Drafting Down
(KISS* Revisited)
The Utility and Fallacy of Simplified Estate Planning

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- State Bar of Texas Wills, Estates and Probate: A Satellite Broadcast, January 19, 2001: (i) Planning Chair, (ii) Institute Director and (iii) moderator of all panel discussions
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- **Putting Revocable Trusts In Their Place**, 129 TRUSTS & ESTATES 8 (September 1990, cover story) (article)

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I.
INTRODUCTION

A. History – The “KISS” Outline

For several decades now, simplicity – in virtually all contexts – has both intrigued and befuddled me. In 2005 I had the opportunity to tilt at the concept in the estate planning context when I wrote and presented the prequel to this outline: “KISS (Keep It Simple and Sophisticated) – Simplified Complex Drafting”, State Bar Of Texas 16th Annual Advanced Drafting: Estate Planning & Probate Course, Austin, Texas, October 27-28, 2005 (the “KISS Outline” or simply “KISS”). The thesis of KISS was:

Complex, flexible estate planning always can be – and always should be – implemented by “simple” documents.

KISS accepted the premise that sophisticated estate planning was an appropriate goal, and limited its focus to simplifying the documents utilized to reach that goal. This outline is based in large part on KISS and retains virtually the entire KISS discussion, but adds an additional layer (as well as additional detail).

B. Purpose and Thesis of This Outline

Originally, the thesis for this outline was: “KISS didn’t go far enough; Estate planning lawyers should ‘dumb it down’ across the board.” (The argument went something like this: “Our profession has become excessively complex; it’s not enough to simplify how we do it, we must simplify what we do. We’re inflicting complex and confusing documents on clients that neither want nor need the benefits those documents purportedly achieve. We’ve placed our own professional satisfaction ahead of our clients’ best interests and it’s got to stop.”)

However, as I researched and analyzed the benefits and detriments of “drafting down”, I realized I could neither defend nor deny that thesis.

Admittedly, there are numerous situations in which we estate planners get carried away with complexity for its own sake, are unwilling to let go of traditional complicated solutions in favor of simpler alternatives that are at least as (if not more) effective, or are simply blind to the ease with which we could eliminate so much of the complexity we unwittingly inflict on our clients.

But there are also numerous situations in which we pursue simplicity to our clients’ peril. Sometimes we seem blinded by a compulsive belief that there is always a simple solution to every problem – if we can only find it. Sometimes we seem so anxious to impress and please our clients, we fail to realize – and fail to explain to our clients – that their circumstances and estate planning goals really are quite complicated, just as their demands for simple solutions really are quite absurd.

This outline embraces the KISS mantra – simplified implementation of sophisticated planning – but also addresses the threshold question – whether sophistication is being overdone. Thus, the thesis of this outline is:

Complex, flexible estate planning always can be – and always should be – implemented by “simple” documents; however, successful simplification of the means does not, by itself, justify a complex end.

This outline has three fundamental goals:

• To persuade estate planning attorneys that complex planning techniques are enhanced, rather than impaired, by “simple” drafting.

• To persuade estate planning attorneys that, complex planning techniques are sometimes essential yet sometimes foolhardy.

• To provide estate planning attorneys with samples forms that fit my definition of “simplified complex drafting” As well as “simple drafting.”
• To motivate estate planning attorneys to utilize the concepts in this outline to simplify their own forms and practices.

This outline begins with a discussion of the fundamental concepts of simplification and simple complexity. Upon that groundwork it lays out guidelines and techniques for simplifying documents, and concludes with various forms and excerpts from forms, that, I hope, demonstrate the validity of the above thesis.

C. Disclaimers and Apologies

I incorporate by reference all disclaimers regarding forms that have ever been included in any outline presented to the Texas Bar Advanced Estate Planning Drafting Course. Please carefully review the forms and sample language included in this outline and neither use nor rely on any of them until you've made your own professional decision that it is prudent to do so in your particular situation.

I also apologize to all of my fellow attorneys who may be offended by any of my comments, criticisms or hyperbole that appear to be directed to them or their forms.

All of the forms and clauses included in this outline are my own creation, including those that I offer as examples of the “wrong” approach, and any resemblance to anyone else's forms is purely coincidental. My occasional hyperbole is included only to emphasize subtle points via unsubtle exaggeration, and to entertain, not to offend.

II. KISS FUNDAMENTALS

A. Traditional/ Other Definitions of “KISS”

1. OCCAM'S RAZOR; KEEP IT SIMPLE, STUPID

Traditionally, the KISS acronym is expanded to “Keep It Simple, Stupid” and serves as a worthwhile, albeit uncivil, reminder to avoid unnecessary complexity.

It undoubtedly owes its origins to “Occam's Razor” (a/k/a “Ockham's Razor”), an axiom attributed to the 14th-century English Franciscan, William of Ockham. In essence, Occam's Razor holds:

The simplest solution tends to be the correct solution.

(Although Occam's Razor is more direct, more precise and more civil, “Keep It Simple, Stupid” is the slogan of choice in modern America, thus proving that, in popular culture a catchy quip always beats a concise statement from a dead guy with an odd sounding name.)

2. OTHER KISS'S

“KISS” has been usurped by numerous individuals and groups who have assigned it many varied meanings, from the mundane to the strange. Here are just a few (I do not claim to understand them all): Keep It Simple Stupid; Keep It Simple, Sweetie; Keep It Simple and Short; Keep It Simple and Small; Keep It Super Simple; Keep It Simple and Straight-forward; Keep It Short and Sweet; Korean Intelligence Support System; KEK Information Service System (Tsukuba, Japan); Kristen Iteration Selection and Sequntion method; Kibitz Inquire Surf Steal; Kid's Identity Suddenly Sixteen; Kids Inspiring Selfless Service; Kids In The Savior's Service; Knights In Satan's Service; Knights In The Service Of Santa.

B. My [and Leonardo's] Definition of KISS

"Simplicity is the ultimate sophistication."

LEONARDO DA VINCI

When I saw that dozens of others had already usurped the KISS acronym for their own purposes, I didn't feel so bad about my own impending theft. Subsequently, when I discovered the above quote from Leonardo da Vinci (several months after having started on the original 2005 version of this outline), I was inspired and humbled by my newfound posthumous ally, and I now declare that, if he were alive today, da Vinci would agree with me that what KISS really stands for is:

Keep It Simple and Sophisticated.

The next question is, what exactly did Leonardo mean?

1. "SIMPLE" IS NOT "SIMPLISTIC"

Upon first reading, da Vinci's declaration may seem contradictory, certainly not serious. Your reaction may be “he might as well say 'one is the ultimate infinity' or 'darkness is the ultimate light.' It's just word play, sophistry, right?”
Upon second (third?) reading of any of these apparently contradictory statements, a subtler meaning may step into the reader's view or, more accurately, the reader may shift perspective.

Da Vinci's quote is contradictory if you equate *simplicity* with *simplistic*. However, I'm satisfied that the whole point of his quote is that there are two varieties of “simple”:

- the “good” simple, which this paper refers to as “*simple*” or “*simplicity*” and defined as:
  - free from ornamentation and embellishment
  - not elaborate, elegant, or luxurious
  - unassuming, unpretentious, not affected; and
- the “bad” simple, which this paper refers to as “*simplistic*” and defines as:
  - unrealistically simple, oversimplified;
  - failing to adequately address an issue or a problem by ignoring complexities or complications.

2. **THE THREE STAGE PROGRESSION**

"I would not give a fig for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity."

*OLIVER WENDELL HOLMES*

Here's how I see it:

Mastery of … anything, from specific questions, sports or professions, to friendship, parenthood or inner spirituality, involves a three stage progression that begins with the simplistic and ends with the simple (i.e., da Vinci’s “ultimate sophistication”). The middle step, the expanse dividing the two, is complexity.

**a. Stage 1: The Simplistic**

Everyone's initial understanding of everything is simplistic. When it occurs, we are no longer totally ignorant, but we are close. Perhaps we just watched a show on PBS, or read an advance sheet or skimmed a CLE outline. We can explain the high points to someone else and they'll think we know what we're talking about – provide that they do not know what we're talking about.

This simplistic-ness is, in the words of Oliver Wendell Holmes, “the simplicity this side of complexity.” Its defining characteristic is this:

**b. Stage 2: Complexity**

"One of the great mind destroyers of college education is the belief that if it's very complex, it's very profound."

*DENNIS PRAGER*

Those with sufficient ability, opportunity and tenacity may study further and may eventually claim dominion over every last detail of their quest. At this stage they will wield detail and minutia like a sword and revel in it.

These partially informed “wise fools,” a/k/a “sophomores” (American usage, from Greek *sophos*, “wise” and *moros*, “foolish”), can recite the rules in glorious detail – and will do so at every opportunity. Ask them what time it is and they'll tell you how to make a watch, just to show they can.

This is the complexity that resides between the simplistic and simplicity. Its defining characteristic is this:

**c. Stage 3: Simplicity**

"As we understand more things, everything is becoming simpler."

*EDWARD TELLER*

For the vast majority of us (myself included), our mastery over many, if not most, aspects of our profession remains stuck – at least partially – in the intellectual purgatory of stage 2. And this is understandable. We can finally rest on our laurels and coast, at least a little bit. We worked hard to get here, and we're still working hard, and we're not about to make life harder by burdening ourselves with lofty goals.

However, for the vast majority of us (and I hope this includes me), a stage 2 mastery over some, if not many, aspects of our profession becomes unsatisfactory. And this too is understandable. We may get tired of repeatedly reviewing some convoluted passage in our documents. We may get frustrated at not being able to give the client a direct answer when she says “what does this sentence mean?” Most of all (for me, anyway), we get board, we want to try and make things just a little better than they are.
"... so much more to think about ... What to leave in, what to leave out."

BOB SEGER

Thus, from time to time, those not content to coast will take on some issue or project and dissect it one glorious detail at a time. They'll trash all the superfluous verbiage and reassemble the pieces that remain in every conceivable combination, then fish a part from the trash and repeat the process over and over until they memorize every subtle connection and know everything it could possibly be, and everything it couldn't possibly be, and when they've made it as complicated as it can possibly be, if they're lucky, the epiphany will come, and in this moment of “ultimate sophistication” they will see simplicity.

This is Holmes’ “simplicity on the other side of complexity.” Its defining characteristic is this:

*It is a fraction of what we know but it is all that is necessary.*

3. **TWO FINAL OBSERVATIONS**

At the risk of stating the obvious, let me emphasize two points before moving on.

a. **“Simplified Sophistication” is a Redundancy, Not an Oxymoron**

“In character, in manner, in style, in all things, the supreme excellence is simplicity.”

HENRY WADSWORTH LONGFELLOW

“Simplicity is the glory of expression.”

WALT WHITMAN

“Simplicity is the final achievement.”

FREDERIC CHOPIN

“Simplified complexity” (a/k/a “simplified sophistication”) may embody a certain superficial irony, but it is neither a contradiction nor any other variety of oxymoron. To the contrary, as anyone who has ever reached stage 3 of the above journey even once should already know, it is inherently and necessarily redundant.

b. **It’s not easy being simple**

“I didn’t have time to write a short letter, so I wrote a long one instead.”

MARK TWAIN

Simplicity is very hard; much harder than complexity. As amusing as it is to imagine Mark Twain’s gentle sarcastic tone as he “apologizes” for his long letter, the remark is funny because, like so many of his witticisms, it is absolutely true. (Interestingly, the same quote has been attributed to French mathematician Blaise Pascal, Abraham Lincoln, and T.S. Elliot, among others.) Attaining simplicity is always harder than mastering complexity, just as climbing to the top of the mountain is always harder than climbing halfway.

(The mountains of documents we lawyers continue to draft in lengthy, complex legalese are a testament to expeditiousness – or laziness, depending on your perspective – not to tenacity and hard work.)

### III. HOW TO SIMPLIFY COMPLEX ESTATE PLANNING

A. **Simplify WHAT You Do**

The threshold technique for document simplification is: **simplify the end**, the plan, what the document actually does. The means to a simple end will almost always be easier to simplify than the means to a complicated end.

The several varieties of this technique, discussed below, are powerful to a fault: They have no inherent limitations; thus, the attorney must apply them sparingly, or else simplification will degenerate into evisceration. And whatever varieties of this technique are utilized, they should be the first utilized, so that you avoid the wasted effort of simplifying a plan that is later abandoned.

1. **Simplify Client Issues and Solutions**

The first step in simplifying the end targeted by your documents is to simplify the end sought by your clients. This is fundamentally important because, in my experience:

*The primary source of [non-tax] complexity in the estate plan is the clients.*

They will claim that their goals are simple. *That’s a lie*. They don’t realize they’re lying; it’s just that clients rarely have a complete understanding their estate planning goals.
a. **First, All Parties Must Understand the Goals**

Before you can simplify client goals, you have to understand them. And before you can understand your clients’ goals, your clients have to understand them. This is, of course, a lot to accomplish in a one or two hour planning conference; however, at the risk of attempting to objectify the inherently subjective process of ascertaining and refining client goals, I recommend the following rule of thumb:

*As you seek to build your understanding of the clients' goals, also seek to confirm the clients' understanding of their goals.*

This rule, however, is not always consistent with the mindset and conduct of estate planning attorneys.

Sometimes estate planners meet with clients to ascertain their dispositive wishes, not to question those wishes. The problem is, when we play the good soldier and do exactly what the clients tell us to do, we assume that the clients know what they're talking about.

Other times estate planners meet with clients to redirect their dispositive wishes to be more in-line with the attorney’s own preferences. The problem here is, when we play the clients’ paternalistic father who knows best and do exactly what we've just told them they need, we assume that had we let them speak, the clients would have had no idea what they’re talking about.

In point of fact, many of my clients do know what they're talking about, but many do not. We owe it to our clients to argue with them, or at least to cajole them into arguing with themselves, to be sure they've thought about, wrestled with, and questioned their dispositive goals long enough that they really understand what they're asking us to do.

*Digression: “Active Listening” in the client conference.* Psychologists and counselors use a technique called “active listening” to facilitate self examination by their clients. “Although related to and often confused with a narrower, more passive technique known as “reflective listening,” active listening is far more useful to attorneys. The two techniques are similar in that both compel the listener to keep the conversation focused on the client, to really understand the client, and to restate or paraphrase the client’s words as a means to facilitate communication and demonstrate the listener’s focus on – and comprehension of – the client.

But while the reflective listener limits his restatements to mere reflections of the client’s statements, the active listener goes further:

- If she sees a potential ambiguity in the client’s words, the active listener may restate with a shift left or right to see the client’s reaction.
- If the client says he wants a particular estate planning vehicle, the active listener may respond in terms of the estate planning goals that vehicle generally achieves.
- If the client expresses strong feelings towards a particular family member, the active listener may speculate about past events that might have given rise to those feelings.
- If the client expresses his goals regarding a particular family member, the active listener may respond in terms of the particular estate planning vehicles that achieve those goals or switch back to the clients feelings.

Here are some examples of active listening (note how the different active listening responses raise different issues and/or nudge the client in different directions):

- **Client statement:**
  “I want to split my estate between my son and daughter 66%-33%.”
  The reflective listener might respond:
  “So you want your estate to pass 2/3’s to your daughter and 1/3 to your son.”
  The active listener might add:
  “Do we need to account for unequal lifetime gifts, or is this to send a message?”
- **Client statement:**
  “When we’re both gone my kids get my property and my wife’s kids get her property.”
  The reflective listener might respond:
  “OK, when you’re both gone, your property goes to your kids and her property goes to her kids.”
  The active listener might add:
  “So it’s important to preserve your property rights” or,
  “So no matter what any kid does after the first spouse’s death, he or she is guaranteed his or her share; the surviving spouse can’t change anything.”
Put bluntly, active listening is a tactic for agitating clients. The active listener twists the client’s words and puts words in the client’s mouth, and sometimes annoys the client. However, a combination of active listening, playing dumb and talking to yourself, can get even the most self assured client to reexamine his conclusions in no time at all.

b. Second, Facilitate Simplification By the Clients

Invariably, when I question my clients' goals in this (or any other) manner, two things happen simultaneously: The clients improve their understanding of the plan they've asked me to prepare. And it dawns on them that this plan is a lot more complicated than they originally thought. If I've managed to mention the high cost of custom drafting, it also dawns on them that this plan might be a lot more expensive than they originally thought.

At this point, some clients thank me for the advice and admonitions, and tell me to draft the plan the way they originally told me to. Most clients initiate a review of their original request and as we go down the list, we eliminate a bell here, a whistle there, until we have a much more manageable, much less costly, much simpler plan.

2. **Don't Solve a Problem That Doesn't Exist**

Helping the clients to really understand their dispositive goals (see the preceding) can also help the client – and the lawyer – to realize that some of the “problems” they wanted solved don't exist. In any event, whenever it becomes clear that a particular problem isn't going to be a problem for these clients, stop worrying about it.

There is, however, a cost benefit tradeoff to consider. On the one hand, I believe you should eliminate the marital deduction formula gift (and all the boilerplate that goes with it) when it's virtually certain that the survivor's estate will be well under the Applicable Exemption Amount.

3. **But Don't Waste Effort Removing Superfluous Solutions**

On the other hand, I do not believe you should go through your boilerplate and, eliminate, e.g.:

- the rule against perpetuities clause – even if you're certain that there will never be a perpetuities issue (because everything passes to charity upon the death of the clients' only child, a 64 year old priest); nor
- the qualified retirement plan benefits clauses – even if you're certain that there will never be any qualified retirement plan benefits passing to a trust that might want to avoid immediate taxation on the total balance in the plan (because the clients' 401(k) mandates that any beneficiary other than a surviving spouse must cash out in all events).

My rationale is more than the fact that there's no such thing as 100% certainty (and, thus, these issues really could arise). My concern is based on economics: It can be very costly to analyze your boilerplate from beginning to end, and then strike every provision that is unnecessary for this particular client. I admit that by retaining unnecessary clauses, the document is solving problems that don't exist; but I maintain that by deleting those clauses, the attorney is not solving but, at best, is mildly moderating problems that exist only in theory (and in the minds of retired engineers who are bothered by “unnecessary” boilerplate). The boilerplate belongs to us, not our clients! It's going to be incomprehensible almost no matter what, and the fact that we may reduce it from “utterly incomprehensible” to “completely incomprehensible” is insignificant.

4. **Don't Solve [Or Even Deal With] A Problem That You Can Avoid Instead**

This issue is very closely related to the above three but deserves at least brief mention. We sometimes take such pride in our ability to scale the wall that we miss the opportunity to walk around it.

For example, a few years ago I had clients in a second marriage situation and a particular investment portfolio that they thought was the husband's separate property was very likely a jumbled mess of comingled community and separate. The husband wanted to give the portfolio to his son and daughter from a prior marriage and wanted to ensure that the remaining assets (passing to his wife) had a specific value. However, because of the wife's potential/ uncertain community interest in the portfolio (and some potential reimbursement claims), it was not possible to ensure that the portfolio would pass entirely to his children nor that the value passing to his wife would be in the desired amount.

We could have eliminated the community/ separate property issue with a post marital partition agreement coupled with a contractual will (giving the wife an
enforceable claim in return for her release of her community property interests). We could have used a forced widow's election. (In either case, it would have been tricky considering that I represented them jointly.)

Instead, the husband gave his wife the desired pecuniary amount, and then I included the following adjustment clause:

```
Special Adjustment For Community Interests in Harris Portfolio. The dollar amount of the Marital Deduction Gift shall be reduced dollar for dollar by the amount, if any, of my wife's claim to my Harris Portfolio. For this purpose, (i) my "Harris Portfolio" means the investment account in my name currently being administered by Harris International as account no. HI131842 and all successor accounts at Harris International or otherwise, if any, as of my death, and (ii) "my wife's claim" means the total amount of (A) her one-half community interest or other ownership interest in the Harris Portfolio and (B) the total amount of any reimbursement, economic contribution rights, or other claim with respect to the Harris Portfolio, but (I) only to the extent actually and successfully pursued and obtained by her and (II) only to the extent that I have not named her as a beneficiary or legatee of the Harris Portfolio.
```

Admittedly, this clause pushes the "simplified" definition a bit and it may not qualify as "bullet proof", but the clients liked it in spite of its limitations (which I spelled out in writing), mainly because it made it possible to completely avoid the community/separate property issue yet still achieve their goals.

5. **Draft Options Instead of Answers — Election Planning**

This is the essence of "election planning." Putting off what you can put off.

Election planning is not procrastination. Procrastination occurs when the deferred decision (or other action) is one that clearly should not be deferred. By contrast, properly structured election planning defers only those decisions that "can put off until tomorrow." Or as I explain it to my clients, "I prefer to draft options instead of answers."

Specific election planning techniques are discussed in Part D, "Election Planning," at page 20 of this outline.

**B. Simplify HOW You Do It**

Once you've applied the principals of the preceding discussion to simplify the end — the effect of the document to be drafted — you're ready to simplify the means to the end — the implementation. Although it is still theoretical, the following discussion is at the heart of the whole "simplified sophistication" concept because, unlike simplification of the end, simplification of the means to the end should never entail even the slightest impairment of the sophistication of the end.

1. **The 3 Fundamental Elements of KISS Drafting**

After pondering the matter for months, I've decided that a particular clause or document qualifies as KISS drafting ("simplified sophisticated" drafting) if it has three essential characteristics: functionality, clarity and brevity.

a. **Functionality**

First and foremost, KISS drafting, like all drafting, must work. It must actually achieve the "complex" goal, or at least meet the prevailing standard for competent estate planning. (If it's malpractice, it's not good enough.)

Note that, in practice, most KISS drafting entails preserving functionality, not implementing functionality. This is because KISS drafting invariably starts with language that is already 100% functional but unclear and/or excessively lengthy; the trick is to shorten and clarify the language without impairing functionality.

b. **Clarity**

Although secondary to functionality, clarity, especially substantive clarity, is the defining
characteristic of KISS drafting: it must be understandable by the intended reader.

(1) Substantive clarity

“The single biggest problem in communication is the illusion that it has taken place.”
George Bernard Shaw

“The more elaborate our means of communication, the less we communicate.”
Joseph Priestley

The words, sentences & paragraphs you construct must be easy to understand. How do you learn to do this? We've all had close to 20 years or more of formal education and many of us have had well over 20 years of on the job experience, so I have to believe that just about every estate planning lawyer has had ample opportunity to learn the skills.

I believe that clarity of expression is a function of 2 things: clear thinking, and choice. You cannot write clearly unless you have taken the time to think clearly. And even some remarkably clear thinking colleagues of mine chose to write in the way of the “old school” and will probably continue to do so for the foreseeable future.

For those who make the choice, here are some suggestions for drafting with clarity.

(a) No Legalese

“Think like a wise man but communicate in the language of the people.”
William Butler Yeats

“Don't appear so scholarly, pray. Humanize your talk, and speak to be understood.”
Moliere

Lawyers in ancient Rome were justified to write documents in Latin. Likewise, lawyers in English speaking countries should write in English. The only legalese I use is the term “per stirpes” and I use it only because, as my former partner Mickey Davis once explained, it's the only known case of a lawyer being able to say something with fewer words than a non-lawyer.

(b) Good Grammar, Not Proper Grammar

“Good communication does not mean that you have to speak in perfectly formed sentences and paragraphs. It isn't about slickness. Simple and clear go a long way.”
John Kotter

“From now on, ending a sentence with a preposition is something up with which I will not put.”
Winston Churchill

My mother majored in English. Therefore, I never graduated from high school, “I was graduated from high school”; it was never me, “it was I”; and I never did good, although I believe that, a couple of times, “I did well.” And I never dangled my participles.

I remain sincerely grateful for my mother's tutelage but I now follow the rules of grammar only when it looks and sounds good.

(2) Visual clarity

Once you have assembled the right words, you can enhance clarity by properly arranging those words on the page.

(a) Multiple Sentences; Multiple Paragraphs

Use short sentences.
Use short paragraphs.

Just as good music uses silence to separate sounds, good visual clarity uses silence to separate and emphasize text.

(b) Headings

Every paragraph that's 3 or more sentences long ought to have a heading. If you have difficulty coming up with a succinct heading that captures the full content of a particular paragraph, the paragraph probably needs to be broken into 2 separate paragraphs or else rewritten.

(i) Topic Headings

“Topic headings” merely indicate the subject of the paragraph; e.g., “Marital Deduction Gift,” “Distributions.” They're probably preferable if you assemble documents manually because, otherwise, you can spend as much time modifying headings as you spend modifying the operative language.

(ii) Substantive Headings

“Substantive headings” actually indicate the substantive content of the paragraph; e.g., “Pecuniary Marital Deduction Gift to Marital Trust,” “Discretionary Distributions to my Wife, Children and
Descendants.” Substantive headings are extremely helpful to both client and attorney.

If you’ve automated your documents with a document assembly system you should definitely automate paragraph headings to be substantive. Years before I began marketing FlexDraft (when it was just my personal system) I automated the paragraph headings, and this continues to be one of my favorite things because it allows me to explain an entire Will to my clients, with no advance preparation, just by scanning the headings.

(iii) Make Heading Bold, etc.

