003) is the corresponding provision to §330.

9. Allegedly Colo. Rev. Stat. §38-10-111 also affords creditor protection against any but existing creditors, but *In re* Cohen, 8 P.3d 429 (Colo. 1999) (dicta in a lawyer discipline case) casts doubt on that interpretation.

Asset protection planning is desirable to some individuals because they fear either political instability, economic uncertainty, or liability flowing from the fact that theirs is a deep pocket that may attract vexatious litigants. Individuals desiring protection own businesses that entail significant risk, such as a hazardous chemical or waste disposal operation, or who might be engaged in financially hazardous ventures that expose them to substantial future liability. This may describe professionals such as you: lawyers, doctors, accountants, engineers, architects and such who are subject to potential malpractice liability exceeding their insurance coverage and who cannot protect themselves adequately with a limited liability venture.

As a means of insulating a "nest egg" portion of their wealth (i.e., an amount that would not make the transferor insolvent, as defined under state law) without making an irrevocable transfer that is subject to gift tax, the most frequently considered asset protection device is a foreign situs (offshore) trust.[10] These almost always are created in a jurisdiction that has enacted Statute of Elizabeth override legislation, making it difficult or impossible for future creditors to reach assets that were not fraudulently transferred.[11] In this way the settlor may acquire a degree of protection

10. For literature dealing with this form of planning consult ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS (Osborne, ed., 1995); Boxx, *Gray's Ghost — A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195 (2000); Bruce, Gray, & Luria, *Exploring the Protection of Assets Trusts*, 130 TRUSTS & ESTATES 32, 39 (Nov. & Dec. 1991); Eason, *Home From the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41 (2000); Engle, *Using Foreign Situs Trusts for Asset Protection Planning*, 20 EST. PLAN. 212 (1993); Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987 (1999); Osborne, *New Age Estate Planning: Offshore Trusts*, 27 U. MIAMI INST. EST. PLAN. ¶1700 (1993); Rothschild, *Establishing and Drafting Offshore Trusts*, 23 EST. PLAN. 65 (1996); Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

11. Statute of 13 Elizabeth ch. 5 (1571), the precursor to modern fraudulent transfer and creditor protection legislation, was enacted to void any conveyance that was not upon consideration and bona fide, if it was "contrived . . . to delay, hinder or defraud Creditors or others of their just and lawful Actions, Suits, Debts, Accounts, Damages, Penalties . . . and Reliefs." Because any fraudulent transfer is voidable, a fraudulent transfer into a trust will not prevent creditors from defeating the trust to reach the transferred assets, notwithstanding the settlor's lack of retained interests or powers. 4 Scott & Fratcher, THE LAW OF TRUSTS §330.12 (4th ed. 1989). This is true even in most Statute of Elizabeth override jurisdictions.

As against both present and future creditors, §4(a)(2) of the Uniform Fraudulent Transfers Act, 7A U.L.A. 301 (1999), specifies that conveyances made without fair consideration are deemed to be fraudulent without regard to actual intent if the transferor is or is about to be engaged in activities for which the transferor's remaining property is "unreasonably small" in relation to that activity, or if existing debts or debts that are likely to be incurred after the transfer will exceed the transferor's ability to pay. Prima facie, under §4(a)(1) of the Act a transfer is fraudulent if the transferor had actual intent to hinder, delay, or defraud any present or future creditor, and actual intent would be shown by any number of factors, such as that the transfer was concealed, the transferor was being sued or being threatened with suit, the transfer was of "substantially all" of the transferor's assets, the transfer occurred close to when a substantial debt was incurred, or the transferor was insolvent following a conveyance (meaning that the sum of the transferor's debts exceeds the sum of the transferor's assets or that the transferor cannot pay debts as they become due).

against future potential creditor claims if state law protections are inadequate (many states protect a limited amount of assets, such as homestead, insurance, annuities, retirement benefits, and tenancy by the entireties property against debts of only one spouse, but usually these protections pale in comparison to the potential liability that the settlor fears).

Because of creditors' ability to set aside transfers that are in actual or constructive fraud of their rights, this form of planning is effective only against the potential future claimant who is not yet even a cloud on the horizon. "Asset protection planning is a vaccine and not a cure . . . . [It is] best implemented when the client is least inclined to do so; that is, when the client's legal seas are calm." Engle, *Using Foreign Situs Trusts for Asset Protection Planning*, 20 EST. PLAN. 212, 217 (1993). One recommendation is to provide in the asset protection trust that all claims of present and currently existing future claimants be paid from the trust, making it clear that the protection sought by the trust is only with respect to those subsequent potential unknown claims as to which the present transfer is not an actual or even a constructive fraud.

Experienced practitioners in this arena report that advisors and reputable trust companies will not assist a client who is looking to dodge existing creditors, spousal or child support obligations, or tax liabilities, or to engage in any form of criminal activity. Indeed, to the extent asset protection planning removes property from the reach of a surviving spouse, the advisor may be committing an unintended breach of ethical duties to the spouse, if the spouse also is a client of the advisor for other purposes (such as for traditional estate planning).

The precise construct of such an asset protection trust arrangement will vary depending on the transferor's needs and desires and the laws of the various jurisdictions involved, but the general format of these asset protection devices is something in the order of a revocable trust with at least one non-United States trustee and a custodian of trust assets who is located in a different non-United States jurisdiction. There may be

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Bankruptcy Code (11 U.S.C.) §548 is very similar to the Uniform Fraudulent Transfers Act in that it grants the trustee in bankruptcy power to set aside any transfer made within one year of filing a petition for bankruptcy if the transfer was made with actual intent to hinder, delay, or defraud any present or future creditor or it was made for less than fair market value consideration and the transferor was insolvent following the conveyance, the transferor was or was about to be engaged in activities for which the transferor's remaining property was "an unreasonably small capital," or the transferor intended to incur debts beyond the transferor's ability to pay as they matured. See, e.g., *In re* Brooks, 217 Bankr. 98 (D. Conn. 1998) (making none of the fraud based determinations in finding that the assets of an offshore trust were part of a bankruptcy estate). Cf. *In re* Portnoy, 201 Bankr. 685 (S.D. N.Y. 1996) (summary judgment denial to a debtor who created an offshore trust, arising in an action to deny bankruptcy discharge based on the debtor's alleged efforts to conceal assets).

See generally Alces, THE LAW OF FRAUDULENT TRANSACTIONS ¶1.02[1][b] and ch. 5 (1989); Henkel & Turner, *Asset Preservation Aspects of Domestic Estate Planning*, 29 U. MIAMI INST. EST. PLAN. ¶602 (1995).

cotrustees, who might be located in the United States (they might be relatives, friends, or advisors of the settlor), the custodian may be located in the United States so that physical transfer of trust assets is not required, and the custodian may employ nominee registrations that further the objective of keeping a low profile to the trust's existence.

The trust may contain an Emergency Trustee provision or other duress and flee clauses that operate in case trouble looms in the United States, such as a claim being filed against the settlor or the trust, allowing all connections that would support the jurisdiction of a United States court to be severed. The trust also may have protectors (which may include the settlor) whose function is to "advise but not instruct" the trustee, so that their involvement does not constitute a formal fiduciary role that might subject the trust to the jurisdiction of courts where the protectors are located. In addition, the protectors may have a power to remove the trustee and replace it with another (for legitimate reasons or merely to give a degree of leverage to their advisory role), although typically this power will not be exercisable in cases of duress. The trustee or custodian also may be instructed to employ an investment advisor who is located in the United States but who will make all investments through an offshore order desk arrangement.

In the final analysis the net result of these asset protection trust arrangements may be only a chicane rather than a total roadblock precluding a creditor's claim. This alone may be a sufficient impediment to recovery (in terms of the claimant's ability to locate assets and then the need to research foreign laws, hire local counsel, and prosecute an action overseas) that the claimant will settle early and for a reduced amount, or abandon hope altogether. On the other hand, the settlor of an offshore asset protection trust may be ordered to return the assets to the United States or stand in contempt of court. This could occur notwithstanding that the typical asset protection trust provides that any retained power of revocation is not available in the event of duress (which would include an involuntary revocation pursuant to a court order) and therefore compliance would be impossible.

Intent appears to be relevant in the asset protection trust context involving transfers that predate liability or any court orders, and the burden of proof is on the party seeking to impose a contempt order, to establish by more than a preponderance of evidence that the alleged contemnor acted in bad faith. Many cases involve actions in anticipation of particular decrees that were regarded as contumacious. The currently unanswerable question is whether the act of establishing an asset protection trust with a duress provision (in anticipation of a potential court order to return assets to the United States to satisfy a potential judgment) is itself sufficient to establish bad faith.

Regardless of how these issues ultimately are resolved, perhaps the most poignant reality is that a court may require the settlor to await the judicial determination of good faith while sitting in jail. Asset protection trust advocates often cite the fact that the device is merely a mechanism to slow down creditors; in this context, delay works to the disadvantage of the settlor. In effect this happened in Federal Trade Commission v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999) (arising from fraudulent trade practice litigation involving a telemarketing Ponzi scheme in which the court ordered the wrongdoer to return several million dollars of profits from a Cook Islands trust). The lower court ordered the settlors of an irrevocable offshore trust to repatriate assets transferred to the trust, the trustee refused the request on the basis of a duress provision in the trust, and the court held the settlors in jail for civil contempt.

In a subsequent similar case the settlor of a Mauritius trust was jailed for contempt for failure to comply with an order to repatriate assets. He still was in jail over two years later when the court of appeals denied his appeal to that judgment. *In re* Lawrence, 279 F.3d 1294 (11th Cir. 2002). See also *In re* Coker, 251 B.R. 902 (Bankr. M.D. Fla. 2000), and Securities and Exchange Comm'n v. Bilzerian, 112 F. Supp. 2d 12 (D. D.C. 2000) (both finding trust settlors in contempt for failure to comply with court orders to repatriate assets in offshore asset protection trusts). Allegedly the contemnors in the *FTC* case also still are in jail. See Rothschild & Rubin, *Asset Protection After* Anderson: *Much Ado About Nothing?*, 26 EST. PLAN. 466, 474 n.32 (1999). "Bring your toothbrush" not being what the typical trust settlor wants to hear, and even "just" several days (to say nothing of a year) being longer than most estate planning clients are willing to spend in jail, these cases give new significance to the contempt possibilities of asset protection trusts.

Avoiding Will Contests

The time to win a will contest is when the will is prepared. See Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87 (1958). The most effective way to avoid a successful challenge to a decedent's estate plan is to use a living trust instead of a will as the principal estate planning document because, for reasons noted below, trust contests seldom succeed.

Will contests invariably entail a postmortem critique of the testator's habits, reputation, foibles, lifestyle, and sometimes even lack of capacity or other deficiency that constitutes a legitimate will contest ground. A trust may be called for if a will contest is likely, because one of the estate planner's duties is to insulate the testator's dispositive plan and reputation from challenge. And, fortunately, those cases in which a will contest is predictable usually are readily identifiable.

A significant percentage of all will contests arise in one of four fact settings. The most common involves a surviving spouse who is not a parent of the decedent's surviving children, and it really doesn't matter whether the will favors the surviving spouse or the children. A second likely source of potential litigation exists if children are not treated equally among themselves, whether they all have a common set of parents or they are half-siblings. A third dangerous situation exists if the decedent had no close relatives and the dispositive plan deviates from the intestate distribution among collateral relatives. In this case there may be parties with standing to contest the will who may be disappointed by the will's terms and are so distant in relation that they have no reticence about contesting the will and possibly besmirching the decedent's reputation. Finally, contest is likely in the growing number of cases involving "alternate lifestyles." If a client wants to leave property to a lover (i.e., not a spouse, whether of the same or a different sex), there are indications that juries, and courts reviewing evidence on appeal, are affected by their feelings about the morality or normalcy of the relationship. And the same may be true about other "unnatural" dispositions.

Some potential contests may be deflected with an explanation of the decedent's dispositive plan, or by inclusion of an in terrorem clause, by soliciting the opinions of a psychiatrist, or videotaping execution of the will. Nevertheless, a revocable trust is significantly less vulnerable to challenge than a will and usually is the contest avoidance technique of choice. The practical reality is that there are formidable obstacles to a trust contest challenge, notwithstanding the technical fact that a revocable trust is as subject to challenge on grounds of lack of capacity or undue influence as a will[12] (indeed, a greater capacity may be required to validly execute a trust, being the capacity to make a deed or contract).[13]

For example, potential heirs cannot challenge a revocable trust during the settlor's life, because the contestants are only heirs apparent or expectant and therefore lack standing. See, e.g., Davis v. Hunter, 323 F. Supp. 976 (D. Conn. 1970). Instead, concerned but disappointed potential heirs would need to have the settlor declared incompetent and a conservator appointed who could seek to revoke the trust, presumably requiring a showing that revocation is in the best interests of the settlor. All this presupposes that the potential heirs know that the trust has been created, which is not required. And potential heirs who know about the trust and are inclined to challenge it are unlikely to bring suit if the settlor is capable of amending the trust. It is one thing to contest a will when the testator cannot retaliate, but taking the settlor on during life presents an altogether different endeavor.

Moreover, actual heirs may not challenge a trust after the settlor's death because, as mere heirs, they have no standing to set aside a revocable trust on grounds of lack of capacity or undue influence. Only the duly appointed personal representative has standing to bring suit on behalf of the decedent or regarding the decedent's assets.[14] This obstacle might be

12. 4 Scott & Fratcher, THE LAW OF TRUSTS §333.

13. 1 Scott & Fratcher, *id.* §§18-19.

14. See 3 Scott & Fratcher, *id.* §220.1.

avoided if the heirs filed a contest before the will is admitted to probate and petitioned for the appointment of a Temporary Administrator who would be under an obligation to collect, marshal, and preserve all assets to which the decedent's estate may have a claim. The heirs might exert sufficient pressure to commence an investigation or an action with respect to the revocable trust, but this is not extremely likely either.

Enormous practical difficulties confront heirs who contest a trust even if they surmount the standing hurdle. A respectable trustee of a funded living trust usually is an excellent witness to establish that the settlor had capacity and was in control of his or her faculties and affairs during life. Furthermore, the settlor's continuing contacts with the trustee during life normally constitute a continuous validation of the capacity to deal with the trust assets. Thus, the heirs must persuade a court to rule that the trust was void from the outset, and that every act taken by the trustee in the intervening years was without legal authority. It is uncommon for a court to open this can of worms. Thus, experienced attorneys report that an attack on a trust after the settlor's death, when the trust already has operated during the settlor's life, is substantially less likely to succeed than an attack on a will. This is what makes trusts the will contest avoidance technique of choice.

Probate Avoidance

To many people the foremost factor recommending the use of living trusts or self-trusteed declarations of trust is avoidance of the need to probate trust assets. Probate estate assets are in suspended state until letters of administration are issued and a personal representative undertakes estate administration. And they must be transferred again (with another potential interruption) when probate administration ends, even if the same fiduciary acts as personal representative of the estate and trustee of any following trust.

Conversely, assets held in a revocable living trust remain under the trustee's continuous administration from before the settlor's death through administration, which may span the lives of successive sets of beneficiaries. A trustee will be careful regarding distributions that would leave the trust inadequately secured against obligations imposed on trust property (such as a portion of the settlor's estate tax liability). But most trust funds are available without interruption for the needs of beneficiaries, and management of the decedent's assets does not suffer from bureaucratic or administrative delays or disruptions common to some probate administrations. This continuity may be of particular import if the settlor's estate consists of a family business that would suffer from interrupted management.

Revocable trusts often are used to avoid the costs and delays of probate in jurisdictions in which estates are subject to court supervised administration (dependent administration),[15] as well as to avoid public scrutiny of the decedent's assets and dispositive plan that is permitted in the public probate court process.[16] State law also may limit the right of creditors to reach trust assets after the settlor's death.[17] In many cases, however, the absence of state nonclaim protection against creditor claims is a significant factor that dictates at least a modest probate estate and administration to generate a bar against late filing creditors.

Furthermore, many jurisdictions draw a distinction between "court" trusts and "noncourt" trusts, the former being created as a result of a court decree (for example, a testamentary trust), and the latter being created without any court action. Noncourt trusts arise solely by the settlor's execution of a trust instrument and conveyance of assets to the trustee. State law may permit the document to negate certain requirements and the drafter of the trust instrument may choose to do so. Otherwise court trusts may be subject to stringent court accounting proceedings, at which a court appointed guardian ad litem may be required to represent the interests of minor or contingent beneficiaries.[18]

The accounting rules applicable to testamentary trusts can be avoided by utilizing a revocable living trust as the principal dispositive vehicle with a pour over will, along with life insurance beneficiary designations and employee benefits made payable to the trustee of the revocable trust. Absent a provision to the contrary in the settlor's will, Uniform Probate Code §2-511(b) is representative of most pour over statutes in allowing testamentary additions to a revocable living trust. Under that rule additions do not make the trust a testamentary trust, which should preclude any argument that the pour over mandates court trust compliance.

Revocable living trusts are widely used in estate planning as the principal document in the dispositive plan in jurisdictions that lack independent administration. These trusts will contain tax payment and dispositive provisions, and the will serves an ancillary function by making a pour over gift of remaining assets into the revocable trust. On the other hand, in the growing number of states that offer independent administration (or the Uniform Probate Code unsupervised administration

15. See Dacey, How to Avoid Probate — Updated! (Crown 1980); R. Esperti & R. Peterson, The Living Trust Revolution: Why America Is Abandoning Wills and Probate (Viking 1992); and R. Esperti & R. Peterson, The Loving Trust: The Right Way To Provide For Yourself and Guarantee the Future of Your Loved Ones (Viking 1988). Although many attorneys are critical of the probate avoidance craze, these have been very popular and highly marketed techniques.

16. Public scrutiny of the decedent's living trust is not generated even if the probate estate pours over to the trust, unless the will makes the mistake of incorporating the trust by reference. Any required notice from the estate should be given to the trustee of the pour over trust, not its beneficiaries, thus obviating any indirect revelation of that aspect of the decedent's estate plan. See 1A Scott & Fratcher, The Law of Trusts §54.3 (4th ed. 1987).

17. See 5 American Law of Property §23.18 (Casner ed. 1952); 4 Scott & Fratcher, *id.* §330.12.

18. See 2A Scott & Fratcher, *id.* §172, and 3A Scott & Fratcher, *id.* §260.

procedures), estate planners need not be as concerned about excessive probate costs and are not nearly as ardent about avoiding probate as they once were especially if the personal representative does not compute its fee as a percentage of the probate estate.

Nevertheless, avoiding ancillary administration of out-of-state assets may be appropriate, even if the decedent's home state is not a probate avoidance state and even if other reasons exist to make probate advantageous. Seldom is it desirable to conduct probate and administration in every jurisdiction in which assets are located. Some jurisdictions offer an ancillary administration that is simple and inexpensive, but real property located in most states may generate costs to clear title through ancillary proceedings that may be substantial in relation to the value of the property. This particularly is true because often knowing the law isn't sufficient to conduct an ancillary administration; local practice may vary and require research that the estate easily could avoid. A revocable trust is just the best of several planning arrangements that can be used to avoid the delay and cost of these ancillary probate proceedings.[19]

The revocable trust also may be appropriate for a mobile client, by centralizing management while the client retains control through a power to alter, amend, or revoke the trust. For example, mid-level executives who are moved from location to location as their employers advance them up the management ladder, or the "snowbird" retired client who spends the summer up North and winters down South, both may find a trust to be useful for administration.

In addition, historically many states replaced their inheritance taxes with only a "pick-up" estate tax designed solely to absorb the §2011 credit for state death taxes. More recently many states have enacted inheritance taxes that can be substantial, and repeal of §2011 effective after 2004 caused many states to (re)enact separate estate or inheritance taxes. Use of a revocable trust can put intangible assets beyond the reach of the taxing authority of any state in which the settlor resides only temporarily. Without this planning more than one state may claim the right to impose its tax, which could be costly (either alone or in combination with other states' taxes). See, e.g., Blood v. Poindexter, 534 N.E.2d 768 (Ind. Tax Ct. 1989) (the decedent avoided Indiana inheritance tax by transferring Indiana realty to an Illinois trust, which effected a conversion of the property to intangible status for tax purposes).

Finally, for clients who are moving to a noncommunity property jurisdiction but are maintaining community property ties, settlement of

19. For example, joint tenancy with right of survivorship would avoid ancillary administration, but only until the last tenant's death. Or, if the client is willing, making a gift of the property also can eliminate ancillary administration. Title is cleared while the client is alive by executing, delivering, and recording a deed. Either transfer will require the filing of a gift tax return under §6019(1) if the value of the property exceeds the §2503(b) gift tax annual exclusion. And payment of some gift tax may be required if the client's unified credit is not sufficient to cover any gift tax incurred.

their community assets in a revocable trust situated in the community property state will tend to ensure that the community character of the assets will be recognized and administration will not be thwarted by ignorance regarding community property when one of the spouses dies. This may be of particular importance if the community assets have substantially appreciated in value, such that the income tax new basis at death accorded to both halves of the community under §1014(b)(6) will be important to the estate. Compare Rev. Rul. 68-80, in which community property assets, moved to another state and reinvested in another form, were denied the benefit of §1014(b)(6).

Statutory Entitlements

An additional factor that is worthy of consideration (but often it benefits from a separate discussion because of emotional baggage that it may carry) relates to the use of trusts to disinherit. Creditors of a decedent probably cannot be disfranchised by creation of a trust during the settlor's life,[20] but it may be possible to minimize or eliminate the statutory forced heir entitlement of a surviving spouse (or a descendant's civil law legitime entitlement) to a portion of a settlor's wealth. This issue is relevant with respect to a decedent's share of community property, or as to any separate property to the extent state law grants rights to a protected beneficiary, but only to the extent a living trust is immune to challenge. It is likely appropriate if, for example, spouses are estranged but for some reason will not divorce, or if one spouse needs to provide for other objects of their bounty in addition to their surviving spouse (who might be expected to object to a division of benefits). It also can be relevant for clients who want to qualify the surviving spouse for Medicaid (or other needs-based governmental entitlements). This significant but controversial topic is discussed in depth in Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI INST. EST. PLAN. ¶900 (1998).

Pour Over from Wills to Trusts

Notwithstanding the utility of creating and funding revocable inter vivos trusts, seldom is a trust a total substitute for the use of a will. Usually at least a portion of the settlor's wealth is not transferred to the trust (or, having been placed in the trust, it was removed by inattention to proper accounting or other inadvertent acts during the balance of the settlor's life). Thus, a will usually is necessary to transfer assets not impressed with the trust, and often a will is desirable to glean advantages of probate administration. In these cases a will typically "pours over" to the trust. The trust serves as the primary estate planning document, but the will provides simple directions regarding disposition of a limited number of selected

20. See RESTATEMENT (SECOND) OF TRUSTS §156 and the asset protection trust discussion at page 2. RESTATEMENT (THIRD) OF TRUSTS §§58(2), 60 (2003) are the corresponding provisions to §156.

probate assets (such as personal effects), a tax payment provision (with directions regarding whether the will or the trust governs tax payment to the extent they create inconsistent obligations), and distribution of the inevitable residue of the testator's estate to the receptacle trust. Usually the pour over trust was created by the testator, but in some cases the pour over is by another testator (often the settlor's surviving spouse).

In an historical context it was not always clear that pour over wills were valid. Early in the development of this planning the prevailing legal concept underlying the delegation by will to a trust of dispositive control was the doctrine of incorporation by reference, by which a completely separate document like the trust was treated as if it was a part of the will. Incorporation by reference required compliance with numerous rules and respected only the trust terms as they existed when the will was executed. Subsequent amendments of the trust did not count unless they were followed by re-execution of the will.[21]

The doctrine of independent legal significance was crafted because of these and other legal impediments to a successful and complete incorporation by reference. It also avoids creating by incorporation a testamentary or court trust governed by the will. See Second Bank-State Street Trust Co. v. Pinion, 170 N.E.2d 350 (Mass. 1960) (breakthrough case recognizing the trust's independent significance and validating this approach). Under the doctrine a will may pour property over to a trust (typically a revocable living trust that was created by the testator as settlor), to be governed by the terms of the trust as amended from time to time, without the inconvenience or impossibility of re-execution of the will after each trust amendment.[22]

Because a revocable trust has its own independent legal significance, the doctrine permits the trust to be a beneficiary under a will and serve in lieu of separate dispositive provisions in the will, all without the trust being incorporated by reference as a part of the will or being subject to probate administration or court trust supervision. In addition, under the law of many states a receptacle trust need not have its own separate valid existence prior to the pour over but may be validated in the first instance by the testator's bequest to it, if all other requisites for a valid trust have been met. See Uniform Testamentary Additions to Trusts Act and §2-511 of the Uniform Probate Code; Clymer v. Mayo, 473 N.E.2d 1084, 1090 (Mass. 1985): "We agree with the [lower] court's conclusion that 'the statute is not conditioned upon the existence of a trust but upon the existence of a trust *instrument*'." Many states also permit a pour over to a trust established after execution of the testator's will, including testamentary trusts created by the will of another person that was not

21. See generally 1A Scott & Fratcher, THE LAW OF TRUSTS §54.1 (4th ed. 1987).

22. See *id.* §54.2, and Uniform Probate Code §2-511, which also is the freestanding Uniform Testamentary Additions to Trusts Act that is the law in the vast majority of states, even those that have not adopted the Uniform Probate Code. 8B U.L.A. 360 (2001).

executed until after execution of the testator's will, provided that the receptacle trust is in existence when the testator dies (meaning that the other testator must have predeceased the pour over testator).[23]

Indeed, a pour over will does not fail even if the receptacle trust terminates or is revoked before the testator dies, unless the testator provides to the contrary.[24] And there is authority that, if a pour over does fail, the testator's disposition will be effected by treating the will as an incorporation of the receptacle trust by reference. Because not all state laws are as liberal as these, however, and because absence of the receptacle trust when the testator dies means that the pour over might fail for lack of a taker, the safest approach in all cases is to guarantee that the pour over is to a trust with at least a nominal trust corpus when the will is executed and that the trust will remain in existence until the testator dies.

Receptacle Trusts

Two final nontax reasons to create trusts during a settlor's life are to serve as a receptacle for benefits received in a divorce settlement or under a personal injury claim, and to receive and coordinate the disposition of the proceeds of life insurance policies and the death benefits under deferred compensation plans. The former may allow for expert management of funds the beneficiary otherwise could not administer. The latter permits more rapid collection of proceeds than if a testamentary trust was named because the inter vivos trust presents no delay in having a will admitted to probate, which is required before the testamentary trustee can be qualified to act, which also must occur before collection can be undertaken. This allows more timely payment of estate taxes and accelerated administration and investment of these funds, which represent the bulk of the decedent's wealth in some estates.