Headings should stand out; make them boldfaced or italic. This is as much for your benefit as the clients’. (See preceding discussion of substantive headings.)

(3) Organizational Clarity

It can be difficult deciding how to group clauses because every clause is related to every other clause to some degree. Nevertheless, grouping similar concepts together logically is very helpful. Of course, this means you have to thoroughly understand the logic of your documents and the legal issues they address before you can properly apply organizational clarity.

(a) The UPIA Example

The effect of the Uniform Prudent Investor Act on the FlexDraft forms is a good example of this concept. The FlexDraft Editorial Board concluded that UPIA effectuated a fundamental shift in the relationship between

- standards of fiduciary duty and
- standards for exoneration from liability for breach of fiduciary duty.

Prior law seemed to presume that fiduciaries were going to breech their fiduciary duties (because the standards were so high). The old view essentially punt ed the question of duty, and focused on exoneration from liability and the situations in which fiduciaries would qualify for exoneration. (“Your evil, but it's OK to be evil.”)

The pre UPIA version of FlexDraft mirrored that focus with detailed exoneration provisions but limited focus on explicit duty:

<table>
<thead>
<tr>
<th>PRE-UPIA Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 - EXECUTOR AND TRUSTEE</td>
</tr>
<tr>
<td>...</td>
</tr>
<tr>
<td>8.6. Fiduciary Liability.</td>
</tr>
</tbody>
</table>

---

| A. Generally. | Except as otherwise provided, an individual or entity serving as a Fiduciary who has exercised ... reasonable care, skill and prudence ... shall not be liable ... |
| B. Uncompensated Individual Fiduciary. | In addition, an Uncompensated Individual Fiduciary ... |
| C. Limited Liability For Predecessor Fiduciary. | ... |

9 - ADMINISTRATIVE PROVISIONS

[11 sections on general administration, and then...]


A Fiduciary shall exercise the judgment and care under the circumstances that persons of ordinary prudence ... considering the entire portfolio ... rather than on an individual asset basis, even if such investments fail to constitute properly diversified ...

UPIA shifted the focus from fiduciary exoneration to fiduciary duty, and the relatively higher (and lower) duties that different fiduciaries might have, thus making it clear that breech could be avoided by proscribing the caliber of duty expected or by setting significantly lower duties for selected fiduciaries. (“You're not evil after all.”)

As a result, the post UPIA version of FlexDraft contains shorter exoneration clauses and much more detailed statements regarding fiduciary duty. Also, the exoneration clause itself measures entitlement to exoneration in terms of the proscribed duty (while pre UPIA, the focus was on general fiduciary principals):

<table>
<thead>
<tr>
<th>Post UPIA Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 - EXECUTOR AND TRUSTEE PROVISIONS</td>
</tr>
<tr>
<td>...</td>
</tr>
<tr>
<td>8.6. Fiduciary Liability.</td>
</tr>
</tbody>
</table>

| A. Generally. | A Fiduciary who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Fiduciary in Section 9.2 and the other provisions of this Will shall not be liable .... For purposes of the preceding, a Fiduciary's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight. |

B. Uncompensated Individual Fiduciary. In addition, an individual serving as Fiduciary without compensation ...

...  

9 - ADMINISTRATIVE PROVISIONS  

9.1. Duties At Inception Of Estate. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, a Fiduciary shall ...

9.2. Fundamental Fiduciary Duties.  

A. General Standard Of Care.  

B. Loyalty And Impartiality; Primary And Secondary Beneficiaries.  

C. Conflict Resolution.  

D. Duty To Verify Facts.  

E. Reliance On Predecessor Fiduciary.  

F. Special Rule For Uncompensated Individual Fiduciaries. … (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Fiduciaries without special skills or expertise

9.3. Prudent Investor Rule. Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of a Fiduciary's investments. …

(b) One Trust per Article  

Combining multiple dispositive provisions – multiple trusts – in a single Article is contrary to the idea of grouping together related provisions and setting apart unrelated provisions. By having only one trust per Article, creating separate Articles for each separate dispositive arrangement, the client can more confidently know that, if he's reading in Article 5, he's reading about, e.g., “Child's Trusts.”

I've seen numerous documents that include a single Article providing for “Descendant's Trusts” or “Special Trusts”, or even so-called “Child's Trusts” for children and grandchildren. There's nothing wrong with that per se (except for a “Child's Trust” for a grandchild). However, when the Article contains various half-buried provisions carving out special exceptions “in case of Descendant's trust for child of mine” or “where the beneficiary is a grandchild or more remote descendant of mine, …” it makes it far too easy to misconstrue the document.

(c) The First 5 Pages as the Explanatory Memo  

Absolutely, without question, the best application of the “group similar concepts together” rule is the careful concatenation and concentration of the provisions most important to the clients in the first few pages of the instrument. I cannot overstate the importance and desirability of this drafting approach. Properly executed, it eliminates the need for explanatory memos because, for all practical purposes, the first 5 or so pages of the document are the explanatory memo.

(i) Explanatory Memos are Either Useless or Deceptive  

OK, I admit the preceding heading qualifies as strong talk; perhaps “fightin' words” to some. Here's my reasoning:

If the memo is identical to the Will, it's useless.

If the memo is not identical to the Will, it's deceptive.

OK, I admit it again, the preceding boarders on the Draconian – except that I've argued the point with various colleagues for over 15 years now, and while some have dismissed it, no one has refuted it.

When I first came to Houston I had the opportunity to work with some of the best probate litigators around. It is their influence that led me to the above conclusion. Time after time, I'd see a Will that, technically, should have been upheld. But there'd be a smoking gun, a letter, or a memo that persuaded the jury that maybe the testator really didn't know what was in the Will. And it wouldn't matter that the only possibly viable claim was lack of testamentary capacity: Juries know which boxes to check and what to write in the blanks to ensure that the “right” side wins.

A memo that oversimplifies the plan is dangerous.

And all “explanatory memos” are expensive to prepare, sometimes taking longer than the Will itself.

(ii) FAQ's Memos Are Just Fine  

By “explanatory memo” I mean a memo that paraphrases or purports to describe the effect of the Will or trust. A generic “FAQ's” memo that merely helps the clients get through the document but never says “your document provides …” does not implicate the above issue, if it is properly prepared. For example:
"Bad" Explanatory Memo

“Section 4.2.B gives your husband a “power of appointment” over the Bypass Trust. This is a very beneficial provision because it enables him to fine tune your Will upon his death without having to turn it upside down. For instance, he could revise the boilerplate applicable to the trusts for your children in order to help save taxes.”

Good FAQs Memo

“Q: What is a power of appointment?
“A: A power of appointment is a power to change who gets the property of a trust and/or change the terms of a trust. Specifically, when a document says, e.g., “Sam shall have a power of appointment ... exercisable in favor of my children that survive him...” it means that Sam has the power to give all or part of the trust to one or more of the children, or to change their relative shares or the terms of any trusts that apply to them, etc...

“Powers of appointment can be narrow, permitting only minor adjustments, and they can also be very broad, permitting wholesale revisions to the terms of a trust, depending on their terms and the applicable ‘boilerplate’ provisions.”

(a) Consistency Within Each Document

This is embarrassingly obvious. Everybody knows you shouldn't change the name of your defined terms, or vary your “standard” way of saying “in the trustee's sole discretion”, etc. Yet all lawyers (including estate planners, and including me when I let my guard down) commit these sins when hurried, tired or lazy.

Inconsistency within documents is a natural consequence of the fact that so much of our drafting consists of constructive plagiarism. When we see a good clause, we paste it into our forms. This improves our documents but imbues them with multiple drafting styles, and unless we take the time to carefully polish each new addition, over time, our documents become devoid of any “style” whatsoever.

My former litigator colleagues and I agreed whole heartedly that every word matters, and if a clause appears 5 times in the document but one of the times it's worded differently, then presumptively, there's a reason for it. And if an upset beneficiary or skilled litigator is able to craft a reason that supports his or her position, inconsistent drafting becomes defective drafting.

But this is more than malpractice avoidance. This is good lawyering, drafting that rises to level of fine prose, that becomes an effortless joy for the clients. (OK, no Will is “effortless,” but well written ones can be low-effort.)

Bad FAQs Memo

"Q: What is a power of appointment?
"A: A power of appointment is a power to change who gets the property of a trust and/or change the terms of a trust. Specifically, when a document says, e.g., “Sam shall have a power of appointment ... exercisable in favor of my children that survive him...” it means that Sam has the power to give all or part of the trust to one or more of the children, or to change their relative shares or the terms of any trusts that apply to them, etc..

“Powers of appointment can be narrow, permitting only minor adjustments, and they can also be very broad, permitting wholesale revisions to the terms of a trust, depending on their terms and the applicable 'boilerplate' provisions.”

Sublime consistency is the aspiration great minds.

BARNEY JONES

(4) Consistency

Consistency is the last refuge of the unimaginative.

OSCAR WILDE

A foolish consistency is the hobgoblin of small minds, adored by little statesmen and philosophers and divines. With consistency, a great soul has simply nothing to do. (emphasis added)

RALPH WALDO EMERSON

The lawyer's truth is not Truth, but consistency or a consistent expediency.

HENRY DAVID THOREAU

Clients and lawyers alike are confounded by inconsistencies of every variety, and it doesn't take many before the clients begin to doubt your qualifications. Yet for reasons I don’t fully understand, consistency often gets a bad rap.

In some circumstances, consistency is, indeed, a surrender to boring, mindless habit. That’s bad. Oscar Wilde’s “The Importance of Being Earnest” demonstrates that inconsistency can be wildly humorous and entertaining; I don’t begrudge him his disdain for consistency. Nor do I begrudge Emerson his disdain for the intellectually impotent leaders of his day who embraced draconian dogma and rejected provocative original thought. Fight the Power, Ralph!

But in law, both natural and legal, I sincerely believe that consistency is truth. Thus, I do begrudge those who dismiss their own inconsistency and incoherence by invoking Emerson and misquoting – and completely contorting the meaning of – his famous assessment of consistency. He never said “consistency is the hobgoblin of small minds” and I seriously doubt he would agree with anyone who did. Perhaps, however, Emerson would agree with the following:
(b) Consistency Among Different Documents

While not necessarily implicating the same legal construction issues as internal inconsistency, inconsistency among different documents detracts from the overall “quality” perceived by the client. Consistent documents dramatically improve the clients' ability to really understand their documents.

For instance, if you were to raise the hood and take a look inside FlexDraft, you'd see that it actually contains only one form from which all Wills and all trusts are drafted. This obviously makes my job as a forms designer/updater a lot easier. But it also makes the clients' job a lot easier when, a couple of weeks after they've signed their Wills, they receive a proposed draft of their life insurance trust and it reads almost like a clone of their Wills. They breeze through it and, even better, they sometimes catch something they missed when they were reviewing their Wills. This allows me to conform their Wills to the final terms of their ILIT and then they can re-execute their Wills when they execute the ILIT.

(i) Signature Lines, etc.

Consistency is helpful even on the most mundane level. For instance, the FlexDraft “Ancillary Documents” (Directives, powers or attorney, etc.) all have consistent introductions and consistent signature blocks, to the extent possible: they look the same, they're worded the same, they're in the same location on the page, etc. This makes life a lot easier for elderly clients who, exhausted at the end of a document review, can easily recognize “just another signature block.”

(c) Between Client Conferences and Documents

This type of consistency is the one most likely to improve your clients' understanding of the documents you prepare. Prepare your clients for their documents by speaking in the language of your documents.

- If you Will forms create a “Bypass Trust,” don't call it a “Credit Shelter Trust” in the client conference.
- Make a point of telling them what the document is going to say when they receive it: “It will say ‘I give a Marital Deduction Amount to the Marital Trust’, and a couple of paragraphs later it will say ‘I give my Remaining Property to the Bypass Trust.’”

Years ago, when my then partner Mickey Davis switched forms (to what later became FlexDraft), he joked: “The new form started off real confusing to my clients, but about the same time I got used to it, my clients weren’t confused anymore” (not a verbatim quote). Mickey, of course, spoke the language of his prior forms very well and, as a result, his clients generally understood those forms very well. When he became comparably well versed in FlexDraft, his clients started understanding FlexDraft forms too.

c. Brevity

“Brevity is the best recommendation of speech, whether in a senator or an orator.”

*Marcus Tullius Cicero*  
(106 BCE-43 BCE)

Everybody always prefers brevity in documents they deal with. When you give your clients succinct documents, you're telling them “I respect the value of your time.”

OK, not *everybody*. Years ago, my boss would sometimes instruct me to lengthen documents. The idea was that longer documents would impress the clients, making them more willing to pay our fee. Enhancing the clarity of the documents wasn’t a concern.

Likewise, brevity sometimes ignites concerns that the document is incomplete (“It can’t possibly cover everything and be that short”) but I believe that’s a reflection of client anxieties that shouldn’t dictate drafting styles.

Excepting the above peculiars, I can not recall anybody anywhere who was ever seriously unhappy that the document did what it was supposed to do succinctly.

(1) Admittedly; Brevity is Hard and Scary

“The waste basket is the writer's best friend.”

*Isaac Bashevis Singer*

The Mark Twain quote (page 4 of this outline) about lacking the time to write a short letter is on point here. Even if you already have something that is both functional and clear, it’s still a substantial effort to instill the third “KISS Drafting” essential of brevity. It’s also, to me, the scariest of the three to implement. Like cleaning out the garage, when you come across something that appears totally useless, there's always that nagging fear: “What if I need this one day?”

If you make the wrong decision cleaning out the garage, you might have to make an extra trip to the
hardware store for eye hooks. By contrast, if you strike the reference in your “plan benefits trust” clause that deals with powers of appointment and this subsequently causes the trust to no longer meet the “look through trust” requirements for designated beneficiary status, you might have to write a letter to your malpractice insurance carrier.

I recently finished thinking through my HIPAA Disclosure form. I had reviewed lots of other forms and many of them, by colleagues I respect, referred to the person authorized to receive information as a “personal representative.” I had to read the regulations half a dozen times before I was finally comfortable in my conclusion that “personal representative” was a defined term with a specific meaning that could be stricken from the form (and that, actually should be stricken because it implied that the authorized person was intended to have decision making authority, not merely the right to receive information).

(2) Minimize the Number of Words Used to Make Each Point

The obvious starting point is to minimize the number of words used for each point you make – without impairing either functionality or clarity. This falls into the “easier said than done” category. And though this is the most obvious way to make a document brief, it's actually one of the poorest ways to do it well, for the simple reason that, if you already have a functional, clear document, a Herculean effort might shorten the document only slightly yet significantly impair it's clarity.

(3) Minimize Repetition

Minimizing repetition is the best way to achieve brevity. Lawyers and non-lawyers alike surely agree: in a hunt for repetition, legal documents qualify as a “target rich” environment.

The moment you say something for the third time, consider creating a defined term.

Verbose way:

<In a Descendant's Trust> “If 2 physicians who have examined the beneficiary within the prior two years have certified that in their judgment the beneficiary does not have the physical or mental capacity to effectively manage his or her financial affairs ...”

<In the Trustee Provisions> “If 2 physicians who have examined the trustee within the prior two years have certified that in their judgment the trustee does not have the

Brief way:

<In a Descendant's Trust> "If, the beneficiary is incapacitated ..."

<In the Trustee Provisions> "If the trustee is incapacitated ...

<In the initial revocable trust> "If I am incapacitated "

<In the Definitions provision in the back> "For purposes of this Will, an adult individual shall be considered legally incapacitated if 2 physicians who have examined the person within the prior two years have certified that in their judgment the person does not have the physical or mental capacity to effectively manage his or her financial affairs ...

(4) Minimize Physical Document Length

This is nothing more than typesetting and layout but it's worthwhile. Sheer page count, in and of itself, can tip the clients into a state of intimidation before they even read the first word. Clients like short documents. It's environmentally friendly, and it's not hard:

- Minimize margins. Text (not headers and footers) should be a maximum of 1” from the paper's edge; headers and footers should reside within that 1” space.

- Minimize paragraph indents. The old-school standard 1/2” inch indent made sense for fixed pitch Courier typewriters but is excessive for today's proportional typefaces. (This outline uses 3/10” and 2/10” indents.)

- Don't use double indent (left-right indent). Indent only the left side of subparagraphs.

- Don't double space. If you simply can't abide single spacing, try 1 ½ spacing.

- Don't put a full blank line between paragraphs. Use half-line “paragraph spacing” (a “space before” of 6 points).
• Use letter size paper. Even though it increases the page count, letter size documents always feel shorter than legal size documents (and this is mostly about spin, not substance).

• Most of all, bury the boilerplate. As discussed both above and below, minimize the amount of the document the client is forced to read in order to understand the plan. (See Part III.B.1.b(3)(c), “The First 5 Pages as the Explanatory Memo”, at page 10 of this outline.)

2. DEFINITIONS

“If you wish to converse with me, define your terms.”

VOLTAIRE (1694-1778)

If you stop and think about it, it’s nonsensical to question the use of defined terms in your documents. If the words you use appear in the dictionary, you already draft with defined terms; you’re just abdicating control of the definitions.

a. Why To Use Them

I’ve already discussed the use of definitions to minimize repetition. (See Part III.B.1.c(3), “Minimize Repetition“, at page 13 of this outline.)

They also allow you to move boilerplate to the back of the document, so the clients don’t have to wade through technical provisions.

Most of all, however, definitions allow you to write precise clear language with fewer words and less risk of inconsistency.

b. Where To Put Them

There’s no single right place for all definitions.

(1) In Context

Sometimes the definition of a term simply belongs in context, within a particular provision in the document; e.g.: when the term is used in that provision and no other; when knowing the term’s meaning is essential to understanding the provision and the term’s meaning is not apparent; or where the term is particularly important to the client or you want to be sure the clients understand exactly what they’re doing.

For example, I believe the clients’ own “children” should be defined in the introductory provisions because it is so important to be sure the clients know (i) the current children who are included, (ii) the children, if any, who are excluded, and (iii) whether afterborn children are (or are not) included automatically:

Clients’ “Children” defined in context.

I have two children: Wallace Cleaver, and Theodore Cleaver. Every reference in this Will to a “child” or “children” of mine is to them and all other children who may be born to or adopted by me in the future.

Clients should be able to get the [general] meaning of documents via a linear read – without being forced to flip to the back for the meaning of a quirky or essential term.

(2) Grouped In the Boilerplate

Sometimes the definition of a term is best grouped with others in a “Definitions” section in the boilerplate. This is true for any term that is used throughout the document; that has an intuitive (readily deduced) meaning; and whose precise technical meaning is not essential to understanding the general meaning of the provisions that use it.

For example, I prefer to place the definition of “children” of other individuals in the back of the document, because that definition is more complicated yet generally less relevant to the clients' goals:

Children of Others defined in the back

Children And Descendants. Except as otherwise provided, a “child” of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual’s “descendants” means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

(3) Never Grouped in the Front

Definitions should never be grouped together in the front of a document. This may be convenient for the lawyer (who knows the terms by heart anyway) but it’s an imposition on the clients inasmuch as it forces them to memorize (or ignore and skip) often a dozen or more defined terms, all out of context.

c. Clarifying Potentially Ambiguous Terms

Many commonly used words are not sufficiently precise to be safely used without a clarifying definition.
However, clients’ rarely need to know nor care to know the precise limits; they’re just as happy to work with the lay definition. Thus, a boilerplate clarifying definition is appropriate for terms like

- Incapacitated
- Survive
- per stirpes

d. **Counterintuitive Definitions**

Never assign definitions that are flat out contrary to common usage or contrary to generally accepted technical meaning. For example:

<table>
<thead>
<tr>
<th><strong>Confusing Counterintuitive Definitions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>“My children” means my son Jack, my daughter Sue, my niece Emily, and my good friend, Inga.</td>
</tr>
<tr>
<td>Or</td>
</tr>
<tr>
<td>Or</td>
</tr>
</tbody>
</table>

Definitions like these, especially when they're buried in the back (and I have seen the first two of the above “buried” in actual, executed Wills) are a dirty practical joke at best, and completely misleading, perhaps even negligent, at worst.

The above definition of “self dealing” is taken from the Grizzle case (Texas Commerce Bank v. Grizzle, 96 S.W.3d 240, 2002) and serves as an extreme example of the confusion that can result when a term is assigned a definition completely contrary to its normal meaning. In that case the plaintiff argued that the above acts should qualify as “self dealing” if the trustee was acting out of personal interest, and that this rendered the exoneration clause inapplicable because, at the time, it was not possible to relieve a corporate trustee from liability for “self dealing.” The Texas Supreme Court ruled (properly, in my view) that you could exonerate corporate trustees from liability for the above acts but because the court ruled within the framework of the plaintiff’s definition, the court worded its ruling (in advisedly, in my view) to say you could exonerate corporate trustees from liability for “self dealing” (so defined). The court’s “so defined” proviso was often lost in retellings of the case and this created a lot of confusion in the estate planning community.

e. **Expanding/ Limiting Definitions To Achieve Dispositive Goals**

On the other hand, I believe it’s good drafting to stretch or squeeze the meaning of a term as a means to achieve a dispositive goal, but only if the definition assigned to the term is reasonably consistent with its common usage or the clients’ usage. For example:

<table>
<thead>
<tr>
<th><strong>Effective Stretching/ Squeezing of Definitions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>“My children” means my natural born sons, Tom, Dick and Harry, and my wife’s natural born daughters, Sarah and Samantha, whom I intend to treat as my own.</td>
</tr>
<tr>
<td>Or</td>
</tr>
</tbody>
</table>

In both of the above cases, the defined meaning of “my children” is very consistent with the clients’ personal definition and reasonably consistent with common usage. (But note, however, that both examples arguably constitute excessive “dispositive definitions”, as discussed below.)

f. **Excessive “Dispositive Definitions”**

Definitions, especially when grouped and segregated from operative provisions, can sometimes get carried away You could draft an effective Will with only a single dispositive provision and lots of definitions. For example, the following Will could be perfectly valid (which simply proves the point that absurdity and validity are not mutually exclusive concepts):

<table>
<thead>
<tr>
<th><strong>Excessive Dispositive Definitions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>I, Testator, make this my Will and give my property to my heirs.</td>
</tr>
<tr>
<td>...</td>
</tr>
</tbody>
</table>

**Definitions.** “Testator” means Jim Jones, of Harris County, Texas.

“My heirs” means (i) as to my ski boat, my son Chuck, (ii) as to $10,000 cash, my daughter Sue, and (iii) as to my residuary estate, my wife Mary.

In the case of any heir who is incapacitated, “give” means “give to the Trustee to be held in a Contingent Trust until the heir is not incapacitated.
g. Capturing Complex Concepts

The most common estate planning example of a definition used to capture, and then work with, a complex concept, is a formula marital deduction gift. These can be very difficult to figure out, or delightfully concise.

Old-School Marital Gift

Marital Deduction Gift. If my wife survives me, I give the sum of (i) all income in respect of a decedent and rights to income in respect of a decedent included in property (including any Nonprobate Assets payable to the Trustee) or the proceeds of property, the value of which is included in my gross estate for federal estate tax purposes, that is available for distribution in satisfaction of the this gift, and as to which (if distributed in satisfaction of this gift) it is possible (by election or otherwise) to obtain a federal estate tax marital deduction, if any, plus (ii) the smallest additional pecuniary amount of such property, if any, which, if allowed as a federal estate tax marital deduction, would result in the lowest possible total of federal estate tax and state death taxes (but only those state death taxes which are estate taxes computed by reference to the credit allowable under Code Section 2011, or successor provisions) payable from all sources by reason of my death, to the Trustee, to be held as a “Marital Trust” for the benefit of my wife, ...

Note that the above clause is actually substantially simplified (it's incomplete); the actual language necessary to do it the “old school” way would be roughly three times longer.

FlexDraft Marital Gift

2.3. Marital Deduction Amount. If my wife survives me, I give a Marital Deduction Amount (defined in Article 11) to the Trustee of the Marital Trust, to be administered as provided in Article 4.

... 11.1. Marital Deduction Amount. The Marital Deduction Amount is the sum of ... <etc.>

h. Excess Simplification of Complex Concepts

Simplifying definitions can go overboard, however, if instead of allowing the clients to gloss over the subtleties, they simply leave out salient information. For example, I consider the following to be misleading:

Excess Definitional Simplification

4 - MARITAL TRUST

4.1. Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife the income of the Marital Trust, at least quarterly.

... 11.7 Income Of The Marital Trust. For purposes of section 4.1, the “income” of the Marital Trust means (i) all trust accounting income plus (ii) so much of the principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for my wife’s continued health, maintenance and support.

On the other hand, the following is not misleading, especially if you’ve discussed uni-trust concepts with the clients and told them it’s possible to define “income” as a uni-trust amount:

Reasonable Simplification

4 - MARITAL TRUST

4.1. Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife the income of the Marital Trust, at least quarterly.

... 11.7 Income Of The Marital Trust. For purposes of section 4.1, the “income” of the Marital Trust means (i) a four percent Unitrust Amount of the Marital Trust, determined as follows: ...