Tax Minimization

There are several tax minimization reasons for using trusts in addition to the numerous nontax advantages they provide, but they are not widely embraced. The most obvious, and easiest to implement for a settlor's transfer tax purposes, is creation of an irrevocable living trust that will not be includible in the settlor's gross estate at death. This is not common, and the value of any property held in a *revocable* living trust at the death of the settlor will be includible in the settlor's gross estate as if no transfer into trust had been made during life. See §2038(a)(1).

No gift taxable transfer is made by the settlor of a revocable living trust (except to the extent distributions are made to third parties) until the settlor releases the power to revoke the trust. On the other hand, the settlor's transfer of assets to an immediately irrevocable trust will invoke

23. 1A Scott & Fratcher, *id.* §54.4.

24. *Id.* §54.3.

an immediate gift tax, computed on the present value of the assets transferred. Again, this favors revocable trust planning and usually means there are no tax advantages to inter vivos trust planning.

There are advantages that may be worth pursuing of making current gifts rather than waiting to incur a subsequent gift or estate tax, but not many clients will embrace this planning during the current period of uncertainty about repeal of the estate and generation-skipping transfer taxes. See Chapter 12. In some cases, however, an intentional acceleration of the wealth transfer tax liability may reduce taxes and increase the overall net worth of the assets involved. Still, this is exceptionally rare planning, even among the super wealthy.

More sophisticated planning that couples bifurcated enjoyment with transfer tax minimization objectives yields techniques that §2702 may regulate (but does not eliminate): grantor retained annuity trusts, grantor retained unitrusts, and qualified personal residence trusts, all created during the settlor's life. This does favor use of trusts, but again it is not a predominant motive for inter vivos trust use. It is fair to note that gifts as complicated as these specialized and highly regulated techniques can be made without using a trust, but any reluctance regarding loss of control or about the donee's ability to manage the property can be minimized with appropriate use of trusts. In addition, compliance with highly complicated statutory requirements that must be met if tax objectives are to be gleaned generally is facilitated with a trust instrument rather than with some form of deed or other arrangement. Nevertheless, these concepts are not further explored here because they are not the stuff of everyday planning for middle-rich or smaller estates, and also because of the avowed nontax tenor of this book.

On the other hand, trusts present a number of income tax opportunities because they are respected as separate income tax paying entities with their own rate schedule, allowing a final bit of opportunism. Trusts have the unique advantage of allowing the settlor to control the income tax liability for trust income. By intuitive drafting it is possible to cause a trust or its beneficiary to be regarded as the owner of the trust income, making the trust or the beneficiary pay tax on its income. Alternatively, a trust may be intentionally "defective" for income tax grantor trust purposes, which allows the settlor to continue to incur income tax as if no trust were created. The choice among these options may depend on the relative income tax rates and any advantages of engineering the liability for income tax with respect to trust income.[25] The point is that trusts make the choice possible, unlike virtually any other approach.

Perhaps the best tax aspect of trusts overall is that they may provide current enjoyment of a high level of benefits without causing state or

25. See Chapter 17 for discussions of the many reasons why defective grantor trust planning is sensible and how to make a trust defective for grantor trust rule purposes.

federal estate or gift taxes to the beneficiary. Indeed, if properly done, a trust may even give a beneficiary full power over trust administration as trustee.[26] And trusts enjoy certain advantages over outright dispositions to younger generation beneficiaries even if the generation-skipping transfer tax is applicable. These also are beyond the intended scope of this Chapter but are addressed in the next.[27]

Reasons to Favor Probate

Notwithstanding all this gush about trusts, they are not always a panacea and seldom exist without an accompanying pour-over will. Moreover, a number of factors may diminish the utility of revocable living trusts, and a significant number of reasons explain why knowledgeable estate planners nationwide wisely embrace probate in appropriate circumstances to glean the many benefits that only probate can provide.

Often the most important benefit is that probate allows a court to determine the proper beneficiaries in "sticky" situations, such as a potential conflict among several sets of descendants of a decedent who had several spouses or consorts. Probate also provides nonclaim statutory protections against "stale" claims of creditors, which otherwise must be brought within a normal statute of limitation period that may expire long after the client's death.[28]

Integration of the total estate plan also is made easier in some cases by directing all assets back to the probate estate. One illustration of this is to control otherwise nonprobate property (such as retirement benefits or life insurance) that could overfund a marital deduction bequest if made payable directly to the decedent's surviving spouse. Another illustration is failing to coordinate the total dispositive pattern. A third might be losing the availability of liquid assets for tax payment or other purposes. All of these might be manageable without a pour back to the estate, but there could be significant complications either for the family or in the plan.

26. See Halbach, *Tax-Sensitive Trusteeships*, 63 Or. L. Rev. 381 (1984); Horn, *Whom Do You Trust: Planning, Drafting and Administering Self and Beneficiary-Trusteed Trusts*, 20 U. Miami Inst. Est. Plan. ¶500 (1986); Pennell, *Estate Planning: Drafting and Tax Considerations in Employing Individual Trustees*, 60 N.C. L. Rev. 799-820 (1982), abridged and reprinted in 9 Est. Plan. 264-272 (1982).

27. See 2 Casner & Pennell, Estate Planning §11.4 (1999), for a gagging treatment of generation-skipping transfer tax planning, and Chapter 18 for a less overwhelming overview.

28. A compelling illustration of the value of this protection is Witco Corp. v. Beekhuis, 38 F.3d 682 (3d Cir. 1994), in which CERCLA environmental clean up liability was precluded by a state probate law nonclaim statute. The decedent was a potentially responsible party and the party that incurred remediation costs sued the decedent's estate for contribution, relying on the three year statute of limitation under CERCLA, 42 U.S.C. §9613(g)(3). The personal representative was granted summary judgment because the court determined that the period for filing claims under the state law nonclaim statute had expired and that the state nonclaim statute could coexist with the CERCLA statute of limitation. Essential to the decision was that the plaintiff was aware of a potential contribution claim against the decedent and, under state law, could have filed its potential claim in a timely manner in the decedent's probate proceeding.

Furthermore, for postmortem planning purposes, disclaimers may be easier and produce more certain results under state law if the disclaimed interest is a probate entitlement. And, because certain laws apply with respect to estates but not trusts, in many states the effect of divorce on various dispositions is more clear in probate than it is for nonprobate dispositions. The same may be true regarding the rights of adopted or nonmarital descendants and children of the "new biology," the treatment of a slayer, and the effect of lapse, ademption, advancements, and tax apportionment rules, just to name a few. Care is required in this domain, however, because sometimes these disparities are advantageous, in terms of avoiding certain state law restrictions that apply to estates but not to trusts. Thus, it is impossible to proclaim a best approach for all cases.

For a number of reasons, in the income tax arena estates subject to probate may be slightly more desirable than living trusts that continue after the settlor's death. For example, estates are not required by §644 to use a calendar year for tax reporting purposes, as must trusts that are recognized for income tax purposes. Estates also are entitled to a two taxable year moratorium on compliance with the estimated tax rules, which is available to a trust under §6654(*l*) only if the trust was entirely a grantor trust prior to the deceased settlor's death and it is the pour-over receptacle of the residue of the settlor's estate. A revocable living trust may be entitled to the same treatment as an estate if both the executor and the trustee make an election under §645(a). However, this alternative is available only if the trust was treated as a grantor trust under §676 because it was revocable by the grantor during life. And treatment as if the trust was part of the estate is available only for a limited period after the settlor's death. The timing rules for reporting income distributions make these rules important, and proper estate administration takes advantage of them to accelerate or defer a beneficiary's year for reporting that income, as appropriate.

Similarly, a number of other disparities also favor estates to the extent a §645(a) election to treat a trust as part of the settlor's estate does not provide equivalent treatment. For instance, under §6013, a decedent's surviving spouse and the decedent's personal representative may elect to file a joint income tax return for the decedent's final income tax year. This election is not available to the trustee of a probate avoidance trust, even if the trust income was taxable to the decedent during life under the grantor trust rules. And under §1361, stock of an S Corporation may be held in an estate for the duration of reasonable estate administration; it may be held in a trust for only two years after the deceased shareholder's death unless the trust qualifies as an Electing Small Business Trust (ESBT) or as a Qualified Subchapter S Trust (QSST).

A number of other important differences between living trusts and probate estates also favor estates for wealth transfer tax purposes. For example, the existence of an "executor" is important for making certain elections under the estate and generation-skipping transfer taxes, and for purposes of discharging personal liability for estate, gift, and income taxes of the decedent.

Living trusts can create additional complications that may diminish their appeal, especially if the trust has a nonprofessional trustee. For example, a nonprofessional trustee may need to open one or more bank accounts, rent a safety deposit box, and perhaps hire a custodial accounting service to replicate the safekeeping of trust property that most professional fiduciaries offer. Moreover, the settlor must transfer legal title to trust assets to the trustee, securities must be reregistered and, if land is involved, deeds must be executed and recorded. These acts may attract nondeductible state and local transfer taxes that would not apply at death, potentially could trigger a due-on-sale clause in a mortgage on nonresidential property, might violate restrictions that apply to restricted stock or stock options, could cause the loss of nonassignable title insurance coverage, and might generate the legal and other costs of making effective conveyances under state law.

Furthermore, the trustee must maintain adequate records and keep trust assets and activities separate from the trustee's own assets and activities. This particularly is important if it is contemplated that a professional fiduciary will succeed a nonprofessional trustee at some future time, because a professional fiduciary typically will be more careful about reviewing its predecessor's conduct if it does not succeed another professional fiduciary. Professional trustees' fees are avoidable if the settlor or a family member is serving as trustee. But a custodial or investment advisory service fee might be only slightly less than a professional fiduciary's total fee, especially if the fiduciary would provide services (such as tax return preparation, dividend and interest collection and investment, and automated inventory, valuation, and accounting services) for which other professional fees otherwise would be incurred.

In any event, all of these legal fees and other costs attributable to creation, funding, and administration of funded revocable living trusts are in addition to the cost to prepare a will, which remains an essential aspect of the overall plan. These costs may be regarded as just a prepayment rather than an added excise, to the extent they would be incurred at death as part of normal estate administration, but few people appreciate the opportunity to accelerate even unavoidable expenses. And if the estate plan calls for distributions immediately after the settlor's death, these costs and any trustee's fee for termination of the revocable living trust may exceed the costs that would have been incurred in a normal probate of the settlor's entire estate.

Subchapter S Election Concerns

Many of your clients will own a family business, perhaps incorporated and run as a Subchapter S entity for income tax purposes. Under §1361(c)(2)(A)(i), a revocable trust is a permissible shareholder in an S

Corporation because of grantor trust treatment (typically under §§676 and 677). But §1361(c)(2)(A)(ii) allows the Subchapter S election to continue for only two years after the settlor's death. If it is desired to have the election continue beyond the two year period, the stock must be distributed from the trust either into the settlor's estate or to a beneficiary, or the trust must qualify under §1361(d)(3) as a QSST or under §1361(e) as an ESBT. A QSST may have only one current income beneficiary (who must be a United States citizen or resident), all trust income must be distributed currently to that beneficiary, the beneficiary's income interest may terminate no sooner than the beneficiary's death or termination of the trust, and trust principal may be distributed only to that one beneficiary while that beneficiary is alive. An ESBT may have numerous individuals, estates, and certain charities as beneficiaries and there is no mandatory income distribution requirement, but all S Corporation income is taxed at the highest rates under the Code (even if it is distributed to the beneficiaries). In some contexts, a QSST may not be favorable because a separate trust for each beneficiary would be required and income could not be accumulated; an ESBT may be preferable in those cases, notwithstanding the high income tax impost. By way of comparison, however, an estate may be an S Corporation shareholder for as long as the estate properly is under administration, without compliance with any of these requirements.

Joint Settlor Trusts

Trusts created by multiple settlors can create problems that may be better avoided than cured. Seldom is there a good reason for creation of a joint settlor trust unless the property being contributed to it is concurrently owned (community property or tenants in common, joint tenancy, or tenancy by the entireties), or the joint settlors are spouses. Partition is possible with respect to community property, but it might be a mistake to do so because community property enjoys an income tax benefit under §1014(b)(6), which provides a new income tax basis in both halves of the community property on the death of the first spouse to die. This normally is a desirable result and does not apply to noncommunity property because typically only half the property is includible in the first decedent's estate. In addition, a variety of Private Letter Rulings illustrate that spouses may be able to employ a joint settlor trust to better plan to shelter their collective unified credits than through bifurcation of their assets in hopes of guessing correctly which spouse will die first. See Chapter 7 at page 68 for a full discussion of this useful planning opportunity for spouses whose aggregate wealth is more than the applicable exclusion amount but less than double that amount.

A joint settlor revocable living trust may be sensible if it is funded with community or other concurrent ownership property, particularly if other reasons support the selection of a revocable living trust for property management and disposition during the spouses' joint lives and thereafter during the surviving spouse's overlife. In community property situations a revocable living trust also may be useful to keep each spouse's separate property separate (such as separate property brought to a community property state from a noncommunity property jurisdiction, property inherited by one of the spouses, or property owned by either spouse before the marriage).

Both spouses must join in creation of a joint settlor trust if the trust is to become irrevocable with respect to any property upon the death of the first spouse to die. This is because, otherwise, the surviving spouse loses a valuable property right and might be able to defeat the trust on grounds that the trust constitutes a fraud on that spouse. In any case in which a trust becomes irrevocable during a settlor's life, further care is required to ensure that a completed gift does not occur unintentionally, in this case consisting of the surviving spouse's property interests contributed to the trust. A power of withdrawal exercisable by the surviving spouse with respect to his or her property interests would make irrevocability of the trust harmless, as would retention by the surviving spouse of any power to appoint that property, exercisable inter vivos or only at death. Alternatively, these concerns all can be avoided if the surviving spouse retains a power to revoke or amend any separate trust funded with his or her property interests.

The point never to overlook is that there are two transferors, each with respect to their respective shares of the community property and any of their separate property interests. The survivor should retain some power over his or her property but not over the decedent's property interests, to the extent the plan is to preclude estate taxation to the survivor of any part of the decedent's property in the joint trust.

Declarations of Trust

A settlor who wants to retain control or benefits in a revocable living trust often creates a self-trusteed declaration of trust, in which the settlor is trustee and beneficiary, typically with exclusive enjoyment and control until incompetence or death. Frequently the self-trusteed declaration of trust is warranted for asset management purposes because the client is unwilling to relinquish control presently but the client's health is poor, because there is concern that senility approaches, or because the trust was created for probate avoidance purposes.

The self-trusteed declaration of trust allows the mechanics for independent administration to be put into operation, with the settlor still in charge until a change in management becomes necessary. Instead of waiting for disability or incapacity to become a reality, the trust can be created and funded immediately so that, at the right time, the successor trustee simply steps forward and continues uninterrupted administration of the trust corpus. Although something akin to this might be accomplished through the use of a durable power of attorney, the transition would not be as smooth or rapid as with the declaration of trust. Similarly, many durable powers are rejected a "stale" if they are more than six months old, but established trusts seem to garner more respect from outsiders the older the trust is.

Indeed, if a corporate fiduciary is to be successor trustee, the plan might even include placing assets in the corporate fiduciary's name under a custodianship arrangement, or naming the corporate fiduciary as a cotrustee at the outset, all to minimize transition problems. The trust could be drafted to sharply limit the powers and liabilities of the corporate fiduciary while the settlor is serving as co-trustee. In effect, the corporate fiduciary would have only record keeping and custodial duties while the settlor is serving as a trustee. In this way the transition would be even quicker and the corporate fiduciary's concerns would be reduced regarding its duties to account and its responsibility for acts of the settlor as the trustee the corporate fiduciary succeeds. Many corporate fiduciaries will negotiate a reduced fee to reflect the fact that they would be serving only in a reduced custodial or investment advisory role during the settlor's trusteeship.

A final reason to use a self-trusteed declaration of trust is if the settlor is the best trustee of certain assets that are located in jurisdictions in which ancillary administration is to be avoided through the use of a living trust. In these cases the plan is useful even if no other reason for using a trust exists and is all the more appropriate if the settlor's ability to act as trustee is not in question. In either case, the primary advantage of the self-trusteed declaration of trust is that creation involves no taxable transfer for wealth transfer tax purposes, the trust is ignored for income tax purposes, and about the only tangible manifestation that anything different has happened with respect to the settlor's ownership of the trust property is transfer of trust assets from the name of the settlor individually into the name of the settlor as trustee of the trust.

This extreme form of trust with retained enjoyment and control is deemed acceptable under state law as against the charge that it is testamentary and therefore invalid for failure to comply with the statute of wills. Obviously any lesser degree of control or retained enjoyment also will survive challenge.[29] The only potential danger of any concern is that the settlor's legal interest as trustee and equitable interest as beneficiary will merge, causing termination of the trust. Merger is precluded, however, if at least one other person is given a beneficial interest (either present or future, vested or contingent), even if that interest is subject to revocation by the settlor.[30] Thus, the settlor may call for distribution of the trust at

29. See Restatement (Second) of Trusts §§17(a) and 57; 1A Scott & Fratcher, The Law of Trusts §§17.1, 57.2, 57.6 (4th ed. 1987). Restatement (Third) of Trusts §§10, 25 (2003) are the corresponding provisions to §§17(a), 57.

30. See 2 Scott & Fratcher, *id.* §§99, 100; Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955) (landmark self-trusteed declaration of trust validation case); Will of Sachler, 548 N.Y.S.2d

death in the same manner as would a testator who devises the residue of his or her estate. More commonly, the trust would continue after the settlor's death as it would under either an independently-trusteed living trust or a testamentary trust plan.

Excepting that the declaration of trust had the settlor as its trustee, essentially it is the same as any other trust, only no formal transfer of assets, recordation, or consideration is required. Instead, the trust is valid if four essentials exist. First, there must be a sufficiently clear expression of intent to create the fiduciary relation. Almost any unambiguous indication will suffice. Second, the trust must have enforceable terms for an ascertainable beneficiary other than the settlor. This need not be a current beneficiary, but it must be a beneficiary with an interest that supports the existence of the trust without merger. Third, there must be an identifiable trust corpus. Lacking an actual delivery or transfer of assets, a segregation or identification of trust assets is essential to avoid the appearance that the trust is dry or testamentary (because otherwise it appears that nothing really changes until death). Funding the trust through identification of trust assets is done by registering assets represented by indispensable document (such as stock certificates, deeds, certificates of deposit, and bank account passbooks), execution of a bill of sale for other assets in favor of the trustee, maintenance of books of account that show trusteed ownership, creating trust margin and brokerage accounts, and rental of a separate trust safety deposit box.

Fourth is the essential trust validity requirement of independent trust administration. This is perhaps most important and most difficult to maintain due to natural client proclivities. The settlor must begin to act like a fiduciary and avoid acts that belie trust ownership. Fiduciary principles must be followed. For example, the settlor should render periodic accountings, conform investments to the requirements established by the trust document or local law, and avoid any conduct that bespeaks self-dealing. The estate planner must make the settlor aware of the need to act like a trustee if the trust is to be respected, and should consider whether the settlor is capable of compliance with fiduciary principles (and probably should avoid using a declaration of trust if the assessment is not favorable).

There are few special considerations to be reflected in using the self-trusteed declaration of trust, but one sensitive issue that must be reflected is succession of trustees, because it involves replacement of a settlor who, due to senility or other diminished capability, may not recognize the need

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866 (Surr. Ct. 1989); Contella v. Contella, 559 So. 2d 1217 (Fla. Dist. Ct. App. 1990).

Some jurisdictions have enacted statutes to confirm that merger will not occur if the settlor is the trustee and beneficiary, provided that there is some other future interest beneficiary of the trust. See, e.g., Cal. Prob. Code §15209 and Ohio Rev. Code Ann. §1335.01(C) (enacted to overrule Mathias v. Fantine, 1990 Ohio App. LEXIS 826, which held that a self-trusteed declaration of trust was invalid under the doctrine of merger, *notwithstanding* the existence of remainder beneficiaries).

to relinquish control. Thus, it is imperative that the designated successor be contacted and be willing to act before putting the plan into effect.

In addition, there must be a method for determining when succession is to occur. Death, resignation of the settlor as trustee, or incapacity of the settlor are normal triggering events for the successor to take over, with determination of incapacity being the touchy issue. Determination should not be made by the successor, because the successor may be seen as having a conflict of interest, the successor may not be competent to judge, or it may be too time consuming to bring sufficient facts to the successor to permit it to judge the settlor's condition. Instead, a common and effective procedure is for the settlor's spouse, adult child, a physician, or any combination of them, to make the determination. Doing so will be more effective if the settlor executed an authorization for the physician to share otherwise private information that is protected by the Health Insurance Portability and Accountability Act (HIPAA) privacy provisions.

In this last respect, because many physicians are reluctant to take on such a responsibility, a physician's opinion should be required only if there is a close and continuing relationship between the settlor and a family physician. The physician should be notified before the document incorporates this procedure and should be asked to agree to take on this responsibility. And the decision should be made conclusive on all concerned parties. Finally, the document should anticipate that the particular physician may not be available when the decision must be made, and should address that issue by naming a substitute or by allowing the remaining evaluators of the settlor's capacity to act alone. These issues are illustrated by the following skeletal example.

Sample Declaration of Trust

I, [Settlor], have transferred to myself as trustee the property listed in the attached schedule, and I declare that I hold that property and all investments and reinvestments thereof and additions thereto (herein collectively referred to as the "trust estate") upon the following trusts:

FIRST: During my life the trustee shall pay the income from the trust estate in convenient installments to me or otherwise as I may from time to time direct in writing, and also such sums from principal as I may request at any time in writing.

If at any times I am unable to manage my affairs, the trustee may use such sums from the income and principal of the trust estate as the trustee deems necessary or advisable for my care, support, comfort, or any other purpose the trustee considers to be for my best interests, and for the health and maintenance in reasonable comfort of any person dependent upon me, adding to principal any income not so used.

For purposes of this declaration, I shall be considered to be unable to manage my affairs if I am under a legal disability or by reason of illness or mental or physical disability am unable to give prompt and intelligent consideration to financial matters. The determination of my inability shall be made by _______ and my physician, or the survivor of them, and the trustee may rely upon written notice of that determination. I hereby authorize all health care providers to release to _________ any medical information needed to make a medical determination concerning my capacity for purposes of this provision.

SECOND: Upon my death the trustee shall pay from the principal of the trust estate. . . . [this would be a standard tax payment provision for use in a trust with an appropriately coordinated provision in the settlor's pour over will].

THIRD: [Specific gifts that otherwise would be made under will].

FOURTH: [Marital and Residuary Dispositive Provisions].

FIFTH: [Administrative Provisions — typical except for]:

SECTION *: I may resign at any time by written notice to the successor trustee. After my resignation, death, or inability to manage my affairs, _______, of _______, shall be successor trustee.

Every successor trustee shall have all the powers given the originally named trustee. No successor trustee shall be personally liable for any act or omission of any predecessor. With my approval if I am living, otherwise with the approval of the beneficiary or a majority in interest of the beneficiaries then entitled to receive or have the benefit of the income from the trust, a successor trustee may accept the account rendered and the property received as a full and complete discharge to the predecessor trustee without incurring any liability for so doing, *except that a successor to me as trustee shall accept the assets delivered to the successor trustee as constituting all of the property to which the successor trustee is entitled and shall not inquire into my administration or accounting as trustee.*[31]

31. This form is based on forms produced by The Northern Trust Company, www.northerntrust.com, which grants permission to attorneys to use any part or all of its forms in the preparation of wills and trusts for clients, all subject to a notice and disclaimer that "no form is a substitute for informed legal judgment. The attorney must make an independent determination as to whether a particular form . . . is generally appropriate for a client and, further, whether it must be modified to meet any special circumstances and objectives of the client." Typically any user of this type of form who designates a corporate successor trustee would want the trustee to take possession of the trust, and to ensure that the designated fiduciary will serve. The settlor usually will want to include the italicized language.

Note that the preparation of forms by nonattorneys may constitute the unauthorized practice of law. See, e.g., *In re* Advisory Opinion, 613 So. 2d 426, 427, 428 (Fla. 1992) ("nonlawyer companies selling living trusts are engaging in the unlicensed practice of law and . . . the public is either actually being harmed or has the potential of being harmed by this practice. . . . '[A]ttorney review . . . does not . . . remove the activity from the unlicensed practice of law.'"). By stipulation the opinion "does not apply to the activities of corporate fiduciaries associated with financial trust departments or to the practice of public

SIXTH: The law of the state in which the trust property from time to time has its situs for administration shall govern the validity and interpretation of the provisions of this declaration.

SEVENTH: [Typical provision permitting additions to trust].

EIGHTH: [Revocability].

In Witness whereof I have signed this declaration this ___ day of ______.

____

Individually and as trustee

An excellent illustration of numerous tax and non-tax advantages to be gained from the use of trusts can be gleaned from the following excerpt. The planning discussed typically is attractive only to very wealthy people and is not likely to be adopted by the typical client. Nevertheless the concepts are sound in many situations.

Oshins, *Megatrusts: Representation Without Taxation*, 48 N.Y.U. Inst. on Fed. Tax'n (1990)[32]

. . . A taxpayer places property into a trust, electing to allocate his or her [generation-skipping transfer tax (GSTT)] exemption against the transfer so that the trust is wholly exempt from the GSTT. The term of the trust will be extended as long as possible, subject only to the constraints of the rule against perpetuities. The trust will be managed with the avoidance of wealth transfer taxes a primary consideration insofar as consistent with the objective of providing comfortably for the trust beneficiaries. The trust corpus can form a "family bank" "or asset pool" for the use of the descendants (and the spouse if the transfer did not qualify for the marital deduction or gift tax exclusion) of the creator. . . . The trust beneficiaries will be expected to pay for their own consumables. Such a trust is the Megatrust™.