But I prefer the following because it is just as easy – probably easier – for the clients to understand, and it reminds them (and us) that we have a sophisticated definition of income at work here:

The Best Alternative

4 - MARITAL TRUST

4.1. Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife a four percent Uni-Trust Amount of the Marital Trust (defined in Article 11), at least quarterly.

... 11.7 Uni-Trust Amount. The Unitrust Amount for each calendar year of the Marital Trust is the ...
specified percent of the net fair market value of the assets of the trust, (i) valued as of ...

3. “Plug & Play” Drafting

I use the term “plug and play” to refer to a drafting style I started experimenting with 15, maybe 20 years ago, at roughly the same time that I was first designing what is now FlexDraft. The goal of plug & play drafting is to allow me to use static boilerplate that will be appropriate for the dispositive scheme no matter how much I might revise the dispositive scheme, and that gives the clients a comparable flexibility down the road.

FlexDraft's Crummey withdrawal powers are probably the best plug & play example. The boilerplate for a standard ILIT or Gift Trust includes definitions of the terms “Full Withdrawal Right” and “5 & 5 Withdrawal Right” along with all the details required to ensure that withdrawal rights work smoothly. As a result, the dispositive provisions in the front of the trust agreement are concise and easy to read. “"

Plug & Play W/D Rights

1.2. Withdrawal Rights. My husband shall have a 5 & 5 Withdrawal Right over all Gifts to the trust. If any Gift is not fully covered by my husband’s Withdrawal Right, each child of mine shall have a Full Withdrawal Right over the portion of the Gift that exceeds my husband’s Withdrawal Right and each other descendant of mine shall have a Full Withdrawal Right over the portion (if any) that exceeds my children’s Withdrawal Rights. All Withdrawal Rights are subject to Section 7.7. (The terms 5 & 5 Withdrawal Right, Full Withdrawal Right and Gift are defined in Article 7.)

7 - WITHDRAWAL RIGHT AND TAXABLE TRUST PROPERTY

7.1. Withdrawal Right. Each beneficiary having a Withdrawal Right with respect to a Gift (defined below) may direct the Trustee to distribute trust property to the beneficiary up to the amount and upon the conditions specified in this Article. The distribution may be made either out of the property involved in the Gift or other trust property, in the Trustee’s discretion.

7.2. Amount Subject To Withdrawal. The amount of a beneficiary’s “Full Withdrawal Right” with respect to a particular Gift (or portion of a Gift) is the lesser of (i) the Annual Exclusion Amount, (ii) the 5 & 5 Limitation, and (iii) the beneficiary’s Pro-Rata Share of the Gift (or portion).

A. Annual Exclusion Amount. ...

B. 5 & 5 Limitation. ...

C. Pro-Rata Share. ...

7.7. Donor’s Right To Alter Withdrawal Right. ...

This drafting style makes it exceptionally easy for me to quickly see exactly what the document does. Thus, whether I’m preparing for the signing conference or answering a CPA’s question about a document I drafted 5 years ago, I’m up to speed in about 15 seconds. (I don’t worry about proof reading the boilerplate for conforming amendments because there’s never any reason to make conforming amendments to the boilerplate.)

Plug & play drafting also simplifies matters for the client. She can review the proposed draft quickly because, in my planning conference, I will have made a point of telling her “your husband will have a 5&5 Withdrawal Right over all gifts to the trust” and, sure enough, that’s what page 1 of the trust says, almost verbatim. The complicated stuff is all there, but it’s in the back so she doesn’t have to wade through it unless she wants to.

Likewise, a year or two later when the client wants to alter the withdrawal rights as to a particular gift, she simply says (in her cover letter for the gift), e.g.: “as to this gift my husband shall have no Withdrawal Right and my children shall have only 5&5 Withdrawal Rights.”

4. Balancing the 3 Essentials

Just as the memory requirement of testamentary capacity requires that the testator simultaneously possess the other requirements, successful KISS drafting must simultaneously achieve its 3 essentials: functionality, clarity and brevity.

a. It's automatic in many cases

“Plug & play” drafting can single handedly achieve all 3 essentials. (Admittedly, it intentionally refrains from maximum brevity by including definitions that might never be needed, but their out of the way location and the flexibility they facilitate justify this slight violation of KISS essentials, in my view.)
Clear wording is almost always shorter than unclear wording.

Functional language – real functional language – is result oriented (see the above Marital Deduction Amount provisions) and is almost always shorter than deficient language.

b. It's difficult, and even counter-intuitive in other cases

(1) Functionality at all costs

Pure functionality, with no concern at all for clarity or brevity, is incomprehensible to anyone who doesn't have a law degree plus 3 hours to kill; however, the flip side, waiving functionality, is legal malpractice.

(2) Brevity at all costs

“In labouring to be concise, I become obscure.”

HORACE (65 BCE-8 BCE)

Ignoring the need for brevity is obviously going to result in excessively lengthy documents. But brevity at all costs is blunt, cryptic. It frequently confuses clients.

The above clause is from the first Will form I worked with, which originated in a Chicago law firm. Those forms are still the undefeated brevity champions in my book. But they were never especially clear. For example, they never gave property to “my children”. They always said “to my descendants.” We estate planning lawyers know that “descendants” starts with children, but most of our clients don't. Eventually, I got tired of irate clients asking me “why did you cut out my children?” and I replaced all the “to my descendants” passages with the following language. It’s substantially longer but also substantially clearer:

That Chicago firm also used “parts” instead of percentages when making gifts to several recipients in unequal shares:

**Extreme Brevity; Questionable Clarity**

**Remaining Property.** My Remaining Property shall be divided into as many parts as necessary to provide for the following and each part shall be distributed to its designated recipient:

- 20 part for my niece Sue Smith, if she survives me.
- 16 parts for my nephew Sam Smith, if he survives me.
- 12 parts for my brother Charles Smith, if he survives me.
- 8 parts for my sister Karen Smith, if she survives me.
- 24 parts for my sister Carol Smith, if she survives me.

The above language is very brief, very precise, and elegantly functional: If the gift to a recipient fails (e.g., if the recipient does not survive), that recipient’s “parts” are not created. As a result, the total of all parts decreases. And because the other recipients’ parts remain the same, their percentage shares of the total parts increase. Thus, lapsed parts are automatically reallocated pro rata to unlapsed shares. The total parts don’t need to equal 100 or any other round number; thus, it’s easy to make revisions (each recipient’s parts can be increased or decreased individually – there’s no need to adjust the other parts so that the total adds up to 100); it’s easy to deal with shares that aren’t easily expressed in percentages (such as third’s); and the math for reallocating lapsed parts is uncomplicated (you simply divide by however many parts remain).

On the other hand, the above language was cryptic and confusing to most clients. Clients were consistently confused when the total parts didn’t add up to 10 or 100. Some clients never understood how lapsed parts were automatically reallocated, no matter how many times I tried to explain. Although I still use parts in special situations, I now prefer the following less brief but more easily understood approach.

** Longer, but Clearer Alternative**

**Remaining Property.** My Remaining Property shall be distributed to the following individuals who survive me, in the following shares:
Drafting Down (KISS Revisited)  Chapter 13

25% to my niece Sue Smith.
20% my nephew Sam Smith.
15% to my brother Charles Smith.
10% to my sister Karen Smith.
30% to my sister Carol Smith.

If any of the above individuals fails to survive me, the share he or she would have received (if he or she had survived) shall be distributed to the other, surviving individuals pro rata to their shares as specified above.

(3) Clarity at all costs

Clarity at all costs is rarely functional and rarely brief. Fortunately, extreme clarity is a disease that afflicts few, if any, attorneys.

5. AVOID ATTESTED CODICILS

Codicils made sense when every page of the Will had to be typed on a manual typewriter with several carbon copies. However:

In the modern world of word processors, optical character recognition, etc., attested Codicils are virtually obsolete and should never be used except in very rare cases.

There are sometimes strategic reasons to use a Codicil when, for instance, the client essentially wants to trick his heirs (or protect them from hurt feelings), so he puts the offending provision in a Codicil and, if the concern addressed by the provision never arises, then Codicil need not be probated. Likewise, clients desiring to take a parting shot at a child or other beneficiary may want that beneficiary to see that his original gift under the Will was reduced by the Codicil.

6. USE HANDWRITTEN PERSONAL EFFECTS MEMOS

Although I’m generally opposed to attorney drafted Codicils, I’m a strong proponent of personal effects memos, handwritten by the clients so as to qualify as valid holographic Codicils. Holographs are, of course, tedious to probate; however, in over 20 years of practice I’ve probated fewer than half a dozen personal effects memos. In nontaxable, amicable estates there’s no need: The family almost always honors the decedent’s wishes as to personal effects, whether those wishes were expressed in a holograph or orally. Yet 9 out of 10 clients really, really like it when the Will mentions the possibility of – and I provide them with guidelines for preparing – a personal effects memo. My standard personal effects memo guidelines are discussed in Part IV.A.1, “Standardized Memos Instead of Customized Explanations”, at page 26 of this outline, and are attached as Exhibit D at page 88 of this outline.

C. KISS LIMITS - When Complexity is Right

“Everything should be made as simple as possible, but not simpler.”

ALBERT EINSTEIN

“The guiding motto in the life of every natural philosopher should be, Seek simplicity and distrust it.”

ALFRED NORTH WHITEHEAD

“For every problem there is a solution which is simple, clean and wrong.”

HENRY LOUIS MENCKEN

1. STATUTES PROHIBIT SIMPLICITY

It could take a 3 volume treatise to cover this topic thoroughly, but, in short, the drafter should be mindful that there are various statutory provisions that, in effect, prohibit KISS drafting.

Safe harbor savings clauses may be embarrassingly bad, but if including the clauses in your document ensures that the client is protected, you don't have much of a choice.

2. STATUTES IMPAIR SIMPLICITY

Sometimes the applicable statute or regulation just doesn't make sense. This leaves us with one workable alternative: Just copy the statute's wording into your document. You'll have a document you don't understand, but at least you know that, whatever it does, that's what the statute requires.

3. OUR IGNORANCE LIMITS SIMPLICITY

This is the one that scares me. When you believe you have found the true simplicity “on the other side of complexity”, there's always a risk that you missed it, and that you're actually wallowing in the over-simplistic on “this side” of complexity.

4. SOMETIMES YOU INTENTIONALLY OBSCURE REALITY

In various situations you may determine that the clients are going to be better off if they don't have to
deal with a particular issue. As discussed above, the use of defined terms shields the clients from the details.

In other situations it may be appropriate to draft in such a manner as to draw attention away from what's really going on. For example, in order to preserve GST Inclusion Ratios, the FlexDraft forms provide that every separately sourced distribution to a trust is actually allocated to a wholly new and separate duplicate of that trust. A “successive distributions not required” provision allows immediate – or even a priori merger.

"Obscured" Multiple Trust Creation/ Merger

3.2. Disposition If My Wife Does Not Survive Me But Descendants Survive Me. If my wife does not survive me but at least one child or other descendant of mine survives me, I give my Remaining Property to my children who survive me, in equal shares. However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me. All of the preceding distributions are subject to the provisions of Article 6 (providing for lifetime Descendant’s Trusts for my children and other descendants).

6 - DESCENDANT’S TRUSTS

6.1. Creation Of Trusts. All property that passes subject to the provisions of this Article that otherwise would be distributable to a child or other descendant of mine shall instead be distributed to the Trustee as a separate Descendant’s Trust named for the child or descendant, to be administered as provided in this Article.

D. Election Planning

The following are samples of relevant language for implementation of various election planning techniques. (General election planning concepts are discussed briefly in Part III.A.5, “Draft Options instead of Answers – Election Planning,” at page 7 of this outline.)

1. DISCLAIMER PLANNING

Effective disclaimer planning entails (i) controlling the distribution of disclaimed assets and (ii) controlling the terms of a trust that receives disclaimed assets. It almost always involves disclaimers by the surviving spouse into a trust for the surviving spouse.

Unfortunately, many disclaimer Wills are more complicated for clients to read than Wills with marital deduction formula gifts.

Excessively Complex Disclaimer Planning

Disclaimer of Gift to Marital Trust. Notwithstanding the foregoing, my wife or her personal representative may disclaim, pursuant to Section 2518 of the Code and Section 112.010 of the Texas Trust Code, all or part of my wife’s interest in the Trust created under this Paragraph in which event the property or interest so disclaimed shall be held in a separate and distinct Trust (herein referred to as “Disclaimer Trust”) from the Trust above created on the same terms as
provided in this Paragraph (excluding, however, the Subparagraphs titled "Election by Executor", "Special Power Concerning Unproductive Property and Intent to Qualify for Marital Deduction" and "Wife’s Special Testamentary Power of Appointment"), as well as on all other applicable terms of trust in this Will, except that my wife, acting individually or as a fiduciary, or her personal representative, shall have no powers over this Trust which would result in such disclaimer failing to be a qualified disclaimer pursuant to Section 2518 of the Code.

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**Better Disclaimer Planning**

2.5. Disclaimer Of Marital Deduction Amount. If my wife survives me but she disclaims all or any portion of her interest in the Marital Deduction Amount, I give the disclaimed portion (including all interests of persons other than my wife) to the Trustee of the Disclaimer Trust, to be administered as provided in Article 5.

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5 – DISCLAIMER TRUST

5.1. Distributions During The Trust Term. During the term of the Disclaimer Trust, the Trustee shall distribute to my wife, as primary beneficiary, and may distribute to my children and other descendants, as secondary beneficiaries, ...

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10 DEBTS, EXPENSES AND TAXES

10.4. Source Of Payment.

C. Disclaimer By My Wife. In the event of a qualified disclaimer by my wife of any interest in any property, any resulting increase in Death Taxes shall be charged against the disclaimed interest.

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11 - MARITAL DEDUCTION AMOUNT

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11.4. Computational Guidelines. The Marital Deduction Amount shall be determined: (i) as if a federal estate tax marital deduction is allowed for property distributed to the Marital Trust; (ii) without regard to any qualified disclaimer that my wife may file with respect to the gift of the Marital Deduction Amount or any other interest passing from me to my wife under this Will or otherwise; and (iii) in all other respects, after accounting for all other deductions and credits allowed to my estate and after giving effect to the exercise or proposed exercise of tax elections.

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12 GENERAL PROVISIONS

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12.3. Disclaimer Trusts. This Section applies whenever an individual (the "Disclaimant") files a qualified disclaimer with respect to any property that passes to (or remains in) a trust under this Will (the "Recipient Trust") by virtue of such qualified disclaimer, but only if the Disclaimant: (i) is a Trustee (or named successor Trustee) of the Recipient Trust; (ii) has the power to remove a Trustee of the Recipient Trust; (iii) holds any Power of Appointment (defined in Section 12.4) over the Recipient Trust; (iv) has any beneficial interest in the Recipient Trust; or (v) has any power to direct the beneficial enjoyment of the Recipient Trust. Notwithstanding any contrary provision of this Will, unless the Disclaimant disclaims all of his or her rights, powers and interests with respect to the Recipient Trust as described above, the property which would otherwise pass to (or remain in) the Recipient Trust shall instead be distributed to a separate Disclaimer Trust on terms identical to the terms of the Recipient Trust except as follows.

A. Power Of Appointment. The Disclaimant shall possess no Power of Appointment over the Disclaimer Trust.

B. Ascertainable Limitation On Discretionary Powers. Neither the Disclaimant nor any Trustee whom the Disclaimant may remove from office without cause, shall possess or exercise any powers with respect to, or be authorized to participate in any decision as to, any discretionary distribution or any loan to or for the benefit of any beneficiary of the Disclaimer Trust, except to the extent that such distributions or loans are limited to amounts necessary for the beneficiary’s health, maintenance, support and education.

C. Discretionary Termination. The Disclaimant shall have no authority to terminate the Disclaimer Trust because of its small size.

D. Estimated Tax Payments. The Disclaimant shall have no authority to treat any estimated income tax payment by the Disclaimer Trust as an estimated income tax payment by a beneficiary.

E. Beneficial Interest. If the Disclaimant is not my wife, the Disclaimant shall have no beneficial interest in the Disclaimer Trust.
F. Independent Trust Administration. As to persons who remain as beneficiaries of both the Disclaimer Trust and the Recipient Trust, the Trustee may exercise discretionary powers held with respect to the Disclaimer Trust and the Recipient Trust (including discretionary distributional powers) on an independent basis, and where the Recipient Trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount so specified shall not change but the Trustee may distribute such amount from either the Recipient Trust or the Disclaimer Trust or partly from each in any ratio.

2. QTIP ELECTION PLANNING

a. ... As a Backup to a “Standard” Marital Deduction Plan

Every Will with a QTIP style Marital Trust should always facilitate QTIP election planning as a backup to the primary marital deduction planning technique; i.e., the Will should authorize but not require the executor to make the QTIP election under IRC §2056(b)(7) as to the Marital Trust. This is true whether the Will utilizes a formula marital deduction gift or disclaimer planning as the primary marital deduction technique. QTIP election discretion empowers the Executor to “non-elect” QTIP (to not make the QTIP election) and effectively reduce the estate tax marital deduction otherwise available for the Marital Trust. The executor may defer the decision for up to 15 months after the decedent’s date of death (i.e., until the extended due date of the federal estate tax return). This post death flexibility to fine tune the marital deduction can be very beneficial, especially if circumstances change after the decedent’s death (e.g., if the surviving spouse dies).

b. ... As the Primary Planning Mechanism: The QTIP Election Plan

If, no matter what, the surviving spouse is to have a lifetime income interest in all the decedent’s property – both the marital share and the bypass share – a QTIP Election Plan is a viable, simpler alternative to a standard marital deduction plan or a disclaimer plan. A QTIP Election Will utilizes QTIP election planning as the primary marital deduction planning technique: 100% of the residuary estate passes to a qualifying QTIP style Marital Trust ... period. There is no Bypass Trust.

The Marital Trust must be a QTIP style marital Trust – one that, under IRC §2056(b)(7), qualifies for the marital if and only if the executor makes the QTIP election. A LEPA (“Life Estate with Power of Appointment”) Marital Trust does not work because that trust qualifies for the marital deduction without regard to any post death elections. IRC §2056(b)(5). The Will also should have properly drafted boilerplate; in particular, I prefer that the Will authorize division of the Marital Trust (or at least not override the division authority of Texas Trust Code §112.057), so that the elected and non-elected portions can be separated into separate trusts, thus allowing separate administration, investment and distribution for each portions.

When the decedent with a QTIP Election Will dies, the executor will probably face one of the following three situations:

- The decedent’s gross estate exceeds the tax free amount; other assets, if any, passing outright to the surviving spouse are not sufficient to eliminate the estate tax; and, more likely than not—
  - The executor will file an estate tax return and make a formula partial QTIP election for the Marital Trust designed to produce the smallest marital deduction needed to result in the smallest estate tax liability possible.
  - The executor will sever the Marital Trust into two separate trusts: A regular Marital Trust, funded with the elected portion, and a “Non-elected Marital Trust” funded with the non-elected portion. The mechanics of the funding of these two trusts will be comparable to the funding mechanics required in the typical marital deduction (fractional formula gift) plan with a Marital Trust and a Bypass Trust.
  - The executor will file an estate tax return but will not make any QTIP election whatsoever. Thus, the entire Marital Trust will be equivalent to the Non-elected Marital Trust above.

- The decedent’s gross estate exceeds the tax free amount but other assets (such as retirement benefits) pass to the surviving spouse so that no additional marital deduction is needed to eliminate the estate tax; and, more likely than not—
  - The executor will file an estate tax return but will not make any QTIP election whatsoever. Thus, the entire Marital Trust will be equivalent to the Non-elected Marital Trust above.
• The [Non-elected] Marital Trust will receive the entire residuary estate; there will be no need for the post death funding required in the typical marital deduction (formula gift) plan.
• For tax purposes, the [Non-elected] Marital Trust will function like a Bypass Trust: It will not qualify for a marital deduction in the decedent’s testate and it will not be included in the surviving spouse’s gross estate.
• The decedent’s gross is less than the tax free amount; and, more likely than not—
• The executor will not file an estate tax return and, obviously, no QTIP election will be made.
• Thus, automatically, the entire Marital Trust will be equivalent to a Bypass Trust and the situation will be identical to situation #2 above.

10 DEBTS, EXPENSES AND TAXES

10.4. Source Of Payment.

D. Non-Elected Marital Trust. In the event of the non-election under Code Section 2056(b)(7) of the Code to qualify all (or any portion) of the Marital Trust for the marital deduction, any resulting increase in Death Taxes shall be charged against that trust (or portion).

11 - MARITAL DEDUCTION AMOUNT

11.6. Statement Of Intent. I intend that the distribution of the Marital Deduction Amount to the Marital Trust qualify in full for the federal estate tax marital deduction and any similar state death tax marital deduction. … However, this Section shall not require that the election provided for in Code Section 2056(b)(7) be made in whole or in part with respect to the Marital Trust.

3. PASSIVE GST PLANNING

(Note: GST planning, marital deduction planning, and the §2056 “passing requirement” are topics far beyond the scope of this outline. The following discussion of those issues is cursory and should not be relied on for any purpose other than consideration of the extent to which passive GST planning can simplify a Will or other estate planning document.)

“Active” GST planning for an unmarried person is mildly complicated: The Will typically gives a GST Exempt Amount to one or more “exempt” trusts (trusts which are exempt from the GST tax and thus able to pass to grandchildren and future generations without transfer tax exposure), and gives the residuary estate to one or more “non-exempt” trusts (trusts which are fully subject to the GST tax and will, if not previously consumed, be subject to transfer tax upon distribution to grandchildren, etc.).

Active GST planning for a married person (“Active GST/Marital Planning”) can be ridiculously complicated, often including several or all of the following gifts:

• A "GST Exempt-Tax Free Amount" (equal to the lesser of the Tax Free Amount and the GST Exempt Amount) to an "Exempt Bypass Trust."
• An "Excess Tax Free Amount" (equal to the excess, if any, of the Tax Free Amount over the GST Exempt Amount) to a "Non-Exempt Bypass Trust."
• An "Excess Exempt Amount" (equal to the excess, if any, of the GST Exempt Amount over the Tax Free Amount) to an "Exempt Marital Trust" (a/k/a “Reverse QTIP” Trust).
• A residuary gift to a "Non-Exempt Marital Trust."

The best KISS drafting can’t make Active GST/Marital Planning easy to understand. Standard marital deduction planning combined with “passive” GST planning is preferable, so long as the entire estate (exempt and non-exempt) ultimately goes to the same beneficiaries.

In passive GST planning, all matters pertaining to the segregation of GST exempt and nonexempt shares are left to the discretion of the executor; the only “active” gifts pertain to the Tax Free Amount and Marital Deduction Amount, which are generally directed to a Bypass Trust and a Marital Trust, respectively.

Active planning is necessary when the marital deduction is concerned because of the so-called “passing requirement” of IRC §2056 which, in essence, allows a marital deduction only where it is the mandatory bidding of the decedent – rather than the discretion of a fiduciary or any other person – that entitles the spouse to receive the gift. If the executor has the discretion to eliminate a gift to the Marital Trust, that gift doesn’t qualify for the marital deduction even if the executor does not exercise that discretion and the trust actually receives the gift.
Passive planning works for GST purposes because there is no passing requirement applicable to the GST tax. It is entirely permissible for the specific ("active") gifts to ignore GST issues entirely, leaving it up to the executor's discretion to carve out and segregate exempt and nonexempt shares. This dramatically simplifies the Will.

### 6 DESCENDANT’S TRUSTS

...  

#### 6.3 Termination And Final Distribution Upon Beneficiary’s Death. Upon the Beneficiary's death, the Beneficiary's trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

**A Testamentary Powers Of Appointment.** The Beneficiary shall have a Testamentary General Power of Appointment over the GST Taxable portion of his or her trust. As to the remaining property of the trust, if any, the Beneficiary shall have a Testamentary Limited Power of Appointment, exercisable in favor of any one or more of the following: my descendants, the spouses of my descendants, the surviving spouses of any deceased descendants of mine, any public, charitable and religious organizations. (The terms Testamentary General Power of Appointment and Testamentary Limited Power of Appointment are defined in Section 12.4, and the term GST Taxable portion is defined in Section 12.7.)

...  

### 9 ADMINISTRATIVE PROVISIONS

...  

#### 9.16 Merger Of Trusts. A Fiduciary may terminate (or decline to fund) any trust created by this Will and transfer the trust assets to any other trust (created by this Will or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this Will also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this Will may receive and administer as a part of its trust the assets of any other substantially similar trust. In exercising either discretion, the Trustee shall consider the trusts' inclusion ratios for generation skipping transfer tax purposes but may merge trusts with different inclusion ratios if the Trustee shall deem the merger to be advisable.

...  

#### 9.17 Creation Of Multiple Trusts. A Fiduciary may divide any trust created under this Will into two or more separate identical trusts (in any proportion) if the Fiduciary deems it advisable. A Fiduciary shall divide any trust created under this Will into two or more separate identical trusts (in the appropriate proportion) in order: (i) to segregate assets having different presumed or actual transferors for GST purposes into separate trusts, (ii) to segregate assets exempt from the generation-skipping transfer tax from other assets, and (iii) to ensure that every trust has a GST inclusion ratio of either one or zero. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio. If a Fiduciary allocates assets between the new trusts based on values as of a date prior to the allocation date, the assets allocated to each trust shall have an aggregate fair market value that is fairly representative of the appreciation and depreciation in value of all available assets from the valuation date to the date or dates of allocation (or the Fiduciary may use an alternative allocation approach so long as the method of asset allocation does not jeopardize an otherwise allowable estate tax deduction or generation-skipping transfer tax exemption).

...  

### 10 DEBTS, EXPENSES AND TAXES

...  

#### 10.4 Source Of Payment.

...  

**E Direct Skips.** Generation-skipping transfer taxes on direct skips shall be charged against the property involved in the direct skip.

...  

#### 10.5 Death Tax Recovery.

**A Generally.** Except as otherwise provided, the Executor shall enforce all rights to recovery of any Death Taxes with respect to assets not passing under my Will to the maximum extent authorized by Sections 2206, 2207, 2207A, and 2207B of the Code, Section 322A of the Texas Probate Code, or otherwise.

**B Marital Deduction Property.** If any property is included in my gross estate under Code Section 2044 ("Marital Deduction Property"), the following provisions shall apply.

**1 Pro-Rata Recovery.** Except as otherwise provided, the Executor shall limit the recovery of
Death Taxes with respect to Marital Deduction Property to the amount that bears the same ratio to the total of those Death Taxes as the taxable value of Marital Deduction Property bears to the total taxable value of all property in my taxable estate. For this purpose, the “taxable value” of any property (including Marital Deduction Property) shall be determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

2 Cross Payment From Other Trusts. If the trustee of any trust (or any other person controlling any other property not passing under this Will) pays any Death Taxes for any Marital Deduction Property, the Executor shall accept such payment and shall waive all rights of recovery against that Marital Deduction Property to the extent of the payment.

3 Waiver Of Recovery. In addition, the Executor shall waive all rights to recover Death Taxes with respect to any Reverse QTIP Property, but only to the extent that the waiver increases the total amount of available GST Exempt Property and does not decrease the total amount of all available property. In this Paragraph, (1) “Reverse QTIP Property” means Marital Deduction Property with respect to which the reverse QTIP election under Code Section 2652(a)(3) has been (or is intended to be) made; (2) “available property” means the net amount of property (A) passing to my descendants or passing to (or remaining in) trusts that include my descendants as beneficiaries, and (B) with respect to which either my wife or I am the transferor for generation-skipping transfer tax purposes; and (3) “available GST Exempt Property” means available property having a zero inclusion ratio under Code Section 2642.

10.9 Allocation Of GST Exemption. The Executor, in the Executor's discretion, may allocate any remaining portion of my GST Exemption (as defined in Code Section 2631) to any property as to which I am the transferor (under this Will or otherwise), including the following: (i) any property transferred during my life as to which I did not make (and was not deemed to have made) an allocation prior to my death; and (ii) any transfers at my death (whether outright or in trust, or under this Will or otherwise), with respect to which a generation-skipping transfer (as defined in Code Section 2611) may occur at or any time after my death. The Executor shall never be liable to any person by reason of a GST allocation made in accordance with this Section if the allocation is made in good faith and without gross negligence.

10.10 GST Taxes On Trust Distributions. If the Trustee considers any distribution or termination of an interest or power in a trust created under this Will to be a taxable distribution (a “Distribution”), a taxable termination (a “Termination”), or a direct skip (a “Direct Skip”) for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination, or Direct Skip. In the case of a Distribution, the Trustee may increase the amount otherwise distributable by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping transfer tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete
funding of any Direct Skip, and may withhold all or any portion of the distributable trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part with respect to property held in trust under this Will and in part with respect to other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the property held in trust under this Will, taking into consideration deductions, exemptions, credits and other factors that the Trustee deems appropriate. The Trustee may, but need not, make equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions, Terminations or Direct Skips.

12 GENERAL PROVISIONS

…

12.7 Definitions. In connection with the construction and interpretation of this Will the following definitions apply, unless otherwise expressly provided.

…

G GST Taxable Portion. The “GST Taxable” portion of any terminating trust is, collectively, each portion or fraction of the trust, if any, with a positive inclusion ratio that would pass to a skip person with respect to the presumed or actual transferor of the trust in a transfer subject to the generation-skipping transfer tax (all as determined under Chapter 13 of the Code) if no Powers of Appointment over any part of the trust existed.

IV. DRAFTING DOWN GRAB BAG

This part of the outline contains miscellaneous clauses, techniques and ideas – good and bad – and a few random observations, all of which relate to the general topic of drafting down but don’t fit anywhere else in this outline.

A. Simplifying the Client Relationship

Most estate planning attorneys unnecessarily complicate their relation with and their communications with their clients.

1. STANDARDIZED MEMOS INSTEAD OF CUSTOMIZED EXPLANATIONS

I like to use standardized FAQs and other memos addressing basic estate planning concepts that I give to both clients and prospective clients. This virtually eliminates the need to prepare customized memos for individual clients; when their situation is different I typically just handwrite appropriate revisions in the margins but I try to always keep it generic so as to avoid any inadvertent conflict with the actual planning documents. Delivering standardized memos before planning meetings reduces the time spent answering basic questions and gives prospective clients a good preliminary understanding of the estate planning process. Delivering standardized memos before planning meetings reduces the time spent answering basic questions and gives prospective clients a good preliminary understanding of the estate planning process. Providing standardized explanatory memos at the conclusion of the signing conference helps ensure that clients will follow through with their “homework” (updating beneficiary designations, etc.) and reduces the number of “tell me again how I was supposed to do that?” calls. I’ve attached 2 examples:

• Personal Effects Memo Guidelines (Exhibit D, page 88). I give this memo to my clients at the conclusion of the signing conference.

• Beginning The Probate And Estate Administration Process (Exhibit C, page 81). I give this memo to prospective estate administration clients to help them prepare for our initial conference.

2. FILL-IN-THE-BLANK REPRESENTATION AGREEMENT

At the end of the initial client conference (for both planning and administration), the prospective clients
and I both usually know whether they’re going to hire me, and if they are they’re invariably ready to make it official. I used to promise to deliver a proposed representation agreement – I’d get around to drafting it in a few days – they’d get around to signing and returning it in a few days. In the best case it delayed the process by a week, sometimes two.

I now use generic fill-in-the-blank representation agreements; it takes about a minute to paste their names and our agreed fee and another couple of minutes to walk them through it. Now, more than 95% of the time, at the end of the initial client conference they have a signed agreement and I have a retainer check. One of my standard representation agreements is attached (Exhibit E, page 92).

B. Reducing Probate Complications

Assuming you can get the clients to follow your advice, you can do a lot during life to eliminate headaches after death. The following is a very incomplete list.

1. **REDUCE FIGHTS OVER PERSONAL EFFECTS**

As discussed above, a personal effects memo is a simple, economical way for clients to preempt fights over their personal effects. See part III.B.6, “Use Handwritten Personal Effects Memos”, at page 19 of this outline. But there are other techniques as well.

- If there’s concern the heirs won’t be able to agree on an “equal” division of household and personal effects, make gifts to them now wherever possible. Get rid of oddball or undesirable items (that none of the heirs is expected to want) by sale or a gift to charity. This is especially important for items that are potentially valuable but not necessarily highly prized, which may otherwise eat up a substantial portion of an heir’s “equal share.”

- Eliminate blended family disputes over the spouses’ heirlooms. You can provide for one or more “tie-breakers” – individuals with the power to decide whether a particular item constitutes an heirloom – or establish guidelines for identifying heirlooms. Here are samples of both. The first sample, for an unmarried woman giving her heirlooms to a named individual, used the tie-breaker approach. The second, for a widower giving his wife’s heirlooms (which she previously left him) to his wife’s children, uses the identification guidelines approach.

<table>
<thead>
<tr>
<th>Heirlooms clause – named tie-breakers</th>
</tr>
</thead>
<tbody>
<tr>
<td>I give all my “family heirlooms” (meaning all jewelry, china, silverware, nick-nacks, furniture and other items gifted or bequeathed to me by my mother or my grandmother) to Chuck, if he survives me. <strong>Chuck and my Executor shall determine what items constitute family heirlooms</strong> by mutual agreement. <strong>If they cannot agree, then the determination whether a particular item is a family heirloom shall be made by my husband</strong>, if he is then living and non Incapacitated, <strong>otherwise by Chuck</strong>, if he is then living and non incapacitated.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Heirlooms clause – identification guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>I give my wife’s heirlooms in equal shares to my wife’s children that survive me. &quot;My wife’s heirlooms” are all antiques, works of art, jewelry, and other household and personal items included among my personal effects (i) that my wife received by gift or inheritance from her parents or any other person, (ii) that I inherited from my wife on her death, and (iii) that had special keepsake and sentimental value to my wife.</td>
</tr>
</tbody>
</table>

| An item shall be presumed to be an heirloom of my wife’s if it is clearly identified as an heirloom of hers by a written statement (i) that is on the item itself, or on a photograph or other description of the item, **and (ii) that is signed or initialed by me** (and, optionally, by my wife). Items not so identified shall constitute "heirlooms" only if the Executor determines that other evidence clearly and convincingly proves its status as an heirloom. |

2. **DON’T CREATE DISPUTES THAT DIDN’T EXIST BEFORE THE CLIENT HIRED YOU**

There are numerous “estate planner’s sins” I try to avoid committing but perhaps the most problematic is the sin of “surreptitiously giving a reason to fight to children or other heirs who previously had no reason to fight.” It is a sin only if done surreptitiously for the same reason that it is a problematic sin: In spite of your admonitions and warnings that it’s a really bad idea, **Clients often insist** that you do it anyway.

However, if you’re creative – and if you’re lucky enough for the circumstances to make it possible – you can sometimes persuade the client to refine his plan just enough to eliminate (or substantially reduce) the conflict potential of his original concept.
a. **Blended Families**

(1) **The “Magic Percentage”**

Couples in a blended family (where each spouse has children from a prior marriage) regularly ask me to prepare the following estate plan:

*The survivor gets everything for life; on the survivor’s death, the husband’s property goes to his children and the wife’s property goes to her children.*

Typically, they’ve been married for a decade or more and they have no marital property agreement. They, of course, have no conception of Texas’ community property rules – what constitutes his separate, her separate or their community – and their presumptions as to their property rights have only a random relation to reality.

If I obediently implement this plan with no questions asked, I have sinned. I’ve given his children and her children something very big to fight about.

Even if they have the perfect marital property agreement and detailed records, so that tracing is presumably not an issue and their respective children have nothing to fight about, I’ve still created a potential fight between the surviving spouse and the children of the deceased spouse: Every discretionary distribution to the surviving spouse from the Marital or Bypass Trust will reduce the ultimate amount passing to the deceased spouse’s children and will thus be grounds for dispute.

One solution is what I call the “magic percentage”: After explaining marital property characterization and tracing issues, I suggest the following alternate plan:

*The survivor gets everything for life; on the survivor’s death, ALL property (husband’s and wife’s) goes X% to wife’s children and Y% to husband’s children.*

This plan renders all marital property issues moot (and also eliminates various other difficult issues, e.g., how to preserve the deceased spouse’s retirement benefits for his children without a substantial income tax cost). His kids and her kids have nothing to fight about (nothing, at least, caused by me). It also eliminates fights over Marital and Bypass trust distributions to the surviving spouse.

The key is the magic percentage; i.e., the relative value of husband’s property and wife’s property. I tell them: “Think about your total combined wealth, and decide on the ‘magic percentage’ – what percentage do you consider to be ‘husband’s’ and what percentage do you consider to be ‘wife’s’?”

The catch is significant and it is essential that each spouse really, completely comprehend it:

*The other spouse might change his or her Will and disinherit your kids in favor of his/her own kids.*

The surviving spouse could do this after the deceased spouse’s death and even prior to either spouse’s death, the other spouse could secretly revise his or her Will. If this is a problem, the magic percentage plan is not for these clients. Bit if it’s worth the trade off – marital property tracing headache vs. spousal power to disinherit kids – it dramatically simplifies the estate administration process.

(2) **“Split the Baby” and Other Karisch Solutions**

“Split the baby” is where the kids from the first marriage get a life insurance policy and/or perhaps an investment account by nontestamentary transfer or other non-probate asset, and have no interest in the decedent’s probate estate, which passes entirely to the 2nd spouse (or vice versa). The technique generally presumes that we’ll be able to ascertain what exactly constitutes the “decedent’s estate” and has other issues as well, but so long as the surviving spouse gets the entire probate estate (as opposed to the decedent’s prior kids) marital property issues generally aren’t a significant problem.

Glenn Karisch discusses “split the baby” and other blended family issues in several articles that you can download from his web site, [www.texasprobate.com](http://www.texasprobate.com). (See also the “Special Adjustment For Community Interests in Harris Portfolio”, discussed in part III.A.4, “Don't Solve [Or Even Deal With] a Problem That You Can Avoid Instead”, at page 6 of this outline.)

(3) **Conversion to Community**

In certain circumstances, a conversion to community is a viable solution to marital property uncertainty. I realize this is blasphemy to many family law attorneys but, in my opinion, it is appropriate for the estate planning attorney preparing a conversion to community to represent both spouses, although only in very limited circumstances, such spouses with no marital property agreement, that have been married for over 50 years, who both had gainful employment, and that have lived in more than a dozen different states, most but not all of which were community property jurisdictions.
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(Note that a conversion to community is only a partial – and relatively limited – alternative to the magic percentage in that, for the most part, it is equivalent to a magic percentage plan except that the percentage used is limited to 50%.)

3. **Sell, Gift or Abandon Out of State and Other Problem Assets**

Your client can efficiently and effectively deal with their goofball problems during life. After the client’s death, those problems are substantially more trouble: Typically, the Executor must either incur an exponentially greater effort to solve the problem “correctly” or else expose himself to potential fiduciary liability for taking shortcuts. Although a revocable trust is generally the “right” way to deal with these types of assets, when the values are small I consistently recommend that my clients—

- Give away worthless or near worthless properties, especially those located outside of Texas.
- Utilize rights of survivorship or POD options when acquiring out of state properties, especially personal use properties, with low to moderate value, such as time share interests.
- Sell or gift their tiny royalty interest(s) and tiny fractional interest(s) in the family farm to a sibling or cousin who owns an interest in the same property.

4. **Reduce §128A (and Other) Notice Requirements**

Once a client has died there’s not much you can do to avoid §128A notice requirements: Every taker under the Will gets one and that includes every current permissible trust beneficiary. Over the years, some of the Wills I’ve drafted have included long lists of cash or personal effects gifts; many created a Bypass Trust for the client’s spouse and all descendants. When I probate these Wills I have to do a lot of §128A notices. Lately, when drafting Wills and revocable trusts, I try to at least be mindful of the opportunities to reduce §128A notices. Most of my clients are very interested in anything that reduces notice requirements and/or other post death complications and some are adamant that I do absolutely whatever it takes to minimize or even eliminate §128A notices entirely. Here are some suggestions:

- Get more complete beneficiary information. This doesn’t eliminate any required §128A notices but it makes it a lot easier to give notice properly.
- Use ROSs & PODs for Small Cash Gifts. §128A notices must go to every legatee under the Will but not to recipients of nontestamentary transfers.
- Use Nonbinding Personal Effects Memos. §128A notices must go to every actual individual getting so much as a single bud vase under the terms of the Will – or any holographic codicil to the Will (a/k/a “binding personal effects memo”). Thus, broad or open ended gifts of personal effects to a large and/or vague class of beneficiaries could be a §128A nightmare. On the other hand, precatory requests under a non binding personal effects memo do not implicate §128A.

### Keepsakes to relatives – the Wrong Way

I give to each relative of mine that attends my funeral one keepsake item selected from my home, provided the item’s value is less than $100.

### Keepsakes to relatives – a Better Way (for inclusion in a personal effects memo where the Will leaves personal effects to the surviving husband)

I request but do not require that my husband allow each relative of mine that attends my funeral to select one keepsake item selected from our home, provided the item’s value is less than $100.

- Use lifetime gifts instead. Making the gift prior to death eliminates §128A issues and, as noted above, eliminates other issues as well.
- Limit the beneficiaries of the Bypass Trust. In the case of a testamentary trust, the §128A notice goes to the trustee – or maybe to each current, permissible beneficiary of the trust, depending on how you read the statute. However, it’s clear that if the personal representative is the trustee, a notice must go to each beneficiary. If, e.g., the Bypass Trust includes “my descendants” as current permissible beneficiaries, even as only secondary beneficiaries, a §128A notice must be delivered to every descendant living at the decedent’s death. If, instead, the trust beneficiaries (other than the spouse) are “my children and the descendants of each deceased child of mine”, it could substantially reduce the number of notices required.
- Use Revocable trusts – with care. If the Will pours over to a [revocable] trust, the §128A notice goes to the trustee, unless the personal...
representative is the trustee, in which a notice must be provided to every current permissible recipient of a distribution under the revocable trust. Thus, a revocable trust with a 3rd party (someone other than the executor) can eliminate the requirement for notice to, conceivably, all the decedent’s beneficiaries.

Section 128 notices aren’t the only notice requirements. Accountings, for example, can reasonably be demanded by relatively unimportant beneficiaries if their interest in the estate is affected by the total size of the estate. For example:

- **Use fixed dollar amounts for “smaller” gifts.** Once a fixed-amount cash legatee receives his §128 notice (and his cash gift), he’s rarely going to be entitled to receive additional information, such as accountings. By contrast, if the gift is “5% of my Net After Tax Residuary Estate”, the recipient could justifiably demand regular accountings disclosing the total value of all assets included in the gross estate.

- **If you must percentages, structure them as rounded, conditional reductions.** An estate that is substantially smaller than the client anticipated can easily be bankrupted by a large dollar amount gift – or by a large list of small dollar amount gifts. In either case, it can be good planning to provide percentage limitations in order to preserve the relative, minimum size of the residuary estate. But be careful not to inadvertently give the legatees the right to full accountings. Structure the percentage as a conditional reduction that’s irrelevant so long as he receives the full stated dollar amount. Likewise, you can reduce the headaches of percentages (when they can’t be avoided) by rounding to, e.g., the nearest $1,000.

C. FLP Special Allocation Provisions

1. **INTRODUCTION**

The following discussion is a *work in progress*. In late spring 2009 I made what I thought was a very simple and reasonable decision: I should understand the provisions in my documents. In particular, I decided to be sure I understood the so-called “special allocation” tax provisions in my limited partnership agreement. For the next 4 months I spent every available minute studying, reading and analyzing anything I could find on the subject. I believe I significantly improved both my understanding and my form language, but I am absolutely positive that I’ve still got a long way to go.

a. **My personal, very subjective opinions**

In my opinion, nobody comprehends the special allocation regulations. This is because they are incomprehensible. Because it is not possible to understand their meaning, the most you can hope for is to graft upon them a meaning that, while constructed apart from them, nevertheless tends, most of the time, to come close to probably mimicking – maybe – some of the various and contradictory meanings that their ill fated authors sought but never quite grasped.

I’m also of the opinion that few attorneys who draft limited partnership or LLC agreements fully comprehend the special allocation provisions in their own documents (I don’t) and that, ironically, it is our failure to understand these clauses that compels us to include them, lest we leave ourselves exposed to some present yet unclear danger.

Most special allocation provisions deal with issues that evolved during the tax shelter boom and are completely unnecessary in a “straight-up” FLP.

*And every CPAs I’ve talked to agrees:* They like documents that (i) briefly state the general rules for allocating profits and losses (“P&L”) and (ii) direct all additional allocations necessary for compliance with the rules of the allocation regulations by reference. These documents provide for the economics of the deal and give the CPA freedom to strategize, make elections and file tax returns that comply with the rules. CPA’s do not like documents with lengthy, detailed allocation provisions, which virtually always create problems.

b. **“Special Allocation Regs” Defined**

Savings clauses generally refer to compliance with the “Special Allocation Regulations” or the “Allocation Regulations” but there doesn’t appear to be any agreement (or awareness) on which particular regulations should be included in the term. Some popular definitions are:

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“Special Allocation Regs” – OK Definitions

Treasury Regulations promulgated under Sections 704(b) and 704(e) of the Code.