Special Megatrust™ Features

In order to maximize both flexibility and transfer tax savings, the Megatrust™ should be designed as a sprinkling trust whereby the

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accountancy," but other jurisdictions are pursuing the unauthorized practice of law in the context of living trust "mills" without exception. See Cincinnati Bar Ass'n v. Kathman, 748 N.E.2d 1091 (Ohio 2001), and *In re* Mid-America Living Trust Assoc., Inc., 927 S.W.2d 855 (Mo. 1996) (involving ethics violations by attorneys assisting in this unauthorized practice), and abundant authorities cited in each; Ballsun, *Summary Chart of Responses to Trust Mills*, 21 Prob. Notes 330 (1996), and an updated version in Comm. Rep., *State and Local Action Against Trust Mills: The Unauthorized Practice of Law*, 27 ACTEC Notes 162 (2001); Lopata, *Can States Juggle the Unauthorized and Multidisciplinary Practices of Law?: A Look at the States' Current Grapple with the Problems in the Context of Living Trusts*, 50 Catholic U.L. Rev. 467 (2001).

32. Adapted from the 48th Institute on Federal Taxation, copyright 1990 by New York University, published by Matthew Bender & Co. Reprinted with permission.

trustee will have broad discretionary powers to distribute income or principal to, and provide the use of trust assets for, the trust beneficiaries subject to a set of guidelines.

Operationally, however, it is anticipated that few, if any, distributions will be made in the absence of a compelling reason to make such distributions. . . .

The trustee is expected but not mandated to follow an investment pattern designed to enable the trust to realize and optimize its goal of avoiding transfer taxes for multiple generations. The trustee is encouraged to acquire assets for the "use" of the beneficiaries rather than funding the individual's personal acquisition of the assets. In order to facilitate this result, the trust should contain specific language to permit investments in assets such as homes, artwork, jewelry, and the like, which have significant appreciation potential. For example, if a beneficiary wishes to acquire a home, the trustee could acquire the home as an asset of the Megatrust™, rather than distribute funds to the beneficiary who would utilize such funds to acquire the home personally. As a result, the beneficiary will have the use and enjoyment of the property without the transfer tax problems.

. . . The trustee should also have latitude to make loans to the beneficiaries rather than distributions and should be authorized to allow the beneficiaries the use of trust assets. The trustee should be directed to take into account all factors and all tax results prior to any transfers to beneficiaries.[33]

In drafting the document, attorneys should resist the temptation to draft too "tightly, " as flexibility is extremely important. Thus, the instrument should not preclude distributions, as the beneficiaries might need the trust assets for basic living expenses or even luxuries if the beneficiaries could not adequately provide for such items themselves.[34] Further, tax considerations might dictate that a transfer should be made. From an income tax perspective, a distribution might be desirable even at the cost of reducing the transfer tax benefits. . . .

The trustee should be authorized to retain income even though the trust income tax bracket may exceed that of the beneficiaries and such retention would be counterproductive from an income tax standpoint. Thus, precatory language providing that the trustee may

33. Sample language: "Consistent with the objective of reducing wealth transfer taxes, the trustee shall have broad discretion in withholding distributions and providing the beneficiaries the use of trust assets, after taking into account all factors the trustee shall deem relevant, including, but not limited to, immediate and future income and transfer taxes."

34. In some cases, the trustee might consider making loans to a beneficiary rather than making distributions.

take into account both immediate and future income and transfer taxes should be utilized . . . .

Broad use of powers of appointment should also be considered to deal with changing family circumstances and changing . . . laws. Typically, with the Megatrust™, the power holder will be the member of the oldest generation of any separate trust (representing a family branch) of the Megatrust™. Thus, adjustment can be made in the event of changes in the law or family circumstances. . . .

Surprisingly Broad Application

The visceral reaction is that the Megatrust™ will only be employed for those clients who enjoy considerable wealth and are willing and able to afford to embark on a major gift giving program. However, many Megatrust™ candidates will be persons with large life insurance policies.[35] With the proliferation of large insurance sales, many families potentially will have instant wealth and should consider the Megatrust™ as the vehicle to receive such wealth. Other candidates may come from clients who seek asset protection, particularly from malpractice suits. . . .

As a method of finessing marital discord which might occur subsequent to the funding of the trust, consideration should be given to conditioning the spouse's participation in the trust by adding a requirement that he or she be married to, and living with, the grantor at the time of distribution or death of the grantor and, further, by defining the "spouse" as the one who is married to the grantor at the time of distribution or death. This allows a new spouse to become a beneficiary of the trust in the event of a remarriage after a death or divorce. Additionally, by giving the donee spouse a [nongeneral] power of appointment broad enough to include the donor spouse (e.g., "to anyone other than the donee spouse, the spouse's estate, creditors [of the donee spouse] or creditors of the spouse's estate"), the property may be returned to the creator of the trust. Of course, to the extent it is, the tax and future creditor protection is lost. To prevent the use of the power in a manner undesirable to the trust creator, the exercise of the power might be made subject to the consent of a third party. . . .

35. See Brody, *Putting a Premium on Generation-Skipping Transfer Tax Planning-The Use of Life Insurance*, 23 U. MIAMI INST. ON EST. PLAN. Ch. 10 (1989). Irrevocable Life Insurance Trusts designed to last for multiple generations subject to the rule against perpetuities are commonly known as "Dynasty Trusts," which bear many of the similarities of the Megatrust™ and are considered a form of Megatrust™. The Megatrust™, however, is broader in scope. Additional distinguishing refinements include the concepts of leveraging the benefits through asset selection and trust management. . . .

The Economics

The compounding effect of the Megatrust™ coupled with the avoidance of transfer taxes for multiple generations can lead to some incredible results. The following chart illustrates the differences in result for a $1,000,000 contribution into a Megatrust™ that will last for 120 years and outright transfers subject to an estate tax of 50 percent every 30 years.[36]

Annual After Tax Growth	Value of Megatrust after 120 years	Value of Property if no trust
6.00%	$1,088,187,748	$68,011,734
7.00%	3,357,788,383	209,861,774
8.00%	10,252,992,943	640,812,059
9.00%	30,987,015,749	1,936,688,484
10.00%	92,709,068,818	5,794,316,801
11.00%	274,635,993,245	17,164,749,578
12.00%	805,680,255,013	50,355,015,938

The savings potential is often greater than illustrated since the example ignores the fact that property received outright will probably be reduced further due to (1) divorce settlements; (2) creditor problems; and (3) the fact that assets are less likely to be dissipated in a trust than if held outright even if the invasion rights in a trust are extremely broad and generous. . . .

A Beneficiary Can Receive More Rights and Benefits in a Trust Than With Outright Ownership

From the beneficiary's perspective, he or she is potentially better off receiving property in trust than receiving the property outright. . . .

In addition to rights tantamount to outright ownership, the beneficiary enjoys certain benefits that outright ownership does not allow. These rights include creditor, marital discord, and transfer tax protection. . . .

Clients will often reject multi-generational planning, feeling that their children will take care of the grandchildren. This approach fails to recognize that, by placing property in trust . . . 16 times as much as can be transferred to the fifth generation if a 50 percent estate tax can be avoided at each generation level.

36. It is arbitrarily assumed that the property would be taxed every 30 years as it appears to be a reasonable assumption that each successive generation would survive the preceding generation by such period.

Discretionary ("Sprinkle" or "Spray") Trust

Absent special circumstances . . . income should be retained in the trust and reinvested to increase the transfer tax savings. The discretionary ("sprinkle" or "spray") trust is the vehicle which best achieves the aims of the Megatrust™. It can be designed to provide substantially greater flexibility, affording more opportunity to take advantage of this unique concept. . . .

An additional feature which may be of some interest to the client who is concerned about the property being "tied up" in an irrevocable trust for over 100 years is to give a third person, who may be the independent trustee or the trust protector, a power of appointment to enable the trust to be restructured; a provision which makes a revocable irrevocable trust. A power might also be given to the trustee or any other third person to alter the provisions contained in the document and even terminate any separate trust or trusts if circumstances warrant a termination. Flexibility is a key ingredient in a long term arrangement, in order to make the document fit the family situation as it develops. Consideration might be given to providing that this power be exercised in a "nonfiduciary capacity" to preclude an attack if such power is exercised for the benefit of some beneficiaries and to the detriment of others. This right to amend has been referred to as a " . . . tool for obtaining unparalleled flexibility in estate planning . . . ."[37]

As shown by this extract, trusts are wonderfully useful devices that often provide more flexibility than any other device in the estate planner's arsenal. Frequently they outperform wills as the primary dispositive vehicle but seldom are they a total substitute for the use of a will. Usually at least a pour-over will is necessary and often a trust is used in conjunction with an intended probate administration rather than in lieu of it. Finally, although there are numerous tax reasons to favor the use of trusts, the estate planner should be reluctant to utilize a trust (or any other device) that is not justified by any of the many non-tax reasons for the use of such tools. As illustrated by this Chapter, those can include:

- flexibility, in terms of the discretion and powers that may be created,
- transportability, in terms of situs and the ability to avoid probate,
- durability and respectability (as compared to many "schemes" being marketed),
- self-enforcement (usually without the need for judicial intervention),

37. Early, *The Irrevocable Trust That Can Be Amended*, 18 U. MIAMI INST. ON EST. PLAN. Ch. 17 (1984).

- elasticity (in terms of bifurcation of interests and expandability to accept added beneficiaries),
- future looking (in terms of interests yet to be enjoyed),
- protective (as against creditors, incapacity, will contest or surviving spouse elective share claims, and potentially to create federal entitlements),
- creative (in terms of generating incentives for beneficiaries),
- efficient (in comparison to the cost and delay of probate in some jurisdictions),
- definitional (in terms of preserving the identity of assets),
- springing into existence in the future, allowing the trust to lie dormant until needed.

And trusts can be tax efficient too!

Jt. Rev-1

THE GRANTOR 1 and GRANTOR 2 REVOCABLE TRUST

GRANTOR 1 and GRANTOR 2, Grantors

TRUSTEE 1 and TRUSTEE 2, Trustees

GREENEBAUM
GREENEBAUM DOLL & McDONALD PLLC

2900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202-4728

TRUST AGREEMENT

This Trust Agreement ("Agreement") is entered this ____ day of _____________, 20__ between GRANTOR 1 and GRANTOR 2 hereinafter called "Grantor" or "Grantors", and TRUSTEE 1 and TRUSTEE 2 of Cincinnati, Ohio, hereinafter called "Trustee" or "Trustees". This Trust shall be known as THE GRANTOR 1 and GRANTOR 2 REVOCABLE TRUST.

ARTICLE I

PROVISIONS FOR TRUST DURING GRANTORS' LIFETIME

1. **Contribution of Assets to the Trust**. The Grantors may name the Trustee as the beneficiary of policies of life insurance on the Grantors' lives and may transfer property to this trust. The Trustee shall hold such property as may be contributed hereto in accordance with the terms of this agreement in trust as provided herein.

2. **Payment During Life of Grantors**. In the event that during the lifetime of Grantors any property, real or personal, is held hereunder by the Trustee, the Trustee shall pay the principal and/or net income from such property as Grantors may direct. In the event Grantors are unable to direct for any reason, the Trustee shall pay to or for the benefit of Grantors such amount or amounts of the income and/or principal of the trust estate as the Trustee in the Trustee's Discretion may deem necessary for the Financial Requirements of Grantors. In the event Grantors are unable to direct for any reason, the Trustee may pay to or for the benefit of those children of Grantors who Grantors were supporting on the date Grantors became unable to direct such amounts of the income and/or principal of the Trust as the Trustee in the Trustee's Discretion may deem necessary to support those children in the manner in which Grantors were supporting them, provided, however, that the present and future Financial Requirements of Grantors shall take precedence over such distributions of support to Grantors' children. For purposes of the preceding sentence, "support" shall include college and private education expenses (including a living allowance) if the Trustee believes that Grantors would have paid such expenses.

3. **Life Insurance Payable to the Trust**.

   (a) During the lives of Grantors, Grantors shall have and may exercise, without the consent of the Trustee, all rights, powers, privileges, benefits, options and elections under any policies of life insurance delivered and/or payable to the Trustee hereunder, including without limitation the right to change the beneficiary or beneficiaries under such policies from time to time; to borrow upon any such policy in accordance with the provisions thereof and to pledge the same as security for any such loan; and to receive all payments, dividends, surrender values, disability payments, benefits or privileges of any kind which may accrue on account of any of

said policies. After the death of Grantors, the Trustee shall have all such rights, powers, privileges, benefits, options and elections under any policies of life insurance that the Trustee may own on the life of any insured.

(b) The Trustee assumes no responsibility with respect to the validity or enforceability of any policy of life insurance or assignment thereof hereafter delivered to such Trustee hereunder, and/or made payable to such Trustee hereunder. During the lifetime of Grantors, the Trustee assumes no responsibility with respect to the payment of any premiums or other amounts that may be due or payable on any of such policies, nor does the Trustee assume the responsibility of doing anything else that may be required in order to keep such policies in force. After the death of Grantors, the Trustee may, in the Trustee's Discretion, pay the premiums on any policies of life insurance that the Trustee may own from the principal of the trust estate.

(c) The Trustee shall, after receiving notice of the death of the insured under any policy of insurance, the proceeds of which are payable to the Trustee, take such action necessary to collect the amounts due the Trustee from time to time thereon, provided, however, that the Trustee shall not be required to institute any proceedings to collect the proceeds of any policy of life insurance unless the Trustee holds funds hereunder sufficient for that purpose, or unless the Trustee has been indemnified to the Trustee's satisfaction for all expenses and liabilities to which the Trustee may in the Trustee's judgment be subjected by such action. The Trustee shall have full authority to receive any and all such amounts as may be payable to the Trustee, and the Trustee's receipt therefor shall be a full and complete release to the insurer, who shall be under no obligation to see to the application thereof.