Or

Treasury Regulations promulgated under Sections 704(b) and 704(e) of the Code.
```
**“Special Allocation Regs” – Better Definition**

Regulations adopted by the Secretary of the Treasury pursuant to Code §704 with respect to allocations of the distributive share of income, gain, loss, deduction and credits among partners of a partnership.

I like this “better” definition because I think it includes all of the following:

- §1.704-1. Partner's distributive share.
- §1.704-2. Allocations attributable to nonrecourse liabilities.
- §1.704-3. Contributed property.
- §1.704-4. Distribution of contributed property.

**c. “Special Allocation Provisions” Defined**

For purposes of this discussion, “Special Allocation Provisions” means the provisions in a limited partnership or LLC agreement relating to capital accounts maintenance, profit & loss allocations, and distributions.

2. **“Mandatory” Allocation Provisions**

I believe the following provisions qualify as “mandatory” in the typical family limited partnership. For this purpose:

- a clause is “mandatory” if it must be included in the partnership agreement (the “PA”) for the typical FLP in order for the P&L allocations in that agreement to have “substantial economic effect” (“SEE”) and thus be respected by the IRS; and
- a “typical” FLP is one in which partners are not required to restore capital account deficits.

a. **The three fundamental clauses required by Reg. §1.704-1(b)(2)**

(1) **Capital Accounts maintained per Reg. §1.704-1(b)(2)(iv)**

Per Reg. §1.704-1(b)(2)(iv), the PA must say:

- “Except as otherwise [required by] [Reg. §1.704-1(b)(2)(iv)], each partner’s capital account [shall be]
  - “increased by (1) the amount of money contributed by him to the partnership, (2) the fair market value of property contributed by him to the partnership (net of liabilities that the partnership is considered to assume or take subject to), and (3) allocations to him of partnership income and gain (or items thereof), including income and gain exempt from tax and income and gain described in paragraph (b)(2)(iv)(g) of this section, but excluding income and gain described in paragraph (b)(4)(i) of this section; and [shall be]
  - “decreased by (4) the amount of money distributed to him by the partnership, (5) the fair market value of property distributed to him by the partnership (net of liabilities that such partner is considered to assume or take subject to), (6) allocations to him of expenditures of the partnership described in section 705(a)(2)(B), and (7) allocations of partnership loss and deduction (or item thereof), including loss and deduction described in paragraph (b)(2)(iv)(g) of this section, but excluding items described in (6) above and loss or deduction described in paragraphs (b)(4)(i) or (b)(4)(iii) of this section; and [shall be]
  - “otherwise adjusted in accordance with the additional rules set forth in [Reg. §1.704-1(b)(2)(iv)].”

- “For purposes of [the preceding], a partner who has more than one interest in a partnership shall have a single capital account that reflects all such interests, regardless of the class of interests owned by such partner (e.g., general or limited) and regardless of the time or manner in which such interests were acquired. For liabilities assumed before June 24, 2003, references to liabilities in [the preceding] shall include only liabilities secured by the contributed or distributed property that are taken into account under [IRC] §§752(a) and (b).”

(2) **Liquidating distributions made per capital account balances**

Per Reg. §1.704-1(b)(2)(ii)(b)(2), the PA must say:

- “Upon liquidation of the partnership (or any partner's interest in the partnership), liquidating distributions [shall in all cases be] made in accordance with the positive capital account balances of the partners.”

(3) **“Qualified Income Offset”**

Per Reg. §1.704-1(b)(2)(ii)(d), the PA must say:
Drafting Down (KISS Revisited)

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“[A] partner who unexpectedly receives an adjustment, allocation, or distribution described in (4), (5), or (6) [of Reg. §1.704-1(b)(2)(ii)(d)], will be allocated items of income and gain (consisting of a pro rata portion of each item of partnership income, including gross income, and gain for such year) in an amount and manner sufficient to eliminate such deficit balance as quickly as possible.”

Or maybe the PA could just incorporate by reference & say:

“This Agreement incorporates the ‘qualified income offset’ set forth in sections 1.704-1(d) of the regulations as if its provision were fully set forth in this Agreement.”

b. Three clauses to deal with partnership properties having a book value that differs from tax basis

Book value and tax basis will differ primarily in two situations:

- whenever partners contribute property other than cash, (because the partnership’s basis equals the contributor’s basis but the book value equals FMV on the contribution date), and
- whenever the partnership does a “book-up” (or “book-down”) of partnership assets, adjusting each asset’s book value to reflect current FMV.

Both the above circumstances are likely to occur in a FLP. (Note that there are other situations in which a “typical” FLP might have a book/basis divergence; e.g., any FLP that owns commercial real estate could have a book/basis divergence simply because of the depreciation and other deductions that affect tax basis but not book value.)

(1) §704(c) Allocations, “Built-In Gain/Loss”, a/k/a “Pre-Contribuition Gain/Loss”

This clause ensures that a partner who contributes property with built-in (as yet unrealized) tax consequences will be the person who eventually receives the benefit (or detriment) of those tax consequences. §704(c) allocations are tax allocations, not book allocations; that is, they affect the allocation among the partners of taxable income or deduction, not the allocation of “book” = a/k/a “real” = profit and loss. Per Reg. §1.704-3; i.e., the PA must say:

- “[Income, gain, loss, and deduction with respect to property contributed by a partner to the partnership [shall be allocated] so as to take into account any variation between the adjusted tax basis of the property and its fair market value at the time of contribution.”

(2) “Book-up”/ “book-down”/ Revaluation/ Restatement of Partnership assets, and capital account adjustments

This is an optional mandatory clause: Generally, allocations that otherwise have SEE will still have SEE even if this clause is left out of the PA.

However, this clause is mandatory if the partnership will ever book-up or book-down its assets; i.e., if the partnership will ever restate all partnership assets at current FMV and then adjust capital accounts accordingly. (The same is true of the “reverse 704(c) allocations” clause, discussed below.)

A book-up or book-down may be desirable if, e.g., a new partner is buying in: A restatement immediately prior to the buy-in helps ensure that existing partners get all the benefit or detriment of any unrealized P&L.

Per Reg. §1.704-1(b)(2)(iv)(f); the PA must include a provision authorizing the revaluation and capital account adjustment, and that provision must meet the Reg’s requirements. The clause might read as follows:

Book-Up/ Book Down – Sample Clause

Revaluation of Partnership Assets. The Partnership shall revalue the Partnership property on the Partnership’s books to equal its then fair market value, and shall increase (or decrease) the capital accounts of the Partners to reflect the revaluation, if either of the following triggering events occurs: (1) a new or existing Partner contributes money or other property (other than a de minimis amount) to the Partnership in consideration for the acquisition of an interest in the Partnership, or (2) the Partnership distributes money or other property (other than a de minimis amount) to a retiring or continuing Partner as consideration for the relinquishment of an interest in the Partnership. The revaluation and adjustments shall be effective immediately before the triggering event, shall reflect the manner in which the unrealized income, gain, loss, or deduction inherent in such property (that has not been reflected in the capital accounts previously) would be allocated among the Partners if there were a taxable disposition of such property for such fair market value on that date, and shall otherwise comply with the requirements of Reg. §1.704-1(b)(2)(iv)(f).
(3) “Reverse 704(c) Allocations” following a revaluation

This clause is a companion to the revaluation clause (above). Per Reg. §1.704-1(b)(2)(iv)(f), (g), if a Revaluation clause is included, a Reverse 704(c) Allocations clause must also be included to be sure that post-revaluation allocations account for the book/tax disparity. The Reverse 704(c) Allocations clause is sometimes included within the Revaluation clause where it will typically mirror the [regular] 704(c) allocation clause (above). Other times, it’s incorporated into the [regular] 704(c) allocation clause itself. It might read as follows:

### Reverse 704(c) Allocations – Sample Clause

Income, gain, loss, and deduction with respect to any such revalued property shall be allocated so as to take into account any variation between the adjusted tax basis of the property and its fair market value at the time of contribution.

3. **PUTTING MATTERS IN CONTEXT**

a. **State Law is part of the “Partnership Agreement” per the Regs**

§1.704-1(b)(2)(ii)(h) says: “…the partnership agreement includes all agreements among the partners, or between one or more partners and the partnership, concerning affairs of the partnership and responsibilities of partners, whether oral or written, and whether or not embodied in a document referred to by the partners as the partnership agreement. … In addition, the partnership agreement includes provisions of Federal, State, or local law that govern the affairs of the partnership or are considered under such law to be a part of the partnership agreement.”

In short, if the Texas Business Organizations code says it, you don’t have to repeat it in the agreement (unless the repetition is justified for clarity).

b. **If allocations fail to have SEE …**

(1) **P&L shall be allocated per each “Partner’s Interests in the Partnership.”**

§1.704-1(b)(1)(ii)

When the PA’s P&L provisions lack SEE, the regulations require that P&L instead be allocated in accordance with the partners’ interest in the partnership (or “PIP”). Per §1.704-1(b)(3), a “Partner’s Interests in the Partnership” –

- “signifies the manner in which the partners have agreed to share the economic benefit or burden …
- “shall be made by taking into account all facts and circumstances relating to the economic arrangement of the partners” including: contributions, share of profits and losses, & share of both non-liquidating and liquidating distributions.”

(2) **In a straight-up LP, this is a non sequitur 98% of the time**

The great irony of the substantial economic effect test in the context of a typical FLP is that P&L allocations according to PIP will be identical to P&A allocation according to the PA.

(3) **But it does create uncertainty, so complying with SEE is desirable**

So why even worry about the Special Allocation regulations? Because it is extremely difficult to concisely and objectively apply the regulations’ PIP allocation rules.

For instance, in “clarifying” what it means by “partners’ interest in the partnership”, §1.704-1(b)(3) says “this sharing arrangement may or may not correspond to the overall economic arrangement of the partners. Thus, a partner who has a 50 percent overall interest in the partnership may have a 90 percent interest in a particular item of income or deduction. (For example, in the case of an unexpected downward adjustment to the capital account of a partner who does not have a deficit make-up obligation that causes such partner to have a negative capital account, it may be necessary to allocate a disproportionate amount of gross income of the partnership to such partner for such year so as to bring that partner’s capital account back up to zero.)”

4. **OTHER ALLOCATION PROVISIONS; ISSUES, GLITCHES & QUIRKS**

a. **Provisions dealing with nonrecourse debt; are they relevant in a FLP?**

I’ve never seen a FLP with nonrecourse debt. But I suppose it’s always possible. No doubt, that is why the typical FLP devotes anywhere from several paragraphs to several pages to the subject. I personally believe that these lengthy provisions are completely unnecessary, possibly even counter productive (they generally limit flexibility and they often impose one of several optional rules when another option would be better for the
partnership). Perfectly adequate provisions can be very brief.

To satisfy the Partnership Nonrecourse Liability rules, you might add the following:

**Minimum Gain Chargeback.** This Agreement incorporates the “minimum gain chargeback” provisions set forth in sections 1.704-2(f) and (g) of the regulations (which shall apply as provided in those regulations).

**Partner Nonrecourse Debt Minimum Gain Chargeback.** This Agreement incorporates the “partner nonrecourse debt minimum gain chargeback” set forth in sections 1.704-2(i)(4) of the regulations (which shall apply as provided in those regulations).

**Partnership Nonrecourse Deductions.** Any “partnership nonrecourse deduction” (as defined in section 1.704-2(b)(1) of the regulations) will be allocated to the Partners in proportion to their respective Percentage Interests.

**Partner Nonrecourse Deductions.** Any “partner nonrecourse deduction” (as that term is defined in section 1.704-2(i)(2) of the regulations) will be allocated to the Partner that bears the economic risk of loss (as determined under section 1.752-2 of the regulations) for the partner nonrecourse debt giving rise to such deduction, all in accordance with section 1.704-2(i)(1) of the regulations.

Alternatively, you might cook it down to an even briefer version:

**Nonrecourse Debt.** This Agreement incorporates the following provisions from the Special Allocation Regulations, each of which shall apply as provided in those regulations: (i) “minimum gain chargeback” (§1.704-2(f) and (g)); and (ii) “partner nonrecourse debt minimum gain chargeback” (§1.704-2(i)(4)). Any “partnership nonrecourse deduction” (as defined in Reg. §1.704-2(b)(1)) will be allocated to the Partners in proportion to their respective Percentage Interests. Any “partner nonrecourse deduction” (as defined in Reg. §1.704-2(i)(2)) will be allocated to the Partner that bears the economic risk of loss (as determined under Reg. §1.752-2) for the partner nonrecourse debt giving rise to such deduction, all in accordance with Reg. §1.704-2(i)(1).

b. “704(c) Allocations must be made property by property, not on an aggregate basis”

This clause is frequently included but is not necessary because §1.704-3(a)(2) absolutely requires that, if you make 704(c) allocations they must be made property by property. (Although including it might be helpful if the FLP’s CPA is unqualified.)

c. “704(c) Allocations must be made using the [Traditional Method /or/ Traditional Method with Curative Allocations /or/ Remedial Allocation Method]. §1.704-3(a)(6)”

This is another common clause although in the typical FLP form it approaches half a page in length. It is not a required clause but by including it you can specify which of the three permissible methods must be used, thus eliminating the discretion of the general partner (and the FLP’s CPA) to pick a method.

In a deal among strangers (or any non-family members) it can make sense to reduce general partner discretion. On the other hand, some commentators say this is a counterproductive clause because the Regs simply require that a reasonable method be used and expressly say that, depending on the circumstances, any 1 of their 3 methods might possibly be unreasonable; thus, requiring one particular method could force failure of the SEE test. Furthermore, general partner discretion is generally a good thing in a FLP – the more the better.

If you can’t bring yourself to delete this clause from your FLP form, at least revise your form to say “use the X method to the extent it qualifies as a reasonable method under the regulations”, and discuss the matter with the CPA to be sure the particular method you’re picking makes sense.

d. What about “excess” liquidating distributions – partnership assets remaining after all capital accounts reduced to zero?

Numerous forms provide that liquidating distributions shall be made as follows:

**A. Per Capital Accounts.** First, cash shall be distributed pro rata among the Partners in accordance with the credit balances of their respective Capital Accounts;

**B. Per Partnership Interests.** Thereafter, cash shall be distributed among the Partners rata in accordance with their respective Partnership Interests.

In my view, in the typical FLP, clause B is, at best, superfluous: If the books are maintained properly, there will never be negative capital accounts; the capital account balances before the final distribution will exactly equal the cash or other property to be
distributed; and all distributions will be covered by clause A.

Arguably, if clause B ever were relevant, it would violate the fundamental rules of §1.704-1(b)(2) (that all distributions must be made according to capital account balances, as discussed above)

e. Setting/ Adjusting Partnership Interests

Some forms define partnership interests explicitly, as a fixed percentage. Others define partnership interests as the relative balances in each partner’s capital accounts. Some forms using the explicit percentage approach adjust those percentages regularly, based on capital account balances.

I’m pretty sure that in family partnerships, where IRS §704(e) applies, the sharing ratios must be pro-rata to the partners’ capital accounts (or at least pro rata to their “donated capital”) and that, therefore, “Interest in the Partnership” must be the same as relative pro rata capital account balance.

f. Allowable Revaluation Events – Are Gifts Included?

Many FLP forms’ Revaluations clause provides for a revaluation (book-up or book-down) of partnership property upon a gift of a partnership interest by a partner. However, I’m about 95% convinced that a book-up or book-down is allowed only when a partner gets a partnership interest from the partnership or surrenders a partnership interest to the partnership, not when there is a gift (or sale) of partnership interests from one person to another. I don’t fully understand the consequences of a provision including gifts as a revaluation event, much less the consequences of actually making a revaluation in that circumstance.

5. SAMPLES OF SHORT ALLOCATION PROVISIONS

a. John C. Ale’s 2005 LP Form

I plagiarized the following from a limited partnership form by Texas attorney John C. Ale. It is the shortest, most succinct yet fully adequate form for Limited partnership allocations and distributions that I encountered.

Capital Accounts. Each Partner shall have a single capital account (its “Capital Account”), which shall be

(i) increased by the amount of cash and the fair market value of any property (net of liabilities assumed by the Partnership and liabilities to which the property is subject) that Partner contributes to the Partnership, plus all items of income and gain of the Partnership allocated to that Partner,

(ii) decreased by the amount of distributions the Partnership makes to that Partner of cash or other property (net of liabilities assumed by that Partner and liabilities to which the property is subject), plus all items of loss and deduction of the Partnership allocated to that Partner.

The provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulation § 1.704-1(b), and shall be interpreted and applied in a manner consistent with those Treasury Regulations.

Allocations. All items of income, gain, loss, deduction and credit of the Partnership shall be allocated to the Partners for accounting and tax purposes pro rata according to their Percentages [as expressly specified]; provided, however, that any allocations pursuant to this Agreement shall comply with the qualified income offset requirements of Treasury Regulation § 1.704-1(b)(2)(ii)(d) and the nonrecourse deduction or minimum gain chargeback requirements of Treasury Regulation § 1.704-2. Distributions. The General Partner, in its sole discretion, may cause the Partnership to distribute to the Partners cash available after servicing all Partnership debts, liabilities and obligations then payable and provision of reasonable reserves for expenses and contingencies, which distributions shall be made to the Partners pro rata according to their Percentages.

Winding Up Affairs and Distribution of Assets. [After winding up the Partnership and providing for creditors, remaining partnership property shall be distributed to the Partners having positive Capital Accounts in relative proportion to those Capital Accounts. Except as required by nonwaivable provisions of the TLPL, no Partner shall have any obligation at any time to contribute any funds to replenish any negative balance in its Capital Account.

b. Misc. LLC Form

This next one is the current version of my LLC allocations and distributions provisions. It addresses some additional details that are not addressed in John Ale’s form but that are, arguably, a good idea to include in family deals (although the following does not include a revaluation clause).

Profit, Loss and Tax Allocations. Profits and Losses shall be allocated among the Members in proportion to their Membership Interests [as expressly specified] (even if and when the ratio of
their Capital Account balances may be different). Income, loss, deductions, credits, and other federal income tax items shall be allocated in the same ratios except to the extent otherwise required by federal tax rules.

**Distributions.** Distributions shall be made to the Members in the same ratios as the above allocations. Interim Distributions may be made if and when there is Distributable Cash; however, the parties do not expect that there will be significant Distributable Cash nor that there will be significant Interim Distributions. Distributions on termination of the Company shall be made as provided in Section [___ below].

**Capital Accounts.** A separate Capital Account shall be established and maintained for each Member and shall be increased and decreased in accordance with the following provisions:

**Increases.** Each Member's Capital Account will be increased by (i) the amount of money contributed by such Member to the Company; (ii) the Fair Market Value of any property contributed by such Member to the Company; (iii) the amount of any liabilities of the Company that are assumed by the Member or that are secured by any property distributed by the Company to the Member; and (iv) the amount of Profits allocated to such Member.

**Decreases.** Each Member's Capital Account will be decreased by (i) the amount of money distributed to such Member by the Company; (ii) the Fair Market Value of any property distributed to such Member by the Company; (iii) the amount of any liabilities of such Member that are assumed by the Company or that are secured by any property contributed by such Member to the Company; and (iv) the amount of Losses allocated to such Member.

**Compliance with Internal Revenue Code and Treasury Regulations.** The Members intend that the terms of this Agreement regarding the computation and maintenance of the Capital Accounts of the Members shall comply in all respects with the provisions of Section 704(b) of the Internal Revenue Code and Treasury Regulations Section 1.704-1(b)(2)(iv) and applicable provisions of succeeding law or regulations. The Company shall make such adjustments as may from time to time be necessary in order to effectuate the intent of the Members with respect to such compliance.

**Effect of Transfers.** In the event of a permitted sale or other disposition of a Membership Interest in the Company, the Capital Account of the transferor shall become the Capital Account of the transferee to the extent such Capital Account relates to the transferred portion of the Membership Interest.

**Distribution of Assets Upon Dissolution.** In settling the accounts of the Company after its dissolution, the assets of the Company shall be applied and distributed in the following order of priority:

First, to the extent otherwise permitted by law, and in accordance with the priorities, if any, established by applicable law, to creditors in satisfaction of liabilities of the Company, including liabilities of the Company to Members who are creditors (other than for Distributions and Capital Contributions), whether by payment or establishment of reserves; provided, however, that if the property and assets of the Company are not sufficient to satisfy or discharge all of the Company's liabilities and obligations, the Company shall apply its property and assets so far as they will go to the just and equitable payment of its liabilities and obligations; Second, to the Members, amounts due and unpaid with respect to Distributions to which such Members have previously become entitled; and

Third, an amount equal to the then remaining positive balances, if any, in the Capital Accounts of the Members shall be distributed to the Members in proportion to the amounts of such positive balances.

**Distributions in Kind.** If any assets of the Company are distributed in kind, such assets shall be distributed to the recipient Members as tenants in common in the same proportions as the Members would have been entitled to cash Distributions if such property had been sold for cash and the net proceeds distributed to the Member. In the event that Distributions in kind are made to the Members upon dissolution and liquidation of the Company, the Capital Account balances of such Members shall be adjusted to reflect the Members' allocable share of Profits or Loss which would have resulted if the distributed property had been sold at its Fair Market Value.
V.
APPENDICES

A. Second Generation Will

WILL OF
WARD M. CLEAVER

I am WARD M. CLEAVER of Harris County, Texas. This is my Will. I revoke all earlier wills and codicils.

I am married to June A. Cleaver. I have two children: Wallace Cleaver, born March 21, 1977, and Theodore Cleaver, born May 31, 1983. Every reference in this Will to a "child" or "children" of mine is to them and all other children who may be born to or adopted by me in the future.

1 FIDUCIARY APPOINTMENTS

1.1 Executors. I name the following, in the following order, as sole Independent Executor of this Will, without bond: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver, otherwise Big Trust Company.

1.2 Trustees. I appoint the following, in the following order, as sole Trustee of every trust created under this Will: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver, otherwise Big Trust Company. If all of the above (and any successors) fail or cease to serve as Trustee of any trust and the resulting vacancy is not filled under the provisions of Section 8.2, the Trustee Appointer (designated in Section 8.2) shall appoint a Trustee of that trust in accordance with the provisions of Section 8.3.

2 SPECIFIC TESTAMENTARY GIFTS

2.1 Personal Effects. I give all of my jewelry, pictures, photographs, works of art, books, household furniture and furnishings, clothing, automobiles, boats, recreational vehicles and equipment, club memberships, burial plots, and articles of household or personal use or ornament of all kinds (collectively, my "personal effects"), as follows, subject to the provisions of Section 9.10.

A Memorandum On Personal Effects. I may leave a memorandum making one or more personal effects gifts. If the memorandum is wholly in my own handwriting, signed by me, and dated on or after the date of this Will: (i) it shall be deemed to be a codicil to this Will; (ii) all gifts specified in the memorandum shall be made prior to making any of the following gifts; and (iii) if the memorandum conflicts with any of the following gifts, the memorandum shall control.

B Gift Of Remaining Personal Effects. To the extent not disposed of by the above, I give all of my remaining personal effects to my wife, if she survives me. If my wife does not survive me, I give my remaining personal effects to my children who survive me, in equal shares. However, if any child fails to survive me but leaves one or more descendants who survive me, I give the share that child would have received (if he or she had survived) per stirpes to his or her descendants who survive me.
C  Division Of Personal Effects. Any personal effects given to two or more individuals shall be divided among them as they may agree among themselves. If they cannot agree on a division within a reasonable time following my death, the Executor shall make the division for them.

2.2  My Wife's Retirement Accounts. If my wife survives me, I give all of my interest, if any, in my wife's employee or self-employed benefit plans and individual retirement accounts to my wife.

2.3  Marital Deduction Amount. If my wife survives me, I give a Marital Deduction Amount (defined in Part 11) to the Trustee of the Marital Trust, to be administered as provided in Part 4.

3  REMAINING PROPERTY

After providing for payment of Debts, Expenses and Death Taxes as directed by Part 10, my Remaining Property (meaning the residue of my probate estate, including lapsed legacies and devises, but net of Debts and Expenses) shall be disposed of as provided in this Part.

3.1  Disposition If My Wife Survives Me. If my wife survives me, I give my Remaining Property to the Trustee of the Bypass Trust, to be administered as provided in Part 5.

3.2  Disposition If My Wife Does Not Survive Me But Descendants Survive Me. If my wife does not survive me but at least one child or other descendant of mine survives me, I give my Remaining Property as follows.

   A  Distribution To Bypass Trust. If at least one child of mine who survives me is under the age of twenty-three years, my Remaining Property shall be distributed to the Trustee of the Bypass Trust, to be administered as provided in Part 5.

   B  Distribution To Children And Descendants. If (i) no child of mine who survives me is under the age of twenty-three years but (ii) at least one child or other descendant of mine survives me, my Remaining Property shall be distributed to my children who survive me, in equal shares, subject to the provisions of Part 6 (providing for lifetime Child's Trusts for my children). However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me, subject to the provisions of Part 7 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

3.3  Contingent Disposition. Any part of my Remaining Property not effectively disposed of by the above provisions shall be distributed one-half to my then living Heirs (defined in Section 12.7) and one-half to the then living Heirs of my wife, subject to the provisions of Part 7 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).

4  MARITAL TRUST

4.1  Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife the income of the Marital Trust, at least quarterly, plus so much or all of the trust principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for her continued health, maintenance, and support.

4.2  Termination And Final Distribution Upon The Death Of My Wife. Upon the death of my wife, the Marital Trust shall terminate. The Trustee shall distribute any income accumulated but remaining undistributed at my wife's death to my wife's estate, and shall provide for payment of taxes attributable to the trust as provided in Section 10.8. The remaining trust property, if any, shall be disposed of as follows.

   A  Testamentary Limited Power Of Appointment. My wife shall have a Testamentary Limited Power of Appointment (defined in Section 12.4) over all the remaining trust property, exercisable in
favor of any one or more individuals or entities. If my wife does not fully exercise this Power of Appointment, the remaining unappointed trust property shall be disposed of as follows.

B  Alternate Distribution. The remaining unappointed trust property, if any, shall be distributed as provided in Section 3.2 or 3.3, whichever applies, as if it were my Remaining Property and as if I had died on the termination date of the trust.

5  BYPASS TRUST

5.1  Distributions During The Trust Term To My Wife, My Children And My Descendants. During the term of the Bypass Trust, the Trustee shall distribute to my wife, as primary beneficiary, and may distribute to my children and the descendants of any deceased child of mine, as secondary beneficiaries, so much or all of the trust income and principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

5.2  Testamentary Limited Power Of Appointment. If my wife survives me, she shall have a Testamentary Limited Power of Appointment (defined in Section 12.4) over all the remaining trust property, exercisable in favor of any one or more individuals or entities. To the extent that my wife exercises this Power of Appointment, the trust shall terminate upon her death. Otherwise the trust shall terminate (and the remaining unappointed trust property shall be disposed of) as provided in the following Section.

5.3  Termination And Final Distribution. On the death of my wife, or, if later, the date that no then living child of mine is under the age of twenty-three years, the Bypass Trust shall terminate and the remaining unappointed trust property, if any, shall be distributed as provided in Section 3.2 or 3.3, whichever applies, as if it were my Remaining Property and as if I had died on the termination date of the trust.

6  CHILD'S TRUSTS

6.1  Creation Of Trusts. All property that passes subject to the provisions of this Part that otherwise would be distributable to a child of mine shall instead be distributed to the Trustee as a separate Child's Trust named for the child, to be administered as provided in this Part. When used in this Part, the words "the trust," "the child's trust," or "his or her trust" mean the Child's Trust named for a particular child and the words "the child" mean that child.

6.2  Distributions During Child's Life. During the life of the child, the child's trust shall be administered as follows.

   A  General Discretionary Distributions To Child And Descendants. The Trustee shall distribute to the child, as primary beneficiary, and may distribute to his or her descendants (if any), as secondary beneficiaries, so much or all of the income and principal of the child's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

   B  Special Additional Distributions To Child. At any time after the child has reached the age of twenty-five years, and to the extent the Trustee believes the above distributions will not be unduly jeopardized, the Trustee may distribute to the child so much of the income and principal of the child's trust as the Trustee determines to be appropriate:

      1  Business Or Profession. To enable the child to enter into or continue a business or profession in which the Trustee believes there are reasonable prospects for success; or