(d) In case of any dispute concerning any amount which the Trustee shall be entitled to receive under the terms of any such policy of insurance, the Trustee is authorized in the Trustee's Discretion, to compromise and effect a settlement with the insurer.

ARTICLE II

DISTRIBUTION OF TRUST UPON DEATH OF GRANTORS

1. **Payment of Taxes and Specific Bequests**. If there is not sufficient liquid assets in Grantors' estates to pay all taxes, administration expenses, debts and cash bequests payable by Grantors' estates, the Trustee may, in the Trustee's Discretion, pay out of the trust estate any portion or all of such items, and may make such payments, if any, either direct or to Grantors' personal representative or any beneficiary of Grantors' estates. Notwithstanding the foregoing, if the Trust has been designated as the beneficiary of any death benefit under any qualified pension, profit sharing, Individual Retirement Plan, Stock Bonus or Keogh plan or trust or similar trust or plan in which Grantors were a participant, (hereinafter, "Plan"), the Trustee may not use the proceeds or assets of such Plan to pay any of such taxes, administration expenses, debts or cash bequests payable by Grantors' estates. Further, if Grantors have made a specific bequest of property and such property has been transferred to this trust, the Trustee shall deliver such property to the specific legatee. It is Grantors' intention to prevent the sale or other disposition of illiquid assets by Grantors' estates, and to benefit only beneficiaries of this trust and specific legatees under Grantors' will. It is not Grantors' intention to benefit creditors or persons taking against Grantors' will or contesting Grantors' will. The Trustee may rely and act upon evidence and information which the Trustee believes to be correct, and any action taken by the Trustee in reliance thereon shall be final, binding and conclusive upon all persons.

2. **Division of the Trust**. Upon the death of Grantors (herein referred to as the "Division Date"), the Trustee shall divide the then remaining principal and all accrued and accumulated but undistributed income of the trust estate (after the payment or after setting aside assets sufficient in the opinion of the Trustee to provide for the payment of the taxes, expenses, debts and cash bequests as aforesaid) into that number of equal shares as equals (i) the number of Grantors' children then living; plus (ii) the number of Grantors' children who are then deceased leaving issue then living. The Trustee shall set apart one of such equal shares for each child of Grantors who is then living and shall set apart one of such equal shares for the collective issue then living of each child of Grantors who is then deceased. Any balance remaining in any fund that may be set aside for the payment of taxes and expenses of administration, debts and cash bequests as aforesaid shall, after such payments have been made, be similarly divided and added to the shares so set apart for Grantors' living children and the then living collective issue of deceased children of Grantors.

   (a) **Payment of Income and Principal**. Each share so set apart for a then living child of Grantors shall be held in a separate trust by the Trustee and if such child has then attained the age of 25 years, or when such child thereafter attains the age of 25 years, the net income therefrom shall be paid to such child in convenient installments, not less frequently than quarter-annually, for and during such child's lifetime. If such child has not then attained the age of 25 years, the Trustee shall pay to or for the benefit of such child such amounts of the income and/or principal of such child's

share as the Trustee determines for the Financial Requirements of such child. Any net income which is not so paid in the calendar year in which it is received shall be added to the principal at the end of such year. If from time to time after the Division Date the Trustee, in the Trustee's Discretion, deems the net income payable hereunder to be insufficient for the Financial Requirements of any child of Grantors for whom the Trustee is then holding a share of the trust estate, the Trustee, in the Trustee's Discretion, may pay to or apply for the benefit of such child so much of the principal of such child's share for such child's Financial Requirements.

(b) **Right to Withdraw Principal**. Notwithstanding any other provision of this Agreement, after the Division Date any child of Grantors, after such child's attainment of the ages herein specified, shall have the right at any time or times by request to the Trustee to withdraw in one or more sums an amount not to exceed in the aggregate, when added to amounts, if any, previously withdrawn by such child, the following percentages of the sum of (a) the principal of the share then held hereunder for such child's benefit valued for this purpose at the time of each such withdrawal, plus (b) the amount, if any, previously withdrawn by such child, valued at the time or times of such previous withdrawal(s):

(i) At age 25 50%
(ii) At age 30 100%.

(c) **Death of a Beneficiary**. Upon the death of any child of Grantors the Trustee shall distribute the undistributed principal and income of such child's share in such proportions and in such manner, outright or in trust or otherwise, and to be vested in them at such ages or times, to or for the benefit of any issue of Grantors or spouse of Grantors' issue as such child may appoint by specific reference thereto in such child's will admitted to probate, provided, however, that such child of Grantors shall have no power to appoint the principal of this share or any part thereof to such child, such child's estate, such child's creditors, or the creditors of such child's estate. The Trustee may rely upon an instrument admitted to probate in any jurisdiction as the will of such child of Grantors, but if the Trustee has no written notice of the existence of such a will within a period of three months after such child's death, the Trustee may assume such child died intestate and shall be protected in acting in accordance with such assumption. To the extent that such child shall not exercise such power of appointment, the portion not so appointed shall be distributed to the issue of such child then living, per stirpes, or if no issue of such child be then living, then to the issue of Grantors then living, per stirpes; provided, however, that the share thereof, if any, passing to any of Grantors' issue for whom the Trustee is then holding a share of the Trust hereunder shall be added to such issue's original share, and such issue's

original share so augmented shall be held and distributed on the same terms and conditions as are provided for such issue's original share of the Trust.

(d) **Payment to Issue of a Deceased Child**. Each share set apart for the then living collective issue of a deceased child of Grantors shall be paid over and distributed to such issue per stirpes, pursuant to paragraph 3 below.

3. **Payment to Certain Beneficiaries Who are Minors**. With respect to any share vesting in and payable pursuant to any provision of this Agreement to any beneficiary who is then under the age of 25 years, other than a child of Grantors or the recipient of a specific cash gift or a distribution pursuant to a power of appointment, the Trustee shall continue to hold such beneficiary's share until such beneficiary attains such age, at which time the principal and all undistributed income of such beneficiary's share shall be paid over and distributed to such beneficiary. In the meantime, the Trustee shall pay to or for the benefit of such beneficiary so much of the net income and of the principal of such beneficiary's share as the Trustee in its Discretion deems advisable for the Financial Requirements of such beneficiary. Should any beneficiary die before complete distribution of such beneficiary's share, the principal and all undistributed income so held for such beneficiary shall be paid over and distributed to such beneficiary's then living issue, per stirpes. If such beneficiary has no issue surviving, such beneficiary's share shall pass to such beneficiary's siblings who are also the issue of Grantors, per stirpes. If such beneficiary has no such siblings surviving, then such beneficiary's share shall pass to the issue of Grantors, per stirpes.

4. **Loans to Beneficiaries**. The Trustee shall have the right, in the Trustee's Discretion, to make loans in any amount to any income beneficiary for any purpose that the Trustee deems advisable on such terms as the Trustee deems appropriate, with or without security.

5. **Principal for Special Purposes**. The Trustee is authorized to distribute to any child of Grantors for whom the Trustee is holding a share of the Trust after the Division Date so much of the principal of such child's respective share as the Trustee, in the Trustee's Discretion, may deem advisable to enable such child to marry, purchase a home, enter into a trade or business, or for any similar purpose.

ARTICLE III

SPECIAL PROVISIONS

1. **Vesting of Trust**. It is Grantors' intention that no rule of law against perpetuities or any law restricting or limiting the duration of trusts apply with respect to any interest in real or personal property held in trust under this Trust Agreement, and that this trust be administered in accordance with the provisions of Section 2131.09 of the Ohio Revised Code, as amended. In the event Section 2131.08 of the Ohio Revised Code shall apply to any trust established under this Trust Agreement despite this intention, no trust created under this Trust Agreement shall continue beyond twenty-one (21) years after the death of the last to die of those beneficiaries who were living as of the date of this Trust Agreement. If that trust is subject to the rule against perpetuities, upon the expiration of such period all trusts shall terminate and the assets thereof shall be distributed outright to those beneficiaries (and in the same proportions) as are then receiving, or are then eligible to receive, the income therefrom.

2. **Incapacity of a Beneficiary**. When any payments of income or principal of the trust estate become payable to or may be withdrawn by any beneficiary who is at such time a minor or who is in the sole judgment of the Trustee, mentally or physically incapacitated for any reason, then such payments may be made by the Trustee to such beneficiary or for such beneficiary's Financial Requirements, or to the parent, guardian or custodian of such beneficiary under the Transfers to Minors Act of the appropriate jurisdiction, in the Discretion of the Trustee, and the receipt of any person to whom payment is so made shall be a sufficient release to the Trustee, or, the Trustee may continue to hold such income or principal subject to the terms hereof for such beneficiary until in the sole judgment of the Trustee such beneficiary is no longer mentally, physically, or legally incapacitated.

3. **Distribution to Guardian of Grantors' Children**. If a guardian of the person of Grantors' minor children is appointed after the deaths of Grantors, it is Grantors' desire that the guardian be spared additional expense by reason of having assumed responsibility to provide a home for Grantors' minor children. The Trustee is authorized, in the Trustee's Discretion, to make a one-time distribution out of the Trust directly to the guardian, free of this trust and further accountability by the guardian, of such principal amount as may be deemed necessary and appropriate in the Trustee's Discretion, to assist the guardian in the purchase of a new residence, or the remodeling or enlarging of the guardian's existing residence, if either of such actions shall become necessary. The amount so distributed shall thereafter be the sole property of the guardian. In addition, the Trustee is authorized to make distributions of income and/or principal directly to the guardian, also free of further accountability, as may be deemed necessary, in the Trustee's Discretion, to cover the additional increment of the current expenses of the guardian attributable to the guardian providing a home for Grantors' children, such as the added cost of property insurance, real estate taxes, maintenance and the like. The foregoing payments shall be in addition to those which the Trustee may make for the direct benefit of Grantors' children while in the care and custody of the guardian.

ARTICLE IV

NO NAMED BENEFICIARIES SURVIVING

If at the deaths of Grantors, or at any time thereafter, no child or issue of a deceased child of Grantors shall be living, and to the extent that powers of appointment granted herein have not been exercised, the Trustee shall distribute one-half of the remaining principal and any undistributed income of the Trust not otherwise vested to the persons then living who would be entitled to receive distribution of each of Grantor's estate had such Grantor died intestate at that time, such persons and the proportions each takes to be determined in accordance with the laws of descent and distribution then in force and effect in the State of Ohio.

ARTICLE V

TRUSTEE AND TRUST ADVISORS

1. **Successor Trustee**. If either TRUSTEE 1 or TRUSTEE 2 cannot serve as Trustee for any reason, then the survivor of them shall be the sole Trustee. If both TRUSTEE 1 and TRUSTEE 2 cannot serve as Trustee for any reason, then TRUSTEE 3, shall be the substitute Trustee.

2. **Power to Name Successor Trustee**. Each individual Trustee or substitute individual Trustee shall have the right to name additional substitute Trustees, or to delete substitute Trustees previously named by such Trustee. The additional substitute Trustees shall be named by the Trustee appointing the substitutes by delivering a written notice to all Beneficiaries. The notice shall state the substitute Trustees and the order in which the substitutes shall serve.

3. **Powers of Co-Trustees**. While Co-Trustees are serving hereunder, any one Trustee may sign on behalf of the Trust. Any purchaser or other person dealing with any one or more of the Trustees may act upon the authority of either of the Co-Trustees and shall not be required to determine whether there is a disagreement among the Trustees. A Trustee shall not be responsible for any action taken by the other Trustee in which such Trustee did not join. A Trustee shall not be responsible for any failure by the other Trustee to take action which such Trustee believes should be taken, provided that such Trustee's request for such action shall be filed with the other Trustee in writing within a reasonable time prior to the necessity for taking such action.

4. **Powers of Successor Trustee and Waiver of Bond**. Each Trustee, whether corporate or individual, shall have the same powers and duties as the original Trustee, and no bond shall be required of the Trustee or of any substitute Trustee.

5. **Distribution Advisor**. Upon the Division Date, _______________ shall be appointed as the Distribution Advisors for the trust created herein. After the deaths of Grantors, or during Grantors' lifetime if Grantors are unable to direct distributions by reason of illness or infirmity, no discretionary distribution shall be made by the Trustee from the trust created herein without the prior written direction of the Distribution Advisors. A statement in writing to the Trustee by such Distribution Advisors to make such distribution shall be determinative, and relieve the Trustee from any liability with respect to such distribution. In the event both Distribution Advisors are unable by reason of illness or infirmity to give such written direction, then the substitute Distribution Advisor as named below shall serve during such period of illness or infirmity. The Trustee shall determine whether the Distribution Advisors are, at any time, ill or infirm so as to be unable to give direction to distributions as herein provided. In making the determination as to whether the Distribution Advisors are unable by reason of illness or infirmity to act hereunder, the Trustee shall give consideration to an opinion of any physician selected by the Trustee for such purpose. If the Distribution Advisors fail or refuse to subject himself/herself

to an examination by such physician for an opinion to the Trustee, the Trustee may act without such opinion.

The Distribution Advisors, in making decisions hereunder, shall be bound by the standards set forth herein for the Trustee. The Distribution Advisors are, however, relieved from any liability whatsoever to any person for the Distribution Advisors' decisions made hereunder. The trust shall hold the Distribution Advisors harmless from any expenses incurred with respect to litigation or other controversies caused by the Distribution Advisors' decisions.

In the event that ________________ declines to serve as Distribution Advisor hereunder or cannot serve as Distribution Advisor for any reason whatsoever, and no substitute Distribution Advisor is named as herein provided, then the Trustee shall have the sole distribution responsibility during the period there is no Distribution Advisor serving hereunder. Each substitute Distribution Advisor shall have all of the same powers as set forth for the original Distribution Advisors.

ARTICLE VI

POWERS OF TRUSTEE

The Trustee shall have all the powers and authorities which are now or may hereafter be conferred by law upon Trustees, and, in addition, the Trustee shall, in the administration of the trust, have full power and authority in the Trustee's Discretion:

1. **General**. To hold and control all of the property in the trust, to collect all income thereof and to pay all taxes, expenses, and liabilities incurred in connection with the administration and management of the trust.

2. **Stocks, Bonds, Real or Personal Property**. To purchase, sell, and exchange, such stocks (including by way of example only the stock of any corporate Trustee hereunder, the Trustee's parent or affiliate [hereinafter referred to as "Trustee's stock"]), bonds or other investments or property, real, or personal including participation in any Common Trust Fund established and maintained by the Trustee for the collective investment of fiduciary funds, all without reference to the laws of any state, court order, or the rules of any court governing the investments of trustees; except, however, that any investment in Trustee's stock shall be made only upon the direction of Grantors during Grantors' lifetime, or after Grantors' death or during any period when Grantors may be unable to act for any reason, or if neither Grantors are able to act for any reason, then by the direction of a majority of the adult beneficiaries then entitled to receive or who in the Trustee's Discretion may then receive income hereunder. Any sale or other disposition of any property may be for cash or upon such terms of credit or otherwise as the Trustee may deem advisable.

3. **Retention of Trust Assets**. To hold any of the property received by the Trustee hereunder, in the same form of investments as that in which it shall have been received, without liability for loss or depreciation resulting from such retention, although it may not be of the character of investments permitted by law to trustees and although it represents a large percentage of the total property of the trust.

4. **Borrowing and Pledge of Trust Assets**. To borrow from any person, firm or corporation, or from the banking department of any corporate trustee serving hereunder, upon such terms and conditions as the Trustee deems advisable for carrying out the purposes hereunder; to give notes therefor, with or without power of attorney to confess judgment; and to secure the payment of such loans by a pledge or mortgage of any or all of the property in the trust; to make loans as an investment upon such terms and conditions as the Trustee deems appropriate, with or without security; subject, however, to the other terms of this Agreement even if the term of the loan extends beyond the term of this trust.

5. **<u>Title of Trust Assets</u>**. To hold or transfer any of the securities or other property in the trust in the name of the Trustee in or to bearer form or in the name of a nominee without disclosing any fiduciary relationship, but such registration shall neither increase nor decrease the liability of the Trustee.

6. **<u>Real Property</u>**. To purchase real estate and to convey, with or without warranty, lease perpetually, or for a term of years, irrespective of the period of the trust, with or without privilege of purchase, transfer or exchange any property held in the trust estate at any time at such prices and upon such terms and conditions and in such manner as the Trustee deems advisable.

7. **<u>Cash</u>**. To accumulate and retain cash in the trust estate and keep the same uninvested for such length of time as the Trustee may deem advisable and to invest in and retain non-income producing securities or property and wasting assets in the trust estate.

8. **<u>Estate Matters</u>**. To purchase, upon the request of the executor or administrator of Grantors' estates, securities or other property, real or personal, from the executor or administrator of Grantors' estates. The Trustee shall not be responsible or liable for any loss resulting to the trust estate by reason of such purchase.

9. **<u>Principal and Income</u>**. To determine in cases of doubt whether money or property coming into the Trustee's possession shall be treated as principal or income, to charge or apportion expenses, losses and taxes as the Trustee deems proper. If securities are taken or purchased for the trust at a premium or at a price greater than their par value, the Trustee shall not be required to amortize such premiums or to set aside any part of the income as a sinking fund to retire or absorb such premiums and if securities are taken or purchased for the trust at a discount, or at a price less than their par value, the Trustee shall not be required to treat or accrue as income any part of such discount.

10. **<u>Stock and Bond Rights</u>**. To exercise all rights with respect to any stocks, bonds or other securities or property, real or personal, held hereunder, and all persons, firms and corporations are authorized to deal with the Trustee in connection with said property as if the Trustee were the sole owner thereof. Provided, however, that shares of Trustee's stock shall be voted by the corporate Trustee only if and as directed in writing by the Grantors, during Grantors' lifetime or after Grantors' death or during any period when Grantors may be unable to act for any reason, then by the written direction of a majority of the adult beneficiaries then entitled to or who may receive income hereunder.

11. **<u>Separate Shares Permissible</u>**. To invest and keep invested all or any part of the property of the separate shares held in the trust estate hereunder in one fund, allocating to each such share an undivided interest in the fund in proportion to such share's contribution thereto.

12. **<u>Outside Advisors</u>**. To employ or consult with agents, advisors and legal counsel, other than the regular employees of any corporate Trustee in connection with the Trustee's duties hereunder, and to determine and pay such persons, firms or corporations the reasonable value of their services.

13. **Compromise**. To compromise and adjust any and all claims in favor of or against the trust and in case of any litigation involving the trust, to arbitrate, settle or adjust any matters in controversy.

14. **Execution of Contracts and Voting**. To make, execute and deliver all contracts, deeds, assignments, proxies, powers and other instruments, and to do in general any and all things for the preservation and management of the trust.

15. **Life Insurance**. To pay from the trust estate premiums on all insurance policies owned by Grantors on the date of Grantors' death on the life of anyone other than Grantors, and to purchase and carry in the trust estate new policies of insurance on the life of anyone in whose life the beneficiaries of the trust estate would have an insurable interest.

16. **Distributions**. To distribute income or principal of the trust in cash or in kind, including non-pro rata distributions in kind.

17. **Business Interests**. To participate in the conduct of any business in which the trust holds stock, delegate to others discretionary power to take any actions with respect to its management and affairs, including becoming a party to a voting trust agreement and an agreement of which the Trustee is the voting trustee or one of them, and invest additional capital in, subscribe to additional stock or securities of, or lend money or credit with or without security to such business. The Trustee may also carry on and conduct any business interest held in trust, whether partnership or proprietorship, with complete Discretion to take any action with respect to the management or affairs of such business and to participate in any incorporation, reorganization or liquidation thereof and may invest additional capital in and lend money or credit with or without security to such business. The Trustee may rely upon the reports of accountants as to the operation and financial condition of any such business, corporation or otherwise, without individual investigation.

18. **Options, Warrants, Puts and Calls**. To buy, sell and deal in options as writer of call options against securities, stocks, convertible preferred stock, convertible bonds and warrants whether or not they are owned by the trust, i.e., covered or uncovered options, to repurchase written call options in a closing transaction, to deliver the securities for cash if the option is exercised, to buy "put" options for securities, stock, convertible preferred stock, convertible bonds and warrants, whether or not they are owned by the trust, i.e. covered or uncovered options, to re-sell "put" options in a closing transaction and to receive the securities for cash if the option is exercised.

19. **Margin**. To buy, sell and trade in securities of any nature, including short sales, on margin, and for such purposes may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased by them with such brokers as security for loans and advances made to the Trustee.

20. **Disclaimers**. To disclaim, on behalf of the Trust as a disclaimant under the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, applicable state law, Internal Revenue Code Section 2518, or any law of similar import. In deciding whether to exercise the right to disclaim, the Trustee shall consider the estimated income, estate, and inheritance tax (federal, state and local) payable by reason of the exercise or non-exercise of the disclaimer upon any beneficiary of this Trust or other member of Grantors' family and any other factors that the Trustee considers relevant. The Trustee shall have no liability to any beneficiary of Grantors' estates or of this Trust or to any member of Grantors' family for any decision made with respect to any disclaimer.

ARTICLE VII

MISCELLANEOUS PROVISIONS

1. **Record Keeping Duties of Trustee.**

(a) During any period that the Trustee has the investment responsibility the Trustee shall keep an appropriate record of the administration of the trust and shall render statements of such administration not less often than quarterly to the adult beneficiaries and to the guardian(s) of beneficiaries under disability who are from time to time entitled to receive income hereunder. The Trustee shall make available to any income or remainder beneficiary, at no additional cost and upon written request from time to time, either the details of securities transactions undertaken in such beneficiary's trust or a broker's confirmation thereof.

(b) During any period that the Trustee has no investment responsibility the Trustee shall keep an appropriate record of the administration of the trust and shall render statements of such administration not less often than quarterly to the adult beneficiaries and to the guardian(s) of beneficiaries under disability who are from time to time entitled to receive income hereunder. The Trustee shall make available to any income or remainder beneficiary, at additional reasonable cost and upon written request from time to time, either the details of securities transactions undertaken in such beneficiary's trust or a broker's confirmation thereof.

(c) Relative to paragraphs (a) and (b) of this paragraph 1, the Trustee anticipates that in the normal operation of the trust there will be no special remuneration to it arising from securities transactions other than its normal account fee as provided elsewhere in this Agreement. Should special additional remuneration be necessary, the Trustee agrees to disclose the same to each such beneficiary at or before the time of the transaction.

2. **Life Insurance**. The Grantors or any other person may cause policies of life insurance to be made payable to the Trustee as beneficiary. The Trustee may receive any property, real or personal, transferred, or otherwise payable to the Trustee by the Grantors or by any other person for the purposes of the trust(s) herein created, which additions, on receipt and acceptance by the Trustee, shall become a part of the trust estate.

3. **Spendthrift Provisions**. No income or principal of the trust estate shall be subject in any manner to anticipation, sale, transfer, assignment, pledge, encumbrance, charge or alienation. If the Trustee determines that any beneficiary of this trust has become insolvent or bankrupt, or has attempted to anticipate, sell, transfer, assign, pledge, encumber, charge or otherwise in any manner alienate any rights, interests of or amount payable to such beneficiary

under this trust, or that there is any danger of any levy or attachment or other court process or encumbrance on the part of any creditor of such beneficiary against any amount payable, benefit, right or other interest of such beneficiary under this trust, the Trustee may, at any time, in the Trustee's Discretion, withhold any or all income or principal payable to such beneficiary under the trust estate and apply the same for the comfortable support, maintenance, medical care, emergency needs and education of any such beneficiary, or to or for the benefit of such beneficiary's spouse, children or other dependents, or any of them, in such manner and in such proportions as the Trustee may decide.

4. **Interpretation by Trustee**. The interpretations placed upon this instrument by the Trustee in good faith or upon advice of counsel of the Trustee's own choosing, who may or may not be counsel for any person interested under this Agreement, shall be final, binding and conclusive upon all persons.

5. **Applicable Law**. The trust hereby created shall be governed by the laws of the State of Ohio.

6. **Amendment and Revocation**. The Grantors may at any time amend or revoke this Agreement, in whole or in part, by instrument(s) in writing delivered to the Trustee; provided that the Trustee may refuse to accept any amendments to the trust by giving notice to the Grantors within ten (10) business days of receipt of such amendment.

7. **Administrative Convenience**. Notwithstanding any other provisions of this trust, if an individual then serving as Trustee determines that the value of the trust estate or any share thereof is less than $50,000 and is therefore impractical to administer, then such Trustee shall have the authority to distribute all of the trust estate or share thereof to the current income beneficiary(ies) in the same proportions as such beneficiary(ies) are currently receiving income. If a corporate Trustee determines that the value of the trust estate or any share thereof is so small in value as to be impractical to administer, then the Trustee shall have the authority to distribute all of the trust estate or share thereof to the current income beneficiary(ies) in the same proportions as such beneficiary(ies) are currently receiving income. If the income of such trust or fund is being distributed and/or accumulated in the Discretion of the Trustee, and the beneficiaries are only the issue of Grantors, then to the then living issue, per stirpes, but if the beneficiaries are not only such issue, then to the then living beneficiaries in equal shares.

8. **No Duty to Investigate**. The Trustee shall not be obligated to investigate the acts of the personal representative of Grantors' estates, and the Trustee shall have no liability with respect to any acts performed by or omissions of such personal representative.

9. **Acceleration of a Beneficiary's Interest**. The renunciation, surrender, release, disclaimer or forfeiture by any beneficiary of part or all of such beneficiary's interest in any of the trust funds or shares created hereunder shall accelerate the interests of the remaindermen in the portion of the trust so renounced, surrendered, released, disclaimed, or forfeited, in the same manner as would such beneficiary's death, and all of the provisions of this trust shall be construed thereafter on that basis.

10. **Excludable Property**. Notwithstanding any other provision of this Agreement, if the Trustee receives any property which is excludable from Grantors' gross estates in determining the federal estate tax payable by Grantors' executor or administrator, (herein called "excludable property"), the Trustee shall not use any of such excludable property for the purposes of paragraph 1 of Article II of this Agreement, nor shall the Trustee use any portion of such excludable property in any other manner for the benefit of Grantors' estates. Such excludable property shall be added to the principal of the trust estate (unless otherwise allocated by the terms of the dispositive instrument) after deducting the expenses, including taxes, if any, incurred in connection with the receipt thereof, which expenses may be paid out of such excludable property.