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2 Home Purchase. To provide a down payment on a home for the child and his or her family, the value of which would be reasonably related to the type of home the child might be expected to own, occupy and support.

6.3 Termination And Final Distribution Upon Child's Death. Upon the child's death, the child's trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

   A Testamentary Powers Of Appointment. The child shall have a Testamentary General Power of Appointment over the GST Taxable portion of his or her trust. As to the remaining property of the trust, if any, the child shall have a Testamentary Limited Power of Appointment, exercisable in favor of any one or more individuals or entities. (The terms Testamentary General Power of Appointment and Testamentary Limited Power of Appointment are defined in Section 12.4, and the term GST Taxable portion is defined in Section 12.7.)

   B Distribution To Descendants. If the child does not fully exercise his or her Powers of Appointment, the remaining unappointed property of the trust, if any, shall be distributed per stirpes: (i) to the child's descendants who survive the child, if any, otherwise, (ii) to my descendants who survive the child, if any. The preceding distributions are subject to the provisions of this Part and Part 7 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

   C Contingent Disposition. Any property of the child's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the child's trust.

7 CONTINGENT TRUSTS

7.1 Creation Of Trusts. All property that passes subject to the provisions of this Part that otherwise would be distributable by the Executor or Trustee to any beneficiary (other than my wife or a child of mine) who has not reached the age of twenty-five years or who, in the discretion of the Executor or Trustee, respectively, is Incapacitated (defined in Section 12.6), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Part. When used in this Part, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.

7.2 Distributions During The Beneficiary's Life. During the life of the beneficiary, the beneficiary's trust shall be administered as follows.

   A General Discretionary Distributions. The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

   B Mandatory Terminating Distribution To Beneficiary At Age Twenty-Five. Whenever the beneficiary (i) reaches the age of twenty-five years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 12.6), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.

7.3 Termination And Final Distribution Upon The Beneficiary's Death. If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.
A  Distribution To Descendants. The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the beneficiary's parent who is a child of mine, if any, otherwise, (iii) the descendants of the nearest ancestor of the beneficiary who is a descendant of mine and who has surviving descendants, if any, otherwise, (iv) the descendants of the beneficiary's parent who is more closely related to me, if any, otherwise, (v) my descendants, if any. All of the preceding distributions are subject to the provisions of this Part and Part 6 (providing for lifetime Child's Trusts for my children).

B  Contingent Disposition. Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the beneficiary's trust.

8 EXECUTOR AND TRUSTEE PROVISIONS

The provisions of this Part govern the fiduciary relationship of the Executor and the Trustee. When used in this Will, where the context permits, the term Executor means the executor or co-executors from time to time serving; the term Trustee means the trustee or co-trustees from time to time serving; the term Fiduciary, means any Executor or Trustee; and the "estate" of a Fiduciary means the particular probate or trust estate being administered by the Fiduciary.

8.1 Executor Succession.

A  Executor Resignation. An Executor may resign at any time with or without cause by filing a resignation notice in the probate proceedings pertaining to my estate and by delivering a copy of the resignation notice (i) to each then serving Co-Executor, if any, (ii) to the next successor Executor named in this Will, if any, and (iii) to each adult individual, corporation, trustee, or other beneficiary then entitled to or permitted to receive a distribution from my estate as of the date the resignation notice is given.

B  Failure Or Cessation Of Every Named Executor. If every named Executor fails or ceases to serve, I desire that the successor administrator appointed by the court serve as independent administrator without bond or other security and with all the powers of the named Executors.

8.2 Trustee Succession.

A  Wife's Appointment Of Co-Trustee. Whenever my wife is serving as sole Trustee of any trust created under this Will, she may appoint a Co-Trustee to serve with her. If my wife subsequently ceases to act as Trustee while her appointed Co-Trustee is still serving, then the appointed Co-Trustee shall also cease serving as a Trustee (unless otherwise eligible to continue to serve as a Trustee in accordance with the provisions of this Will). Each Co-Trustee appointment must comply with the general provisions of Section 8.3.

B  Child's Right To Become Trustee Of Own Trust. At any time, each child of mine who has attained the age of twenty-five years may elect to become a Co-Trustee of his or her Child's Trust, and after attaining the age of thirty years may elect to become sole Trustee of his or her trust. If the child ceases to serve as Co-Trustee, the other Co-Trustee or Co-Trustees shall continue to serve as if the child had not become a Co-Trustee. If the child ceases to serve as sole Trustee, the child may appoint a Qualified Individual or Qualified Corporation to serve as Trustee of his or her trust in accordance with Section 8.3, or, if the child fails to appoint a successor, a successor Trustee shall be appointed as if the child had not become a Trustee.

C  Trustee Appointer. I name the following persons, in the following order, to serve as the Trustee Appointer: (i) June A. Cleaver, otherwise (ii) as to any Child's Trust or Contingent Trust, the
named beneficiary, if legally competent, otherwise the parent or guardian of the named beneficiary, if any, otherwise (iii) my oldest then living adult descendant, if any.

D  Resignation. A Trustee may resign as Trustee of any one or more trusts created under this Will at any time, with or without cause, by delivering a resignation notice in recordable form (i) to each adult beneficiary of the trust who is then permitted to receive distributions from the trust; (ii) to each serving Co-Trustee, if any; and (iii) to the next successor Trustee named in this Will, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

8.3 Trustee Appointment And Removal Procedures.

A  Generally. Every appointment (or removal) of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment (or removal), and delivered to the appointee (or Trustee being removed). The instrument must identify the appointee (or Trustee being removed), state the effective time and date of appointment (or removal), and contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this Will must be either a Qualified Corporation or one or more Qualified Individuals.

B  Qualified Individual. The term Qualified Individual means any legally competent individual who has attained the age of thirty years and who is willing to serve under this Will.

C  Qualified Corporation. The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this Will and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars ($5,000,000 U.S.), or (ii) at least one hundred million dollars ($100,000,000 U.S.) in trust assets under administration.

8.4 Fiduciary Compensation.

A  Expense Reimbursement And Reasonable Compensation. Each Fiduciary shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Fiduciary) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.

B  Professional Serving As Fiduciary. A professional individual serving as Fiduciary may receive compensation for Fiduciary services based on his or her customary hourly rates (or other customary charges for professional services). If the professional has hired himself or herself (or any professional organization with which he or she is affiliated) in a professional capacity with respect to his or her estate, Fiduciary compensation shall be in addition to compensation for professional services; however, each service shall be compensated for only once (as either a Fiduciary service or professional service but not both).

C  Corporate Co-Fiduciary. Where appropriate and customary, a bank or other corporate Co-Fiduciary may receive compensation in amounts not exceeding the customary and prevailing charges for services of a similar character at the time and at the place the services are performed as if it were serving as sole Fiduciary.

D  Waiver Of Right To Compensation. Any Fiduciary may at any time waive a right to receive compensation for services rendered or to be rendered as Fiduciary.
8.5 Fiduciary Liability.

A Generally. A Fiduciary who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Fiduciary in Section 9.2 and the other provisions of this Will shall not be liable: (i) for any loss that may occur as a result of any actions taken or not taken by the Fiduciary; (ii) for the acts, omissions or defaults of any other individual or entity serving as Fiduciary or as ancillary fiduciary; nor (iii) to any person dealing with the Fiduciary in the administration of its estate, unless the Fiduciary expressly contracts and binds itself personally. For purposes of the preceding, a Fiduciary's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.

B Uncompensated Individual Fiduciary. In addition, an individual serving as Fiduciary without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Fiduciary.

C Reimbursement. An individual or entity serving as Fiduciary shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Fiduciary in the administration of its estate.

8.6 Transactions In Which The Fiduciary Has An Interest. Notwithstanding any contrary provisions of the Texas Probate Code, the Texas Trust Code or other applicable law: (i) any individual or entity serving as Fiduciary under this Will may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Fiduciary establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Fiduciary may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by me. Whenever the office of Executor or Trustee is filled by more than one person, any transaction in which an Executor or Trustee has a personal interest must be approved by all Executors or Trustees, respectively.

8.7 Independent Administration Without Bond. No action shall be required in any court in relation to the settlement of my estate other than the probating and recording of this Will and the return of an inventory, appraisement and list of claims of my estate. So far as can be legally provided, all of the powers and discretions granted to a Fiduciary shall be exercised without the supervision of any court. No bond or other security shall be required of any primary or successor Fiduciary in any jurisdiction, whether acting independently or under court supervision.

8.8 Ancillary Fiduciary. If at any time and for any reason a Fiduciary is unwilling or unable to act as Fiduciary as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Fiduciary is serving), then, to the extent permitted by applicable law, the Fiduciary may appoint (and remove) any one or more Qualified Individuals or a Qualified Corporation (both terms defined in Section 8.3) to act as ancillary fiduciary on such terms as the Fiduciary may deem appropriate.

8.9 Restrictions On Beneficially Interested Trustee; Independent Trustee.

A Scope. This Section applies to every Trustee of any trust created under this Will (1) who is an "Interested Person" (meaning a person with any direct or indirect beneficial interest in the trust) or (2) who is related or subordinate to an Interested Person with respect to such trust, and was appointed as Trustee by the Interested Person after the Interested Person's exercise of a power to remove a prior Trustee.

B General Rule. No Trustee to whom this Section applies shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of the Interested Person, except to the extent that the
distributions or loans are limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of the Interested Person's legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to the Interested Person or if the distribution would discharge any of the Interested Person's legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by the Interested Person, except to the extent that the payment is limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education.

C  Independent Trustee. Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

8.10 Restrictions On Insured Trustee; Insurance Trustee.

A  Scope. This Section applies to every Trustee of any trust created under this Will (i) who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) or (ii) who is related or subordinate to an Insured Person with respect to such trust, and was appointed as Trustee by the Insured Person after the Insured Person's exercise of a power to remove a prior Trustee.

B  General Rule. No Trustee to whom this Section applies shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section.

C  When Trustee Serves As Sole Trustee. Every Trustee to whom this Section applies who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust.

D  Insurance Trustee. All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy.

8.11 Co-Fiduciary Provisions. Except as otherwise provided, Co-Executors and Co-Trustees shall act (i) by unanimous consent if two are serving, and (ii) by majority vote if three or more are serving. Any individual Co-Executor or Co-Trustee may revocably delegate to any other Co-Executor or Co-Trustee, respectively, any or all of his or her rights, powers and discretions as a Co-Executor or Co-Trustee. Any delegation shall be by written instrument specifying the extent and duration of the delegation. Whenever a corporate Co-Executor or Co-Trustee is serving, it shall have custody of all investments and records of its estate to the exclusion of all individual Co-Executors or Co-Trustees, respectively (but it may revocably waive this right in whole or in part from time to time), and it shall have the primary responsibility for preparing and distributing accountings.
8.12 Reorganization Or Insolvency Of Corporate Fiduciary. Except as otherwise provided, if a corporation nominated to serve or serving as Fiduciary ever changes its name, or merges or consolidates with or into any other bank or trust company, the corporation or successor entity shall be deemed to be a continuing entity and shall continue to be eligible for appointment, or shall continue to act as a Fiduciary. Notwithstanding the preceding, if a corporation serving or designated to serve as a Fiduciary becomes insolvent and its assets are sold, transferred to, or otherwise acquired by another entity by any form of governmental or regulatory process, the successor entity shall not succeed to appointment as Fiduciary, and if it does so succeed by operation of law, I direct the Fiduciary to resign from its office as Fiduciary unless the Trustee Appointer agrees that it may continue to serve.

9 ADMINISTRATIVE PROVISIONS

9.1 Duties At Inception Of Estate. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, a Fiduciary shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections 9.3 and 9.4.

9.2 Fundamental Fiduciary Duties. A Fiduciary shall administer its estate in good faith and in accordance with the terms of this Will and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of a Fiduciary's investment, management and administration of its estate.

A General Standard Of Care. A Fiduciary shall exercise the standard of care, skill, and caution generally exercised by compensated fiduciaries with respect to comparable estates in the same geographic area. A Fiduciary who has special skills or expertise, or is selected as a Fiduciary in reliance upon the Fiduciary's representation that the Fiduciary has special skills or expertise, has a duty to use those special skills or expertise.

B Loyalty And Impartiality; Primary And Secondary Beneficiaries. A Fiduciary shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Fiduciary personally. If a Fiduciary's estate has two or more beneficiaries, the Fiduciary shall act impartially, taking into account any differing interests of the beneficiaries. However, a Fiduciary (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.

C Conflict Resolution. A Fiduciary shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Fiduciary and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Fiduciary, in the Fiduciary's discretion, determines that a mutual agreement is not likely to be reached, the Fiduciary shall resolve the conflicts in the Fiduciary's discretion.

D Duty To Verify Facts. A Fiduciary shall make a reasonable effort to verify relevant facts. However, a Fiduciary may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated) in accordance with this Will and with reasonable care; and (ii) any written instrument or other evidence that the Fiduciary reasonably believes to be accurate. (But a corporate Fiduciary shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)

E Reliance On Predecessor Fiduciary. A Fiduciary may rely on the records and other representations of a Predecessor Fiduciary (meaning a predecessor Fiduciary under this Will or a personal representative or trustee of any estate or trust from which distributions may be made to the Fiduciary), and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Fiduciary to the extent that the Fiduciary (i) has received a request from a beneficiary having a vested material interest in its estate to
secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.

F Special Rule For Uncompensated Individual Fiduciaries. Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Fiduciary (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Fiduciaries without special skills or expertise.

9.3 Prudent Investor Rule. Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of a Fiduciary's investments.

A Generally. A Fiduciary shall invest and manage the assets of its estate as a prudent investor would, by considering the purposes, terms, distribution requirements, and other relevant circumstances of its estate.

B Investment And Management Authority. A Fiduciary may invest its estate in any kind of property or type of investment, and exercise the broadest managerial discretion over its estate, that is consistent with the other provisions of this Will.

C Portfolio Theory. A Fiduciary shall make investment and management decisions respecting individual assets not in isolation but in the context of its estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to its estate.

D Diversification. Generally, a Fiduciary shall diversify the investments of its estate unless the Fiduciary reasonably determines that, because of special circumstances, the purposes of its estate are better served without diversifying.

E Originally Contributed Properties. Notwithstanding the preceding (but subject to Section 11.6), a Fiduciary may continue to hold and maintain all assets originally contributed to its estate and all transmutations of those assets, without liability for any depreciation or loss that may result.

F Unproductive Or Wasting Assets. Except as otherwise provided in Section 11.6, a Fiduciary may receive, acquire and maintain unproductive or underproductive assets.

G Speculative Investments. A Fiduciary may receive, acquire and maintain assets that may be categorized as speculative or hazardous.

9.4 Specific Management And Investment Authority. A Fiduciary's management and investment authority includes, but is not limited to, the following.

A Securities And Business Interests. A Fiduciary may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin. A Fiduciary may form, reorganize or dissolve corporations, give proxies to vote securities, enter into voting trusts, and generally exercise all rights of a stockholder. A Fiduciary may continue, initially form, expand, and carry on business activities, whether in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities.

B Real Estate. A Fiduciary may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property.
C **Mineral Properties.** A Fiduciary may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate.

D **Life Insurance.** A Fiduciary may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest.

E **Joint Investments; Accounts With The Fiduciary.** A Fiduciary may invest its estate in undivided interests in any otherwise appropriate investment and may hold separate estates under this or any other instrument in one or more common accounts in undivided interests. A corporate Fiduciary may deposit the cash portion of its estate with itself and may invest its estate in its common trust funds.

F **Manage, Sell And Lease.** A Fiduciary may manage, sell, lease (for any term, even if beyond the anticipated term of its estate), partition, improve, repair, insure, and otherwise deal with all property of its estate.

G **Nominee Title.** A Fiduciary may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship.

H **Loans And Guarantees.** A Fiduciary may lend money to any individual or entity and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity. All these transactions (except those for the benefit of any current beneficiaries of the particular estate involved) shall be on commercially reasonable terms, including adequate interest and security.

I **Borrow.** A Fiduciary may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Fiduciary individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.

J **Pay Expenses.** A Fiduciary may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Fiduciary.

K **Claims.** A Fiduciary may institute and defend suits and release, compromise or abandon claims.

L **Environmental Hazards.** A Fiduciary may take all appropriate action to deal with any environmental hazard and comply with any environmental law, regulation or order, and may institute, contest or settle legal proceedings concerning environmental hazards.

9.5 **Agents And Attorneys.** A Fiduciary may employ and compensate agents, attorneys, advisors, accountants, and other professionals (including the Fiduciary individually and any professional organization with which the Fiduciary is affiliated) and may rely on their advice and delegate to them any authorities (including discretionary authorities).

9.6 **Principal And Income.** Subject to Section 11.6, a Fiduciary shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining income from a partnership or proprietorship, a Fiduciary may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.
9.7 Records, Books Of Account, And Reports. A Fiduciary shall maintain proper books of account which shall at all reasonable times be open for inspection or audit by all current permissible beneficiaries of its estate who are not Incapacitated. Within a reasonable time after receiving written request from a beneficiary entitled to inspect books of account, a Fiduciary shall make a written financial report of its estate to the beneficiary. The natural or court appointed guardian of an Incapacitated beneficiary otherwise entitled to request a report may request (and receive) a report on the beneficiary's behalf. No Fiduciary shall ever be required to deliver reports of its estate more frequently than quarterly. Whenever my wife is serving as Fiduciary she may provide copies of bank, brokerage and other financial statements and that shall constitute a sufficient report of all assets and transactions disclosed on the statements.

9.8 Discretionary Distribution Considerations. Except as otherwise provided, in making discretionary distributions under this Will, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. Except as otherwise provided, as to any trust with more than one beneficiary, the Trustee may make discretionary distributions in equal or unequal proportions and to the exclusion of any beneficiary. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this Will provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.

9.9 Form Of Payment To Beneficiaries. Distributions to a beneficiary may be made: (i) directly to the beneficiary; (ii) to the guardian or other similar representative (including the Fiduciary) of an Incapacitated beneficiary; (iii) to a Custodian (including the Fiduciary) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Fiduciary shall not be responsible for a distribution after it has been made to any person in accordance with this Section.

9.10 Personal Effects; Personal Residence.

A Division And Distribution Of Personal Effects. As to any personal effects item distributable to a minor or other Incapacitated person, the Executor may: (i) hold the item for future distribution to the distributee; (ii) sell the item and distribute the proceeds to the distributee or any trust named for him or her, or (iii) distribute the item (or sales proceeds) in any manner authorized by Section 9.9. In exercising this discretion, the Executor shall consider the age of the distributee, the practical utility of the item to him or her, and any sentimental or family significance of the item. In dividing personal effects among multiple distributees, each distributee who is a minor or Incapacitated person shall be represented by his or her parent or guardian, if any, otherwise by the Executor.

B Personal Effects Expenses. All reasonable expenses of packing, insuring and shipping any personal effects to a distributee, or storing personal effects for later distribution, shall be paid by the Executor as an administration expense.

C Insurance Proceeds And Liens. Except as otherwise provided, all gifts of personal effects or residential or other real property (i) include the proceeds of any insurance policies on the property and (ii) are subject to all liens other than liens for real property taxes or assessments.
D  Homestead Occupancy Right. My wife shall have the right to use and occupy as a principal residence (rent free and without charge except for taxes and other costs and expenses as may be specified elsewhere in this Will) any residential property held in any trust of which she is a current beneficiary. This right lasts for life or until the trust terminates or is revoked (as to the property) in compliance with Section 11.13 of the Texas Tax Code.

E  Homestead Maintenance And Expenses. At any time that my wife occupies residential property held in a trust as her principal residence she shall be responsible for maintaining the property at her expense; however, in making discretionary distributions to my wife from that (or any other) trust, the Trustee may consider those expenses and shall provide for them to the same extent, if any, as would be proper if the property were not held in the trust. For this purpose, "maintaining the property" means: (i) keeping the property in good repair and in compliance with all applicable ordinances, deed restrictions and other applicable rules, if any; (ii) paying the interest on any "mortgage" (meaning any purchase money or home improvement debt secured by a lien on the property); (iii) keeping the property properly insured; and (iv) paying all utilities and other ordinary expenses of maintaining and preserving the property. All other costs of the property shall be paid by the owners of the residence in proportion to their respective ownership interests. This includes, for example, all principal payments on any mortgage and the cost of all improvements and extraordinary repairs (those necessitated by fire, flood or other casualty) in excess of any available insurance proceeds.

9.11 Character Of Beneficial Interests. All interests provided under this Will (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me and shall not be the community property of the beneficiary and his or her spouse.

9.12 Distributions Not Treated As Advancements. Except as otherwise provided, no discretionary distribution to a beneficiary of any trust created under this Will shall be treated as an advancement.

9.13 Spendthrift Trust. Each trust created under this Will shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this Will shall be subject to anticipation or assignment by any beneficiary or to attachment by any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary.

9.14 Early Trust Termination. Subject to Section 8.9, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) if my wife is then living and a beneficiary of the trust, to my wife; otherwise, (iii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust.

9.15 Maximum Duration Of Trusts. Despite any other provision of this Will, to the extent that any trust created under this Will has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives my wife, all of the descendants of my parents and my wife's parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this Will who are living on the date of my death), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the trust.

9.16 Combination Of Trusts. A Fiduciary may terminate (or decline to fund) any trust created by this Will and transfer the trust assets to any other trust (created by this Will or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this Will also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote,
unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this Will may receive and administer as a part of its trust the assets of any other substantially similar trust. In exercising either discretion, the Trustee shall consider the trusts' inclusion ratios for generation-skipping transfer tax purposes but may combine trusts with different inclusion ratios if the Trustee shall deem the combination to be advisable.

9.17 Creation Of Multiple Trusts. A Fiduciary may divide any trust created under this Will into two or more separate identical trusts (in any proportion) if the Fiduciary deems it advisable. A Fiduciary shall divide any trust created under this Will into two or more separate identical trusts (in the appropriate proportion) in order: (i) to segregate assets having different presumed or actual transferors for GST purposes into separate trusts, (ii) to segregate assets exempt from the generation-skipping transfer tax from other assets, and (iii) to ensure that every trust has a GST inclusion ratio of either one or zero. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio. If a Fiduciary allocates assets between the new trusts based on values as of a date prior to the allocation date, the assets allocated to each trust shall have an aggregate fair market value that is fairly representative of the appreciation and depreciation in value of all available assets from the valuation date to the date or dates of allocation (or the Fiduciary may use an alternative allocation approach so long as the method of asset allocation does not jeopardize an otherwise allowable estate tax deduction or generation-skipping transfer tax exemption).

9.18 Division And Distribution Of Trust Estate. A Fiduciary may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution.

9.19 Successive Distributions Not Required. To the extent that a Fiduciary is authorized to distribute property to any trust (created under this Will or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Fiduciary may distribute the property directly to those persons or trusts in lieu of the directed distribution.

9.20 Additional Contributions. Subject to Section 9.17, the Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.

9.21 Collection Of Nonprobate Assets. A Fiduciary may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Fiduciary (collectively, "Nonprobate Assets"). A Fiduciary may take whatever action, if any, the Fiduciary considers best to collect Nonprobate Assets. Subject to the other provisions in this Will, any Nonprobate Assets shall be allocated: in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in satisfaction of any specific pecuniary gift for which the available properties are insufficient, if any; otherwise, to or among the trusts or individuals receiving my Remaining Property.

9.22 Plan Benefits Trusts. To the extent that a Fiduciary is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this Will is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer, if any; otherwise, (B) subject to Section 11.1 (allocating all income in respect of a decedent to the Marital Deduction Amount if my wife survives me), to or among the trusts or individuals receiving my Remaining Property, substituting Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except that all of the following persons, if any, who would otherwise be beneficially interested in the trust (other than those whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, defined below), are completely excluded as beneficiaries and permissible appointees of the trust: (A) individuals having a shorter life expectancy than the measuring beneficiary and (B) entities not having a life expectancy; and (v) the Trustee shall deliver a copy of this Will or
alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, the "measuring beneficiary" of a Plan Benefits Trust means the oldest individual who is both living and ascertainably specified in this Will (by name or by class) as a current permissible beneficiary of the trust as of the date for determination of the "Designated Beneficiary" under applicable statute and treasury regulations (the "DB Determination Date"). I intend that, except for persons whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

9.23 Creation Of S Trusts. If: (i) any trust created under this Will (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Child's Trust or Contingent Trust, the term "Current Beneficiary" means the child or other beneficiary for whom the trust is named. In the case of the Marital Trust or the Bypass Trust, the term "Current Beneficiary" means my wife. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. I intend that every S Trust qualify as a QSST within the meaning of Code Section 1361(d)(3). This Will shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.


A Generally. To the extent consistent with the other provisions of this Will, and to the maximum extent allowed by law, (i) a Fiduciary shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this Will shall be governed by Texas law.