11. **Tax Qualified Plans**. In the event that the Trustee shall be designated by Grantors as the beneficiary of the death benefit under any qualified pension, profit sharing, stock bonus or Keogh plan trust or Individual Retirement Account or similar trust or plan in which Grantors are a participant and under which the Trustee, as beneficiary, may elect (with or without the consent of any other person) the mode of payment and method of income taxation, the Trustee may elect that mode of payment and method of income taxation that the Trustee determines to be the most advantageous option available under the plan to this trust and its beneficiaries, in terms of income and/or estate and/or inheritance tax (federal, state and local) considerations and/or investment return considerations, based on the Trustee's evaluation of the facts and circumstances relevant to such considerations as they exist at the time the Trustee makes such election.

12. **Real Estate Special Situations**. If the Trustee is unable to act as Trustee with respect to any real estate, then such person or persons or corporation as may from time to time be appointed by the Trustee in writing shall act as Trustee with respect to such real property, without order of court, and shall have all the powers and discretions with respect to such property as are herein given to the original Trustee, and shall be paid the reasonable value of the services rendered. The Trustee appointed in this Agreement may remove such person, persons or corporation appointed by the Trustee with respect to said real estate and appoint another Trustee upon ten (10) days written notice. Should such property be sold, exchanged or otherwise disposed of, the proceeds thereof shall be remitted to the original Trustee appointed hereunder. Such appointed Trustee may employ the original Trustee as agent in the administration of such property. No surety shall be required on the bond of any appointed Trustee or agent acting upon the provisions of this paragraph. No periodic court accounting shall be required of such appointed Trustee, it being Grantors' intention to exclude any statutory accounting which may ordinarily be required. Such appointed Trustee shall, however, send quarterly statements to the current income beneficiaries and to the original Trustee under this Agreement.

13. **Merger of Identical Trusts**. Notwithstanding any provision of this Agreement, if after the deaths of Grantors and the completion of the administration of Grantors' estates, there exists any other trust agreement between any Grantors and the Trustee herein containing a trust with identical beneficiaries and terms substantially the same as the terms of this trust and that have the same inclusion ratio relative to the generation skipping transfer tax, then the Trustee, in the Trustee's Discretion, may merge this trust with such other trust and upon such merger shall terminate either the trust under this Agreement or, if authorized by such other trust, the corresponding trust, and add the trust estate of the terminated trust to the remaining trust, and the assets so transferred shall thereafter be held, treated and disposed of as a part of the surviving trust.

14. **Division of Trust/Tax Allocations**. The Trustee may, at any time without court approval, divide any trust hereunder into two or more separate trusts. Such division shall be based upon the fair market value of the assets then held in trust. If any property is directed to be added to any trust hereunder, the Trustee may hold such property as one or more separate trusts on terms identical to the terms of that trust to which such property was to be added. Further, the Trustee may allocate such property non pro-rata among the several trusts, if any, resulting from the division of the trust to which such property was to be added (including an allocation of all such property to one of such trusts). If a trust is divided into separate trusts, the Trustee may (i) make different tax elections (including the allocation of the GST Exemption) with respect to each trust, (ii) expend principal and exercise any other Discretionary powers differently with respect to each separate trust, (iii) invest such separate trusts differently, and (iv) take all other actions consistent with the treatment of such trusts as separate entities. Further, the donee of any power of appointment with respect to a trust so divided may exercise such power differently with respect to each separate trust created by the division. Grantors anticipate that the Trustee may divide trusts hereunder (or hold an addition of property as one or more separate trusts) for both tax and administrative reasons. Thus, if the executor of Grantors' estates decides to allocate some or all of Grantors' GST Exemption to any trust created hereunder, the Trustee may in its Discretion divide any such trust into separate trusts in order that no trust hereunder has an inclusion ratio as defined in Code Section 2642(a)(1) other than zero or one. Notwithstanding the foregoing, any severance or division of the Trust by the Trustee pursuant to the Trustee's discretionary authority granted by this paragraph which is made for the purpose of creating an inclusion ratio of zero or one pursuant to Section 2642(a)(1) shall conform with the requirements of Treasury Regulation Section 26.2654-1(b)(1)(ii) and Section 26.2654-1(a)(1)(ii). In addition, if any child of Grantors have predeceased Grantors, or failed to survive Grantors for a period of 90 days, the Trustee shall apply the predeceased ancestor exception of Internal Revenue Code Section 2612(c)(2) in any discretionary division of the Trust pursuant to this paragraph so that any share of the Trust set aside for and vesting in the estates of the children of a deceased child of Grantors is comprised, to the fullest extent possible, from a separate trust with an inclusion ratio of one.

15. **Resignation, Replacement of Trustee**.

(a) The Trustee shall have the right at any time to resign as Trustee on notice of such intention to resign to the Grantors, if living, or after Grantors' death, to the adult beneficiaries and guardians of any minor beneficiaries who currently may or do receive income hereunder, fifteen (15) days before resignation, to Grantors or their last known addresses. In case of such resignation and a successor Trustee has not been chosen pursuant to Article V, the Grantors, and after Grantors' death, a majority of the beneficiaries and guardians of minor beneficiaries entitled to notice after

Grantors' death, shall have the right to appoint a successor Trustee by a writing delivered to the Trustee. If no successor Trustee is so designated within fifteen (15) days after such written notice of intention to resign has been sent, or if there be no beneficiary entitled to notice, then without notice or other formality the Trustee may appoint a successor Trustee.

(b) Notwithstanding any other provision of this Agreement, the Grantors, and after the deaths of Grantors, a majority of Grantors' adult beneficiaries and the guardians of any minor beneficiaries then receiving or who may receive income hereunder shall have the right to remove the Trustee by giving the Trustee fifteen (15) days notice of such intention in writing, and the Grantors or a majority of such adult beneficiaries and the guardians of any minor beneficiaries, as the case may be, shall have the right to appoint a successor Trustee.

(c) The successor Trustee (other than any successor appointed by Grantors), shall always be a bank or trust company having a capital and surplus of at least $50,000,000 according to the last statement published by it prior to its appointment.

(d) Upon the appointment of a successor Trustee and the transfer of the trust to the successor Trustee, and obtaining a receipt therefor, the Trustee ceasing to serve shall be released from any and all future duties arising out of this Trust. No successor Trustee shall be obligated to investigate the acts of any prior Trustee except upon written request of any beneficiary and the agreement of that beneficiary to pay the costs of the Trustee for such investigation.

16. **Use of Available Information**. In making any determination or exercising any discretion or making any distribution under this trust, the Trustee may act on information and evidence available to the Trustee, upon which the determination, exercise of discretion or right to distribution may depend, including but not limited to marriages, deaths, births, financial conditions and projections of financial conditions of beneficiaries, and other events and relationships. Any determinations, exercises of discretion or distributions made by the Trustee in good faith on such information and evidence which the Trustee may have or may obtain from members of Grantors' family, Grantors' collateral relatives or other persons interested in this trust without actual notice of any change shall fully satisfy the responsibility of the Trustee in the performance of this trust. With respect to any distributions hereunder, any person feeling aggrieved by such distribution shall pursue his remedy, if any, against the distributees and not against the Trustee.

17. **Definitions**. As used in this trust, the following words shall have the following meanings:

(a) "Child" or "children" shall mean lawful child or children and shall include lawfully adopted child or children but shall not include an heir designated by law pursuant to Ohio Revised Code Section 2105.15 or any similar statute of another state.

(b) "Code" means the Internal Revenue Code of 1986, as it now exists or may hereafter be amended, and any reference to a section of the Code shall mean such section as it may be amended from time to time.

(c) "Discretion" shall mean the reasonable exercise of the Trustee's judgment.

(d) "Financial Requirements" shall mean support in a beneficiary's accustomed manner of living, education, and medical care, and in determining the Financial Requirements of a beneficiary, the Trustee shall consider, to such extent as the Trustee determines to be proper, other funds known to the Trustee to be available to such beneficiary for such purposes. Notwithstanding the foregoing, the Trustee shall not make a distribution to a beneficiary whose parent has the power to remove and replace the Trustee if such distribution would relieve such beneficiary's parent of an obligation of support.

(e) "GST Exemption" means the exemption provided for in Section 2631 of the Code and allocated in accordance with the provisions of Chapter 13 of the Code.

(f) "Issue" shall mean lawful lineal descendants and also include persons adopted as well as those of the blood but shall not include an heir designated by law pursuant to Ohio Revised Code Section 2105.15 or any similar statute of another state.

(g) "Lawfully adopted" shall only include those persons adopted prior to their eighteenth birthday.

(h) "Trustee" shall mean and include any successor trustee and such successor trustee or trustees shall have the same powers, rights, duties and obligations as set forth herein for the original Trustee.

18. Notice. All notices or requests provided for in this trust shall be in writing and made by certified or registered mail, return receipt requested, addressed to recipient's last known address, and shall be deemed to have been given on the date stamped on such return receipt. If such notice or request is returned undelivered, then the Trustee shall make all reasonable efforts to locate and contact the intended recipients by other means. The date notice shall be deemed to have been given if no signed receipt is returned shall be the date on which all reasonable efforts have been exhausted.

19. **Interpretation**. Words in the singular in this Agreement may be interpreted as plural and vice versa, and words used in the masculine may be interpreted as feminine or neuter and vice versa, all as the sense may require.

20. **Deferred Compensation**. The Trustee shall add to the principal of the trust any payments or property it may receive pursuant to any deferred compensation agreement, but the Trustee shall allocate to principal only the net proceeds thereof after the deduction of any expenses in connection with receipt thereof, including income taxes, if any, that may have to be paid on account of such receipt. Such expenses and taxes, if any, shall be paid by the Trustee out of the payments or other property so received.

21. **"S" Corporation Stock**. If there are shares of stock in an "S" corporation or any equity in an entity then taxed as an "S" corporation allocated to this Trust and the Trustee has not made an election to have the Trust taxed as an Electing Small Business Trust, and as such, this Trust would not be a qualifying "S" corporation trust under Code Section 1361(d), then such shares or equity which would otherwise be allocated to this Trust shall instead be allocated, held and administered as follows:

(a) Allocation Provisions:

(i) The Trustee shall divide all such shares in the "S" corporation into that number of separate trusts as there are children of Grantors then living and who are otherwise qualified as S corporation shareholders, and if there are no living qualified children then the Trustee shall divide such shares of stock into separate shares for all other income beneficiaries who are qualified.

(b) Administrative Provisions for the Separate Trust(s):

Any trust created pursuant to the provisions of paragraph (a) above shall be held and administered as provided below:

(i) All of the income shall be paid to the beneficiary during the term of the trust.

(ii) The Trustee may pay to or apply for the benefit of the beneficiary such amounts of the principal of the trust as the Trustee deems necessary or desirable, in the Trustee's sole Discretion, for the Financial Requirements of such beneficiary.

(iii) The Trust shall terminate on the earlier to occur of the following events: the death of the beneficiary or the beneficiary attaining the age of thirty (30) years. If the beneficiary is alive at the time of termination of the trust, all of the remaining principal of the trust shall be distributed to the beneficiary. If the trust terminates upon

the beneficiary's death, the remaining principal of the trust shall be distributed to the beneficiary's estate.

(c) Refusal to Elect. Prior to or simultaneously with the allocation of shares being made pursuant to this Paragraph 21, the Trustee shall obtain from each beneficiary an executed election as provided by Code Section 1361(d). If a beneficiary fails to execute the election provided for by Code Section 1361(d), no shares shall be allocated to such beneficiary's trust and such shares shall then be allocated pro rata to those beneficiaries who do execute such elections; provided, however, if there is no existing agreement between the "S" corporation and its shareholders which requires distribution by the corporation of an amount of dividends equal to any shareholder's highest federal and state income tax rates multiplied by the corporation's income for federal income tax purposes, then such refusal to elect shall not cause a reallocation of such beneficiary's shares.

(d) Spendthrift Clause. Paragraph 3 of this Article VII shall not apply to any separate trust created by this Paragraph 21.

22. Compensation of Trustee. Any individual Trustee shall receive such compensation for services as is provided for by law or as agreed upon in writing between the Grantors and such Trustee. Any corporate Trustee shall receive such compensation for its services as is provided for in its schedule of fees from time to time in effect. Such compensation, other than the compensation on ultimate distribution which shall be charged against principal, shall be charged against income unless the Grantors, during Grantors' lifetime, otherwise directs. Upon the resignation or removal of any corporate Trustee or upon distribution of any assets of the Trust, the corporate Trustee's compensation shall be a reasonable fee measured in terms of services actually rendered in connection with such transfer and/or distribution of such assets as opposed to being based upon the value of the assets of the Trust at that time.

IN WITNESS WHEREOF, the Grantors and the individual Trustee have executed this Agreement as of the day and year first above written.

____

GRANTOR 1, Grantor and Trustee

____

GRANTOR 2, Grantor and Trustee

STATE OF ____________)
) **SS:**
COUNTY OF ___________)

The foregoing instrument was acknowledged before me this _____ day of _______________, 20__, by **GRANTOR 1** as Grantor and Trustee.

____

Notary Public

The foregoing instrument was acknowledged before me this _____ day of _______________, 20__, by **GRANTOR 2** as Grantor and Trustee.

____

Notary Public

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