B Change Of Governing Law. The Trustee of any trust may designate any other jurisdiction's law as the governing law with respect to the administration of that trust, on the following conditions: (i) The change of governing law must be in the best interests of the trust's beneficiaries and must not jeopardize any otherwise allowable estate tax deduction or generation-skipping transfer tax exemption. (ii) The Trustee (or at least one Co-Trustee) of the trust must be domiciled (in the case of an individual Trustee) or have its principal place of business (in the case of a bank or other corporate trustee) in the designated jurisdiction. (iii) The designated jurisdiction may be any nation, state, district, territory, political subdivision, or similar jurisdiction. (iv) The designation must be by signed, acknowledged declaration which states the effective date of the designation and is filed among the trust records. (v) There is no limit on the number of successive designations of governing law for any trust. (vi) Notwithstanding any designation, Texas law shall continue to apply to the extent that the powers of the Trustee are broader under Texas law than under the designated jurisdiction's law.
C  Advance Notice And Consent. Unless waived, the Trustee desiring to change the governing law of a trust must give thirty days' advance written notice in recordable form: (i) to my wife, if she is then living, otherwise to the beneficiary for whom the trust is named, if any, otherwise to each adult beneficiary of the trust who is then permitted to receive distributions from the trust, if any, and (ii) to the Trustee Appointer. The Trustee may not change the governing law of any trust without the prior written consent of the Trustee Appointer.

10 DEBTS, EXPENSES AND TAXES

10.1 Payment Of Debts. The Executor shall provide for the payment, when due, of: (i) all debts and obligations (other than Death Taxes, defined below) that are legally enforceable against my estate; and (ii) any other debts and obligations (other than Death Taxes) the payment of which, in the Executor's discretion, is in the best interests of my estate (collectively, "Debts"). If any property of my estate is directed to be distributed subject to any Debt, the Executor shall make payments on that Debt only as necessary to avoid default pending distribution of the property. Debts payable on a periodic basis may be paid as the payments become due. The Executor may extend or renew any Debt, in whole or in part, for any period (including periods extending beyond the duration of the administration of my estate).

10.2 Payment Of Expenses. The Executor shall provide for the payment of the expenses incident to my last illness and funeral, and the expenses incident to the administration of my estate (collectively, "Expenses").

10.3 Payment Of Death Taxes. Except as otherwise provided, the Executor shall provide for the payment of all estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties and also including generation-skipping transfer taxes on direct skips from my estate) imposed under the laws of any jurisdiction by reason of my death on or with respect to any property, or the transfer or receipt of any property, passing or which has passed under or outside this Will or any codicil to this Will, by beneficiary designation, by operation of law, or any other form of transfer (collectively, "Death Taxes"). Any Death Taxes may be deferred. Notwithstanding the preceding, the term Death Taxes does not include (and the Executor shall not pay) taxes imposed directly upon the recipient of property, including (i) generation-skipping transfer taxes on taxable terminations, taxable distributions or direct skips from a trust, and (ii) recapture of estate taxes under Section 2032A of the Code.

10.4 Source Of Payment.

A Generally. Except as otherwise provided: (i) Debts and Expenses shall be charged against my Remaining Property; (ii) Death Taxes shall be charged against that portion of my Remaining Property that does not qualify for the marital or charitable deduction, until exhausted, then against the balance of my Remaining Property; and (iii) interest concerning any tax (including Death Taxes) shall be charged in the same manner as the tax.

B Certain Management Expenses. Management Expenses attributable to any marital or charitable share may be charged against that share. For this purpose: "Management Expenses" means Expenses incurred in connection with the investment of assets or their preservation or maintenance during a reasonable period of administration; and "marital share" or "charitable share" means a property interest passing from me to my wife or to the Marital Trust, or to any charity, respectively.

C Disclaimer By My Wife. In the event of a qualified disclaimer by my wife of any interest in any property, any resulting increase in Death Taxes shall be charged against the disclaimed interest.

D Non-Elected Marital Trust. In the event of the non-election under Code Section 2056(b)(7) of the Code to qualify all (or any portion) of the Marital Trust for the marital deduction, any resulting increase in Death Taxes shall be charged against that trust (or portion).

E Direct Skips. Generation-skipping transfer taxes on direct skips shall be charged against the property involved in the direct skip.
F Principal And Income Apportionment. Debts, Expenses and Death Taxes shall be apportioned between principal and income in accordance with Section 378B of the Texas Probate Code; however, no Debts, Expenses or Death Taxes shall be charged against the income of any marital or charitable share (both terms defined above) to the extent it would result in a material limitation on the share's right to income.

10.5 Death Tax Recovery.

A Generally. Except as otherwise provided, the Executor shall enforce all rights to recovery of any Death Taxes with respect to assets not passing under my Will to the maximum extent authorized by Sections 2206, 2207, 2207A, and 2207B of the Code, Section 322A of the Texas Probate Code, or otherwise.

B Marital Deduction Property. If any property is included in my gross estate under Code Section 2044 ("Marital Deduction Property"), the following provisions shall apply.

1 Pro-Rata Recovery. Except as otherwise provided, the Executor shall limit the recovery of Death Taxes with respect to Marital Deduction Property to the amount that bears the same ratio to the total of those Death Taxes as the taxable value of Marital Deduction Property bears to the total taxable value of all property in my taxable estate. For this purpose, the "taxable value" of any property (including Marital Deduction Property) shall be determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

2 Cross Payment From Other Trusts. If the trustee of any trust (or any other person controlling any other property not passing under this Will) pays any Death Taxes for any Marital Deduction Property, the Executor shall accept such payment and shall waive all rights of recovery against that Marital Deduction Property to the extent of the payment.

3 Waiver Of Recovery. In addition, the Executor shall waive all rights to recover Death Taxes with respect to any Reverse QTIP Property, but only to the extent that the waiver increases the total amount of available GST Exempt Property and does not decrease the total amount of all available property. In this Paragraph, (1) "Reverse QTIP Property" means Marital Deduction Property with respect to which the reverse QTIP election under Code Section 2652(a)(3) has been (or is intended to be) made; (2) "available property" means the net amount of property (A) passing to my descendants or passing to (or remaining in) trusts that include my descendants as beneficiaries, and (B) with respect to which either my wife or I am the transferor for generation-skipping transfer tax purposes; and (3) "available GST Exempt Property" means available property having a zero inclusion ratio under Code Section 2642.

10.6 Charges Against Exempt Assets. Notwithstanding any contrary provision, and to the maximum extent allowed by law, no Debts, Expenses or Death Taxes shall be charged against or satisfied out of any interest in any Exempt Assets, including: (i) insurance and annuities protected under Chapter 1108 of the Texas Insurance Code or otherwise; (ii) any stock bonus, pension, profit sharing or similar plan (including any individual retirement account or retirement plan for self employed individuals) protected under Texas Property Code Section 42.0021 or otherwise; and (iii) any other property or interest in property that is not chargeable with the claims of the creditors of my estate (collectively, "Exempt Assets"). However, the following may be charged against a particular Exempt Asset: (i) Debts secured by a lien or other security interest in that Exempt Asset, (ii) administrative expenses properly and fairly allocable to the administration of that Exempt Asset, and (iii) Death Taxes imposed with respect to that Exempt Asset.
10.7 Tax Elections. A Fiduciary shall make elections under tax laws solely in fiduciary capacity and in the manner as appears advisable to the Fiduciary to minimize taxes and expenses payable out of my estate, the trust property of trusts created by me, and by the beneficiaries of each. For example: (i) the Executor may join in the filing of a joint income tax return with my wife or her estate; (ii) the Trustee, in its discretion, may elect or not elect to treat all or any portion of federal estimated taxes paid by any trust to be treated as a payment made by any one or more beneficiaries of that trust who are entitled to receive current distributions of income or principal from that trust (the election need not be made in a pro rata manner among all trust beneficiaries); and (iii) equitable adjustments may (but need not) be made to compensate for the effect of tax elections on the interests of beneficiaries or the amount of recovery of Death Taxes as directed above.

10.8 Taxes In My Wife's Estate. Upon termination of any trust created under this Will that results in any Increased Death Taxes in my wife's estate, unless my wife provides to the contrary by specific reference to marital deduction property in her Will, the Trustee shall pay from the trust, either directly or to my wife's estate, the amount of the Increased Death Taxes imposed with respect to the trust.

A Increased Death Taxes. In this Section, Increased Death Taxes means that amount of the total estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties), imposed under the laws of any jurisdiction with respect to my wife's estate that the personal representative of my wife's estate shall rightfully request in accordance with her Will or applicable law giving due regard to the "taxable value" of all property determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

B Multiple Trusts. If there is more than one such trust that results in any Increased Death Taxes in my wife's estate, all Increased Death Taxes shall be paid first out of the trust with the largest inclusion ratio, if any, otherwise (or thereafter), such Increased Death Taxes shall be paid pro-rata out of all such trusts (or all such remaining trusts) based on relative taxable values (as determined above).

C Estimated Payments. The Trustee may make payment based upon a good faith estimate of Increased Death Taxes provided by my wife's legal representative, but only if my wife's legal representative agrees to refund any excess payment. The final amount of Increased Death Taxes shall be determined after the final audit of my wife's federal estate tax return has been completed. The Trustee may make distributions of the remaining assets of any such trust to the ultimate beneficiaries of such trust only after setting aside sufficient cash or properties to assure payment of all Increased Death Taxes.

10.9 Allocation Of GST Exemption. The Executor, in the Executor's discretion, may allocate any remaining portion of my GST Exemption (as defined in Code Section 2631) to any property as to which I am the transferor (under this Will or otherwise), including the following: (i) any property transferred during my life as to which I did not make (and was not deemed to have made) an allocation prior to my death; and (ii) any transfers at my death (whether outright or in trust, or under this Will or otherwise), with respect to which a generation-skipping transfer (as defined in Code Section 2611) may occur at or any time after my death. The Executor shall never be liable to any person by reason of a GST allocation made in accordance with this Section if the allocation is made in good faith and without gross negligence.

10.10 GST Taxes On Trust Distributions. If the Trustee considers any distribution or termination of an interest or power in a trust created under this Will to be a taxable distribution (a "Distribution"), a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination, or Direct Skip. In the case of a Distribution, the Trustee may increase the amount otherwise distributable by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping transfer tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such
Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the distributable trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part with respect to property held in trust under this Will and in part with respect to other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the property held in trust under this Will, taking into consideration deductions, exemptions, credits and other factors that the Trustee deems appropriate. The Trustee may, but need not, make equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions, Terminations or Direct Skips.

11 MARITAL DEDUCTION AMOUNT

11.1 Marital Deduction Amount. The Marital Deduction Amount is the sum of (i) all income in respect of a decedent and rights to income in respect of a decedent included in Eligible Marital Deduction Property (defined below), if any, plus (ii) the smallest additional pecuniary amount of Eligible Marital Deduction Property, if any, which, if allowed as a federal estate tax marital deduction, would result in the lowest possible total of federal estate tax and state death taxes (but only those state death taxes which are estate taxes computed by reference to the credit allowable under Code Section 2011, or successor provisions) payable from all sources by reason of my death.

11.2 Pre Distribution Income. The distribution of the Marital Deduction Amount shall entitle the recipient to the net income of my estate, without material limitation, that is attributable to the Marital Deduction Amount from the date of my death to the date or dates of distribution.

11.3 Eligible Marital Deduction Property. The term Eligible Marital Deduction Property means property (including any Nonprobate Assets payable to the Trustee) or the proceeds of property, the value of which is included in my gross estate for federal estate tax purposes, that is available for distribution in satisfaction of the Marital Deduction Amount, and as to which (if distributed in satisfaction of the Marital Deduction Amount) it is possible (by election or otherwise) to obtain a federal estate tax marital deduction. The gift of the Marital Deduction Amount shall abate to the extent that it cannot be fully satisfied with Eligible Marital Deduction Property. To the extent that there is an excess of Eligible Marital Deduction Property, assets for which a foreign tax credit is available under Section 2014 of the Code shall not be distributed in satisfaction of the Marital Deduction Amount gift.

11.4 Computational Guidelines. The Marital Deduction Amount shall be determined: (i) as if a federal estate tax marital deduction is allowed for property distributed to the Marital Trust; (ii) without regard to any qualified disclaimer that my wife may file with respect to the gift of the Marital Deduction Amount or any other interest passing from me to my wife under this Will or otherwise; and (iii) in all other respects, after accounting for all other deductions and credits allowed to my estate and after giving effect to the exercise or proposed exercise of tax elections. However, except as expressly provided, nothing in this Part requires any particular exercise of any tax election.

11.5 Valuation Of Distributed Property. Each item of property distributed in kind in satisfaction of the Marital Deduction Amount shall be valued for purposes of satisfying the gift at its value as finally determined for federal estate tax purposes in my gross estate, or, if such item is an investment or reinvestment of property included in my gross estate for federal estate tax purposes or the proceeds of any sale or other disposition of property so included or of any such investment or reinvestment, the item shall be valued at its federal income tax basis at the actual date or dates of distribution. Notwithstanding any contrary provision, the total of all property distributed in satisfaction of the Marital Deduction Amount shall have an aggregate fair market value at the date or dates of distribution which is fairly representative of the appreciation and depreciation in value from my death to the date or dates of such distribution of all such property then available for distribution. In estimating the date of distribution values of assets distributed in kind, the Executor may use its best judgment; the Executor need not obtain an independent distribution date appraisal.

11.6 Statement Of Intent. I intend that the distribution of the Marital Deduction Amount to the Marital Trust qualify in full for the federal estate tax marital deduction and any similar state death tax marital deduction. My wife may require the Trustee to make property held in the Marital Trust productive of income within a reasonable time. For each calendar year in which an interest is held by the Marital Trust in any Plan Benefits (defined in Section 9.22): (i)
the Trustee shall allocate distributions from each Plan Benefits interest (A) to trust income, to the extent of the income earned that year by the interest, and (B) to trust principal, to the extent of any excess distributions; and (ii) to the extent that distributions from a Plan Benefits interest are less than the income earned by the interest, my wife may require the Trustee to remedy the shortfall by demanding additional distributions, allocating principal receipts from other assets to trust income, or taking other appropriate measures, at the Trustee's option. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent. However, this Section shall not require that the election provided for in Code Section 2056(b)(7) be made in whole or in part with respect to the Marital Trust.

12 GENERAL PROVISIONS

12.1 Property Disposed Of By This Will. I intend by this Will to dispose only of my separate property and my share of community property. I confirm to my wife her share of our community property. Whenever (i) a Fiduciary possesses any property which is my wife's separate property, or which represents her interest in our community property, including, but not limited to, interests in or the proceeds of life insurance policies, qualified employee benefit plans or trusts, or other employment related compensation agreements or individual retirement accounts, and (ii) the Fiduciary determines that it no longer needs to administer such property, the Fiduciary shall deliver such property to my wife, if she is then living, otherwise, to her estate. Notwithstanding the preceding, a Fiduciary may make non pro rata divisions of any community property with my wife's consent.

12.2 Disclaimers. Except as otherwise provided, if a beneficiary under this Will is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this Will, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.

12.3 Disclaimer Trusts. This Section applies whenever an individual (the "Disclaimant") files a qualified disclaimer with respect to any property that passes to (or remains in) a trust under this Will (the "Recipient Trust") by virtue of such qualified disclaimer, but only if the Disclaimant: (i) is a Trustee (or named successor Trustee) of the Recipient Trust; (ii) has the power to remove a Trustee of the Recipient Trust; (iii) holds any Power of Appointment (defined in Section 12.4) over the Recipient Trust; (iv) has any beneficial interest in the Recipient Trust; or (v) has any power to direct the beneficial enjoyment of the Recipient Trust. Notwithstanding any contrary provision of this Will, unless the Disclaimant disclaims all of his or her rights, powers and interests with respect to the Recipient Trust as described above, the property which would otherwise pass to (or remain in) the Recipient Trust shall instead be distributed to a separate Disclaimer Trust on terms identical to the terms of the Recipient Trust except as follows.

A  Power Of Appointment. The Disclaimant shall possess no Power of Appointment over the Disclaimer Trust.

B  Ascertainable Limitation On Discretionary Powers. Neither the Disclaimant nor any Trustee whom the Disclaimant may remove from office without cause, shall possess or exercise any powers with respect to, or be authorized to participate in any decision as to, any discretionary distribution or any loan to or for the benefit of any beneficiary of the Disclaimer Trust, except to the extent that such distributions or loans are limited to amounts necessary for the beneficiary's health, maintenance, and support.

C  Discretionary Termination. The Disclaimant shall have no authority to terminate the Disclaimer Trust because of its small size.
D  Estimated Tax Payments. The Disclaimant shall have no authority to treat any estimated income tax payment by the Disclaimer Trust as an estimated income tax payment by a beneficiary.

E  Beneficial Interest. If the Disclaimant is not my wife, the Disclaimant shall have no beneficial interest in the Disclaimer Trust.

F  Independent Trust Administration. As to persons who remain as beneficiaries of both the Disclaimer Trust and the Recipient Trust, the Trustee may exercise discretionary powers held with respect to the Disclaimer Trust and the Recipient Trust (including discretionary distributional powers) on an independent basis, and where the Recipient Trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount so specified shall not change but the Trustee may distribute such amount from either the Recipient Trust or the Disclaimer Trust or partly from each in any ratio.

12.4 Testamentary Powers Of Appointment Created In This Will. Except as otherwise provided, the following provisions shall apply to every Testamentary Limited Power of Appointment ("Limited Power") and Testamentary General Power of Appointment ("General Power") (collectively, "Power of Appointment") created in this Will which may be exercisable at any particular time by any person (the "Donee").

A  Exercise Of Powers Of Appointment. Every exercise of a Power of Appointment must specifically refer to the Section in this Will creating the Power of Appointment. A Power of Appointment may be exercised solely by language in the duly probated Will of the Donee. A Fiduciary may assume the Donee had no Will if, six months after the Donee's death, the Trustee has no actual knowledge of the existence of a Will.

B  Permissible Appointees Of Limited Powers. The Donee may exercise a Limited Power only in favor of any one or more then living or subsequently born individuals and other entities who are members of the group or class specified, in such proportions among them (even to the complete exclusion of any one or more of them) and subject to such trusts and such other conditions as the Donee may choose. Notwithstanding any contrary provision, the Donee of a Limited Power shall never have the power to exercise the Limited Power in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, nor may he or she appoint trust property in discharge of his or her legal obligations.

C  Permissible Appointees Of General Powers. The Donee may exercise a General Power in favor of his or her estate or the creditors of his or her estate, as well as any one or more then living or subsequently born individuals or other entities in such proportions and subject to such trusts and such other conditions as the Donee may choose.

12.5 Powers Of Appointment Not Exercised. I do not intend by this Will to exercise any power of appointment that I may possess or may come to possess.

12.6 Determination Of Incapacity. Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.

A  Fiduciaries. For purposes of qualification to serve as a Fiduciary or in any other fiduciary capacity under this Will, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.

B  Beneficiaries. An adult individual beneficiary under this Will shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such
evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.

12.7 Definitions. In connection with the construction and interpretation of this Will the following definitions apply, unless otherwise expressly provided.

A Children And Descendants. Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

B Spouse And My Wife. A "spouse" of a person does not include any individual who, at the relevant time, is divorced or legally separated from the person, or engaged in pending divorce proceedings with the person. A "surviving spouse" of a person means the individual, if any, who was the person's "spouse" at the time of his or her death. References in this Will to June A. Cleaver or "my wife" mean her; provided that we are not divorced, legally separated, nor engaged in pending divorce proceedings as of the date of my death (or her death, if she predeceases me), in which case all provisions in this Will in favor of my wife or appointing her in any fiduciary capacity shall be void and this Will shall be construed as if she predeceased me.

C Heirs. A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.

D Per Stirpes. Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.

E Pronouns. Pronouns, nouns and terms as used in this Will shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.

F Survive. If my wife survives me by any period of time or if we have both died and the order of our deaths cannot be determined, she shall be presumed to have survived me for all purposes. In all other cases a requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days; however, the Fiduciary may make advance distributions within that period of any gift to any beneficiary to the extent necessary to provide for his or her health, maintenance, and support.

G GST Taxable Portion. The "GST Taxable" portion of any terminating trust is, collectively, each portion or fraction of the trust, if any, with a positive inclusion ratio that would pass to a skip person with respect to the presumed or actual transferor of the trust in a transfer subject to the generation-skipping transfer tax (all as determined under Chapter 13 of the Code) if no Powers of Appointment over any part of the trust existed.

H Code. References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.
12.8 Notice. Any notice required to be given or delivered under this Will shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Fiduciary's records for the person or organization.

12.9 Actions By And Notice To Incapacitated Persons. Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom I am more closely related.

12.10 Headings. The headings employed in this Will are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this Will.

I have signed this Will this ____ day of ______________, 2009.

WARD M. CLEAVER

We certify that in our presence on the date appearing above, WARD M. CLEAVER signed, sealed, published and declared the foregoing instrument as his Will, that at his request and in his presence and in the presence of each other, we have signed our names below as witnesses, and that at such time we believed him to be of sound mind and memory.

(Witness Signature) ________________________________

113 Main

Houston, Texas  77096

(Witness Signature) ________________________________

113 Main

Houston, Texas  77096
SELF-PROVING AFFIDAVIT

STATE OF TEXAS }

COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared WARD M. CLEAVER, _____________________________ and _____________________________, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said WARD M. CLEAVER, Testator, declared to me and to the said witnesses in my presence that said instrument is his Last Will and Testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the Testator that the said Testator had declared to them that said instrument is his Last Will and Testament and that he executed the same as such and wanted each of them to sign it as a witness; and upon their respective oaths, each witness stated further that they signed the instrument as witnesses in the presence of the said Testator and at his request; that the Testator was at that time eighteen years of age or over and was of sound mind; and that each of the said witnesses was then at least fourteen years of age.

(Witness Signature)   WARD M. CLEAVER, Testator

(Witness Signature)

SUBSCRIBED AND SWORN TO BEFORE ME by WARD M. CLEAVER, Testator, and _____________________________ and _____________________________, witnesses, this ___ day of ____________, 2009.

____________________________________
Notary Public, State of Texas
B. Second Generation ILIT

WARD M. CLEAVER 2009 IRREVOCABLE TRUST
AGREEMENT

I am Ward M. Cleaver of Harris County, Texas. I irrevocably transfer the sum of One Dollar to June A. Cleaver, as Trustee. This property and all investments, reinvestments and additions shall be administered as provided in this instrument. This instrument may be designated the "WARD M. CLEAVER 2009 IRREVOCABLE TRUST AGREEMENT."

I am married to June A. Cleaver. I have two children: Wallace Cleaver, born March 21, 1977, and Theodore Cleaver, born May 31, 1983. Every reference in this instrument to a "child" or "children" of mine is to them and all other children who may be born to or adopted by me in the future.

1 TRUSTEE APPOINTMENT

I appoint the following, in the following order, as sole Trustee of every trust created under this instrument: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver, otherwise Big Trust Company. If all of the above (and any successors) fail or cease to serve as Trustee of any trust and the resulting vacancy is not filled under the provisions of Section 6.1, the Trustee Appointer (designated in Section 6.1) shall appoint a Trustee of that trust in accordance with the provisions of Section 6.3.

2 WARD M. CLEAVER 2009 IRREVOCABLE TRUST

2.1 Creation Of Trust. All property transferred to the Trustee shall initially be administered as the "Ward M. Cleaver 2009 Irrevocable Trust" ("the trust" in this Part) as provided in this Part.

2.2 Withdrawal Rights. My wife shall have a 5 & 5 Withdrawal Right over all Gifts to the trust (both terms defined in Part 8). If any Gift is not fully covered by my wife's Withdrawal Right, each child of mine shall have a Full Withdrawal Right over the portion of the Gift that exceeds my wife's Withdrawal Right. Any Withdrawals made by a child shall be charged without interest as an advancement against the share of the unappointed trust property, if any, otherwise distributable to the child (or his or her descendants) on the termination of the trust. All Withdrawal Rights are subject to Section 8.7.

2.3 Distributions During The Trust Term.

A General Discretionary Distributions To My Wife, My Children And My Descendants During My Life. During my life, except as otherwise provided, the Trustee may distribute to my wife, as primary beneficiary, and my children and the descendants of any deceased child of mine, as secondary beneficiaries, so much or all of the trust income and principal as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B General Discretionary Distributions To My Wife, My Children And My Descendants After My Death. After my death, the Trustee shall distribute to my wife, as primary beneficiary, and may distribute to my children and the descendants of any deceased child of mine, as secondary beneficiaries, so much or all of the trust income and principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).
C Limitation On Distributions. Notwithstanding any contrary provision, property subject to a Withdrawal Right that has neither lapsed nor been released shall not be distributed to any person other than the holder of that Withdrawal Right.

2.4 Contingent Distribution To Contingent Marital Trust At My Death. On my death, if my wife survives me, all Taxable Trust Property (defined in Part 8) included in the trust, if any, shall be distributed to the Trustee of the Contingent Marital Trust to be administered as provided in Part 3.

2.5 Testamentary Limited Power Of Appointment. If my wife survives me, she shall have a Testamentary Limited Power of Appointment (defined in Section 9.2) over all the remaining trust property, exercisable in favor of any one or more individuals or entities. To the extent that my wife exercises this Power of Appointment, the trust shall terminate upon her death. Otherwise the trust shall terminate (and the remaining unappointed trust property shall be disposed of) as provided in the following Section.

2.6 Termination And Final Distribution. On the last to occur of (i) the date twenty-four months after my death, (ii) the death of my wife, and (iii) the date that no then living child of mine is under the age of twenty-three years, the trust shall terminate and the remaining unappointed trust property, if any, shall be disposed of as follows.

A Distribution To Children And Descendants. If at least one child or other descendant of mine is then living, the remaining unappointed trust property, if any, shall be distributed in equal shares to my then surviving children, subject to the provisions of Part 4 (providing for lifetime Child's Trusts for my children). However, if any child who fails to survive leaves one or more then surviving descendants, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her then surviving descendants, subject to the provisions of Part 5 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

B Contingent Disposition. Any property of this trust not effectively disposed of by the preceding provisions shall be distributed one-half to my then living Heirs (defined in Section 9.4) and one-half to the then living Heirs of my wife, subject to the provisions of Part 5 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).

3 CONTINGENT MARITAL TRUST

3.1 Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife the income of the Contingent Marital Trust, at least quarterly, plus so much or all of the trust principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for her continued health, maintenance, and support.

3.2 Termination And Final Distribution Upon The Death Of My Wife. Upon the death of my wife, the Contingent Marital Trust shall terminate. The Trustee shall distribute any income accumulated but remaining undistributed at my wife's death to my wife's estate, and shall provide for payment of taxes attributable to the trust as provided in Section 7.23. The remaining trust property, if any, shall be disposed of as follows.

A Testamentary Limited Power Of Appointment. My wife shall have a Testamentary Limited Power of Appointment (defined in Section 9.2) over all the remaining trust property, exercisable in favor of any one or more individuals or entities. If my wife does not fully exercise this Power of Appointment, the remaining unappointed trust property shall be disposed of as follows.

B Alternate Distribution. The remaining unappointed trust property, if any, shall be distributed as provided in Section 2.6, as if it were the remaining unappointed property of the Ward
M. Cleaver 2009 Irrevocable Trust and as if the Ward M. Cleaver 2009 Irrevocable Trust terminated on the termination date of the Contingent Marital Trust.

4 CHILD'S TRUSTS

4.1 Creation Of Trusts. All property that passes subject to the provisions of this Part that otherwise would be distributable to a child of mine shall instead be distributed to the Trustee as a separate Child's Trust named for the child, to be administered as provided in this Part. When used in this Part, the words "the trust," "the child's trust," or "his or her trust" mean the Child's Trust named for a particular child and the words "the child" mean that child.

4.2 Distributions During Child's Life. During the life of the child, the child's trust shall be administered as follows.

A General Discretionary Distributions To Child And Descendants. The Trustee shall distribute to the child, as primary beneficiary, and may distribute to his or her descendants (if any), as secondary beneficiaries, so much or all of the income and principal of the child's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B Special Additional Distributions To Child. At any time after the child has reached the age of twenty-five years, and to the extent the Trustee believes the above distributions will not be unduly jeopardized, the Trustee may distribute to the child so much of the income and principal of the child's trust as the Trustee determines to be appropriate:

1 Business Or Profession. To enable the child to enter into or continue a business or profession in which the Trustee believes there are reasonable prospects for success; or

2 Home Purchase. To provide a down payment on a home for the child and his or her family, the value of which would be reasonably related to the type of home the child might be expected to own, occupy and support.

4.3 Termination And Final Distribution Upon Child's Death. Upon the child's death, the child's trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

A Testamentary Powers Of Appointment. The child shall have a Testamentary General Power of Appointment over the GST Taxable portion of his or her trust. As to the remaining property of the trust, if any, the child shall have a Testamentary Limited Power of Appointment, exercisable in favor of any one or more individuals or entities. (The terms Testamentary General Power of Appointment and Testamentary Limited Power of Appointment are defined in Section 9.2, and the term GST Taxable portion is defined in Section 9.4.)

B Distribution To Descendants. If the child does not fully exercise his or her Powers of Appointment, the remaining unappointed property of the trust, if any, shall be distributed per stirpes: (i) to the child's descendants who survive the child, if any, otherwise, (ii) to my descendants who survive the child, if any. The preceding distributions are subject to the provisions of this Part and Part 5 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

C Contingent Disposition. Any property of the child's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Subsection 2.6.2.6B as if it were the remaining unappointed property of the Ward M. Cleaver 2009 Irrevocable Trust and as if the Ward M. Cleaver 2009 Irrevocable Trust had terminated on the termination date of the child's trust.
5 CONTINGENT TRUSTS

5.1 Creation Of Trusts. All property that passes subject to the provisions of this Part that otherwise would be distributable by the Trustee to any beneficiary (other than my wife or a child of mine) who has not reached the age of twenty-five years or who, in the discretion of the Trustee, is Incapacitated (defined in Section 9.3), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Part. When used in this Part, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.

5.2 Distributions During The Beneficiary's Life. During the life of the beneficiary, the beneficiary's trust shall be administered as follows.

A General Discretionary Distributions. The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B Mandatory Terminating Distribution To Beneficiary At Age Twenty-Five. Whenever the beneficiary (i) reaches the age of twenty-five years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 9.3), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.

5.3 Termination And Final Distribution Upon The Beneficiary's Death. If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

A Distribution To Descendants. The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the beneficiary's parent who is a child of mine, if any, otherwise, (iii) the descendants of the nearest ancestor of the beneficiary who is a descendant of mine and who has surviving descendants, if any, otherwise, (iv) the descendants of the beneficiary's parent who is more closely related to me, if any, otherwise, (v) my descendants, if any. All of the preceding distributions are subject to the provisions of this Part and Part 4 (providing for lifetime Child's Trusts for my children).

B Contingent Disposition. Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Subsection 2.6.2.6B as if it were the remaining unappointed property of the Ward M. Cleaver 2009 Irrevocable Trust and as if the Ward M. Cleaver 2009 Irrevocable Trust had terminated on the termination date of the beneficiary's trust.

6 TRUSTEE PROVISIONS

The provisions of this Part govern the fiduciary relationship of the Trustee. When used in this instrument, where the context permits, the term Trustee means the trustee or co-trustees from time to time serving and the "estate" of the Trustee means the particular trust estate being administered by the Trustee.

6.1 Trustee Succession.

A Wife's Appointment Of Co-Trustee. Whenever my wife is serving as sole Trustee of any trust created under this instrument, she may appoint a Co-Trustee to serve with her. If my wife subsequently ceases to act as Trustee while her appointed Co-Trustee is still serving, then the
appointed Co-Trustee shall also cease serving as a Trustee (unless otherwise eligible to continue to serve as a Trustee in accordance with the provisions of this instrument). Each Co-Trustee appointment must comply with the general provisions of Section 6.3.

B Child's Right To Become Trustee Of Own Trust. At any time, each child of mine who has attained the age of twenty-five years may elect to become a Co-Trustee of his or her Child's Trust, and after attaining the age of thirty years may elect to become sole Trustee of his or her trust. If the child ceases to serve as Co-Trustee, the other Co-Trustee or Co-Trustees shall continue to serve as if the child had not become a Co-Trustee. If the child ceases to serve as sole Trustee, the child may appoint a Qualified Individual or Qualified Corporation to serve as Trustee of his or her trust in accordance with Section 6.3, or, if the child fails to appoint a successor, a successor Trustee shall be appointed as if the child had not become a Trustee.

C Trustee Appointer. I name the following persons, in the following order, to serve as the Trustee Appointer: (i) June A. Cleaver, otherwise (ii) as to any Child's Trust or Contingent Trust, the named beneficiary, if legally competent, otherwise the parent or guardian of the named beneficiary, if any, otherwise (iii) my oldest then living adult descendant, if any.

D Resignation. A Trustee may resign as Trustee of any one or more trusts created under this instrument at any time, with or without cause, by delivering a resignation notice in recordable form (i) to me, if I am then living, otherwise, to each adult beneficiary of the trust who is then permitted to receive distributions from the trust; (ii) to each serving Co-Trustee, if any; and (iii) to the next successor Trustee named in this instrument, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

6.2 Corporate Trustee Removal Without Cause. The first named Trustee Appointer who is then living and not Incapacitated may remove any bank or other corporation serving as Trustee of any trust at any time with or without cause and appoint a Qualified Corporation as successor Trustee of such trust. Every such Trustee removal must comply with the general provisions of Section 6.3.

6.3 Trustee Appointment And Removal Procedures.

A Generally. Every appointment (or removal) of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment (or removal), and delivered to the appointee (or Trustee being removed). The instrument must identify the appointee (or Trustee being removed), state the effective time and date of appointment (or removal), and every appointment must contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this instrument must be either a Qualified Corporation or one or more Qualified Individuals (defined below).

B Qualified Individual. The term Qualified Individual means any legally competent individual (other than me or my wife) who has attained the age of thirty years and who is willing to serve under this instrument.

C Qualified Corporation. The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this instrument and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars ($5,000,000 U.S.), or (ii) at least one hundred million dollars ($100,000,000 U.S.) in trust assets under administration.
6.4 Trustee Compensation.

A Expense Reimbursement And Reasonable Compensation. Each Trustee shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Trustee) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.

B Professional Serving As Trustee. A professional individual serving as Trustee may receive compensation for Trustee services based on his or her customary hourly rates (or other customary charges for professional services). If the professional has hired himself or herself (or any professional organization with which he or she is affiliated) in a professional capacity with respect to his or her estate, Trustee compensation shall be in addition to compensation for professional services; however, each service shall be compensated for only once (as either a Trustee service or professional service but not both).

C Corporate Co-Trustee. Where appropriate and customary, a bank or other corporate Co-Trustee may receive compensation in amounts not exceeding the customary and prevailing charges for services of a similar character at the time and at the place the services are performed as if it were serving as sole Trustee.

D Waiver Of Right To Compensation. Any Trustee may at any time waive a right to receive compensation for services rendered or to be rendered as Trustee.

6.5 Trustee Liability.

A Generally. A Trustee who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Trustee in Section 7.3 and the other provisions of this instrument shall not be liable: (i) for any loss that may occur as a result of any actions taken or not taken by the Trustee; (ii) for the acts, omissions or defaults of any other individual or entity serving as Trustee or as ancillary trustee; nor (iii) to any person dealing with the Trustee in the administration of its estate, unless the Trustee expressly contracts and binds itself personally. For purposes of the preceding, a Trustee's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.

B Uncompensated Individual Trustee. In addition, an individual serving as Trustee without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Trustee.

C Reimbursement. An individual or entity serving as Trustee shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Trustee in the administration of its estate.

6.6 Transactions In Which The Trustee Has An Interest. Notwithstanding any contrary provisions of the Texas Trust Code or other applicable law: (i) any individual or entity serving as Trustee under this instrument may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Trustee establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Trustee may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by me. Whenever the office of Trustee is filled by more than one person, any transaction in which a Trustee has a personal interest must be approved by all Trustees.
6.7 Independent Administration Without Bond. So far as can be legally provided, all of the powers and discretions granted to the Trustee shall be exercised without the supervision of any court. No bond or other security shall be required of any primary or successor Trustee in any jurisdiction, whether acting independently or under court supervision.

6.8 Ancillary Trustee. If at any time and for any reason the Trustee is unwilling or unable to act as Trustee as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Trustee is serving), then, to the extent permitted by applicable law, the Trustee may appoint (and remove) any one or more Qualified Individuals or a Qualified Corporation (both terms defined in Section 6.3) to act as ancillary trustee on such terms as the Trustee may deem appropriate.

6.9 Restrictions On Beneficially Interested Trustee; Independent Trustee. No Trustee shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of himself or herself, except to the extent that the distributions or loans are limited by an ascertainable standard relating to his or her health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of his or her legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to himself or herself or if the distribution would discharge any of his or her legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by him or her, except to the extent that the payment is limited by an ascertainable standard relating to his or her health, maintenance, support, or education. Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: the currently acting Co-Trustee(s), if any, otherwise, the next successor Trustee(s) designated under this instrument, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

6.10 Restrictions On Insured Trustee; Insurance Trustee. No Trustee who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section. Every such Trustee who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust. All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not an Insured Person with respect to the policy: the currently acting Co-Trustee(s), if any, otherwise, the next successor Trustee(s) designated under this instrument, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy.

6.11 Co-Trustee Provisions. Except as otherwise provided, Co-Trustees shall act (i) by unanimous consent if two are serving, and (ii) by majority vote if three or more are serving. Any individual Co-Trustee may revocably delegate to any other Co-Trustee any or all of his or her rights, powers and discretions as a Co-Trustee. Any delegation shall be by written instrument specifying the extent and duration of the delegation. Whenever a corporate Co-Trustee is serving, it shall have custody of all investments and records of its estate to the exclusion of all individual Co-Trustees (but it may revocably waive this right in whole or in part from time to time), and it shall have the primary responsibility for preparing and distributing accountings.

6.12 Reorganization Or Insolvency Of Corporate Trustee. If a corporation nominated to serve or serving as the Trustee ever changes its name, or merges or consolidates with or into any other bank or trust company, the corporation shall be deemed to be a continuing entity and shall continue to be eligible for appointment, or shall
continue to act as the Trustee. If a corporation serving or designated to serve as the Trustee becomes insolvent and its assets are sold, transferred to, or otherwise acquired by another entity by any form of governmental or regulatory process, the successor entity shall not succeed to appointment as Trustee, and if it does so succeed by operation of law, I direct the Trustee to resign from its office as Trustee unless the Trustee Appointer agrees that it may continue to serve.

7  ADMINISTRATIVE PROVISIONS

7.1 Trust Irrevocable. This instrument and the trusts evidenced by it shall be irrevocable.

7.2 Duties At Inception Of Estate. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, the Trustee shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections 7.4 and 7.5.

7.3 Fundamental Fiduciary Duties. The Trustee shall administer its estate in good faith and in accordance with the terms of this instrument and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of the Trustee's investment, management and administration of its estate.

A  General Standard Of Care. The Trustee shall exercise the standard of care, skill, and caution generally exercised by compensated trustees with respect to comparable estates in the same geographic area. A Trustee who has special skills or expertise, or is selected as a Trustee in reliance upon the Trustee's representation that the Trustee has special skills or expertise, has a duty to use those special skills or expertise.

B  Loyalty And Impartiality; Primary And Secondary Beneficiaries. The Trustee shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Trustee personally. If a Fiduciary's estate has two or more beneficiaries, the Trustee shall act impartially, taking into account any differing interests of the beneficiaries. However, the Trustee (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.

C  Conflict Resolution. The Trustee shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Trustee and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Trustee, in the Trustee's discretion, determines that a mutual agreement is not likely to be reached, the Trustee shall resolve the conflicts in the Trustee's discretion.

D  Duty To Verify Facts. The Trustee shall make a reasonable effort to verify relevant facts. However, the Trustee may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated) in accordance with this instrument and with reasonable care; and (ii) any written instrument or other evidence that the Trustee reasonably believes to be accurate. (But a corporate Trustee shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)

E  Reliance On Predecessor Fiduciary. The Trustee may rely on the records and other representations of a Predecessor Fiduciary (meaning a predecessor Trustee under this instrument or a personal representative or trustee of any estate or trust from which distributions may be made to the Trustee), and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Trustee to the extent that the Trustee (i) has received a request from a beneficiary having a vested material interest in its estate to
secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.

F  Special Rule For Uncompensated Individual Trustees. Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Trustee (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Trustees without special skills or expertise.

7.4 Prudent Investor Rule. Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of the Trustee's investments.

A  Generally. The Trustee shall invest and manage the assets of its estate as a prudent investor would, by considering the purposes, terms, distribution requirements, and other relevant circumstances of its estate.

B  Investment And Management Authority. The Trustee may invest its estate in any kind of property or type of investment, and exercise the broadest managerial discretion over its estate, that is consistent with the other provisions of this instrument.

C  Portfolio Theory. The Trustee shall make investment and management decisions respecting individual assets not in isolation but in the context of its estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to its estate.

D  Diversification. Generally, except as provided in Subsection 7.5.7.5A, the Trustee shall diversify the investments of its estate unless the Trustee reasonably determines that, because of special circumstances, the purposes of its estate are better served without diversifying.

E  Originally Contributed Properties. Notwithstanding the preceding (but subject to Section 8.9), the Trustee may continue to hold and maintain all assets originally contributed to its estate and all transmutations of those assets, without liability for any depreciation or loss that may result.

F  Unproductive Or Wasting Assets. Except as otherwise provided in Section 8.9, the Trustee may receive, acquire and maintain unproductive or underproductive assets.

G  Speculative Investments. The Trustee may receive, acquire and maintain assets that may be categorized as speculative or hazardous.

7.5 Specific Management And Investment Authority. The Trustee's management and investment authority includes, but is not limited to, the following.

A  Life Insurance. The Trustee may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest. The Trustee may concentrate its investments in policies of insurance covering my life or the joint lives of me and my wife. The Trustee may maintain such policies out of its estate but may also refrain from paying any premiums unless it has adequate resources available.

B  Securities And Business Interests. The Trustee may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin. The
Trustee may form, reorganize or dissolve corporations, give proxies to vote securities, enter into voting trusts, and generally exercise all rights of a stockholder. The Trustee may continue, initially form, expand, and carry on business activities, whether in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities.

C Real Estate. The Trustee may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property.

D Mineral Properties. The Trustee may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate.

E Purchase Of Estate Assets. The Trustee may purchase any property (including speculative investments) from my probate estate at fair market value, and may retain the purchased property (and all transmutations of the property) without liability for any depreciation or loss that may result, to the same extent as if the property were part of the assets originally contributed to its estate.

F Joint Investments; Accounts With The Trustee. The Trustee may invest its estate in undivided interests in any otherwise appropriate investment and may hold separate estates under this or any other instrument in one or more common accounts in undivided interests. A corporate Trustee may deposit the cash portion of its estate with itself and may invest its estate in its common trust funds.

G Manage, Sell And Lease. The Trustee may manage, sell, lease (for any term, even if beyond the anticipated term of its estate), partition, improve, repair, insure, and otherwise deal with all property of its estate.

H Nominee Title. The Trustee may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship.

I Loans And Guarantees. The Trustee may lend money to any individual or entity (including my probate estate), and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity (including my probate estate). All these transactions (except those for the benefit of any current beneficiaries of the particular estate involved) shall be on commercially reasonable terms, including adequate interest and security.

J Borrow. The Trustee may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Trustee individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.

K Pay Expenses. The Trustee may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Trustee.

L Claims. The Trustee may institute and defend suits and release, compromise or abandon claims.

M Environmental Hazards. The Trustee may take all appropriate action to deal with any environmental hazard and comply with any environmental law, regulation or order, and may institute, contest or settle legal proceedings concerning environmental hazards.
7.6 **Agents And Attorneys.** The Trustee may employ and compensate agents, attorneys, advisors, accountants, and other professionals (including the Trustee individually and any professional organization with which the Trustee is affiliated) and may rely on their advice and delegate to them any authorities (including discretionary authorities).

7.7 **Principal And Income.** Subject to Section 8.9, the Trustee shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining income from a partnership or proprietorship, the Trustee may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.

7.8 **Records, Books Of Account, And Reports.** The Trustee shall maintain proper books of account which shall at all reasonable times be open for inspection or audit by me and all current permissible beneficiaries of its estate who are not Incapacitated. Within a reasonable time after receiving written request from a beneficiary entitled to inspect books of account, the Trustee shall make a written financial report of its estate to the beneficiary. The natural or court appointed guardian of an Incapacitated beneficiary otherwise entitled to request a report may request (and receive) a report on the beneficiary's behalf. No Trustee shall ever be required to deliver reports of its estate more frequently than quarterly. Whenever my wife is serving as Trustee she may provide copies of bank, brokerage and other financial statements and that shall constitute a sufficient report of all assets and transactions disclosed on the statements.

7.9 **Discretionary Distribution Considerations.** Except as otherwise provided, in making discretionary distributions under this instrument, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. Except as otherwise provided, as to any trust with more than one beneficiary, the Trustee may make discretionary distributions in equal or unequal proportions and to the exclusion of any beneficiary. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this instrument provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.

7.10 **Form Of Payment To Beneficiaries.** Distributions to a beneficiary may be made: (i) directly to the beneficiary; (ii) to the guardian or other similar representative (including the Trustee) of an Incapacitated beneficiary; (iii) to a Custodian (including the Trustee) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Trustee shall not be responsible for a distribution after it has been made to any person in accordance with this Section.

7.11 **Character Of Beneficial Interests.** All interests provided under this instrument (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me and shall not be the community property of the beneficiary and his or her spouse.

7.12 **Distributions Not Treated As Advancements.** Except as otherwise provided, no discretionary distribution to a beneficiary of any trust created under this instrument shall be treated as an advancement.
7.13 **Spendthrift Trust.** Each trust created under this instrument shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this instrument shall be subject to anticipation or assignment by any beneficiary or to attachment by any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary.

7.14 **Early Trust Termination.** Subject to Section 6.9, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust.

7.15 **Maximum Duration Of Trusts.** Despite any other provision of this instrument, to the extent that any trust created under this instrument has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives me, my wife, all of the descendants of my parents and my wife's parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this instrument who are living on the date of this instrument), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Subsection 2.6.2.6B as if it were the remaining unappointed property of the Ward M. Cleaver 2009 Irrevocable Trust and as if the Ward M. Cleaver 2009 Irrevocable Trust terminated on the termination date of the trust.

7.16 **Combination Of Trusts.** The Trustee may terminate (or decline to fund) any trust created by this instrument and transfer the trust assets to any other trust (created by this instrument or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this instrument also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this instrument may receive and administer as a part of its trust the assets of any other substantially similar trust. In exercising either discretion, the Trustee shall consider the trusts' inclusion ratios for generation-skipping transfer tax purposes but may combine trusts with different inclusion ratios if the Trustee shall deem the combination to be advisable.

7.17 **Creation Of Multiple Trusts.** The Trustee may divide any trust created under this instrument into two or more separate identical trusts (in any proportion) if the Trustee deems it advisable. The Trustee shall divide any trust created under this instrument into two or more separate identical trusts (in the appropriate proportion) in order: (i) to segregate assets having different presumed or actual transferors for GST purposes into separate trusts, (ii) to segregate assets exempt from the generation-skipping transfer tax from other assets, and (iii) to ensure that every trust has a GST inclusion ratio of either one or zero. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio. If the Trustee allocates assets between the new trusts based on values as of a date prior to the allocation date, the assets allocated to each trust shall have an aggregate fair market value that is fairly representative of the appreciation and depreciation in value of all available assets from the valuation date to the date or dates of allocation (or the Trustee may use an alternative allocation approach so long as the method of asset allocation does not jeopardize an otherwise allowable estate tax deduction or generation-skipping transfer tax exemption).

7.18 **Division And Distribution Of Trust Estate.** The Trustee may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution.
7.19 Successive Distributions Not Required. To the extent that the Trustee is authorized to distribute property to any trust (created under this instrument or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Trustee may distribute the property directly to those persons or trusts in lieu of the directed distribution.

7.20 Additional Contributions.

A Generally. Except as otherwise provided, and subject to Section 7.17, the Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.

B Contributions By My Wife. Notwithstanding any contrary provision, contributions of my wife's property made while my wife and I are both living to any trust in which my wife has an interest shall not be accepted by the Trustee and shall be void if improperly accepted. In the event of any improper acceptance, the Trustee shall deliver the property (or other property of equivalent value) to my wife, if she is then living, otherwise, to her estate, effective as of the contribution date. In this Section, "my wife's property" means any property which is my wife's separate property, or which represents her interest in our community property, including, but not limited to, interests in or the proceeds of life insurance policies, qualified employee benefit plans or trusts, or other employment related compensation agreements or individual retirement accounts, but excluding property transferred in a bona fide sale for an adequate consideration in money or money's worth.

7.21 Collection Of Nonprobate Assets. The Trustee may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Trustee (collectively, "Nonprobate Assets"). The Trustee may take whatever action, if any, the Trustee considers best to collect Nonprobate Assets. Subject to the other provisions in this instrument, any Nonprobate Assets shall be allocated: in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in the same manner as other trust contributions.

7.22 Creation Of S Trusts. If: (i) any trust created under this instrument (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Child's Trust or Contingent Trust, the term "Current Beneficiary" means the child or other beneficiary for whom the trust is named. In the case of the Contingent Marital Trust or the Ward M. Cleaver 2009 Irrevocable Trust, the term "Current Beneficiary" means my wife. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. I intend that every S Trust qualify as a QSST within the meaning of Code Section 1361(d)(3). This instrument shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

7.23 Taxes In My Wife's Estate. Upon termination of any trust created under this instrument that results in any Increased Death Taxes in my wife's estate, unless my wife provides to the contrary by specific reference to
marital deduction property in her Will, the Trustee shall pay from the trust, either directly or to my wife's estate, the amount of the Increased Death Taxes imposed with respect to the trust.

A Increased Death Taxes. In this Section, Increased Death Taxes means that amount of the total estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties), imposed under the laws of any jurisdiction with respect to my wife's estate that the personal representative of my wife's estate shall rightfully request in accordance with her Will or applicable law giving due regard to the "taxable value" of all property determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

B Multiple Trusts. If there is more than one such trust that results in any Increased Death Taxes in my wife's estate, all Increased Death Taxes shall be paid first out of the trust with the largest inclusion ratio, if any, otherwise (or thereafter), such Increased Death Taxes shall be paid pro-rata out of all such trusts (or all such remaining trusts) based on relative taxable values (as determined above).

C Estimated Payments. The Trustee may make payment based upon a good faith estimate of Increased Death Taxes provided by my wife's legal representative, but only if my wife's legal representative agrees to refund any excess payment. The final amount of Increased Death Taxes shall be determined after the final audit of my wife's federal estate tax return has been completed. The Trustee may make distributions of the remaining assets of any such trust to the ultimate beneficiaries of such trust only after setting aside sufficient cash or properties to assure payment of all Increased Death Taxes.

7.24 GST Taxes On Trust Distributions. If the Trustee considers any distribution or termination of an interest or power in a trust created under this instrument to be a taxable distribution (a "Distribution"), a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination, or Direct Skip. In the case of a Distribution, the Trustee may increase the amount otherwise distributable by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping transfer tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the distributable trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part with respect to property held in trust under this instrument and in part with respect to other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the property held in trust under this instrument, taking into consideration deductions, exemptions, credits and other factors that the Trustee deems appropriate. The Trustee may, but need not, make equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions, Terminations or Direct Skips.

7.25 Discharge Of Legal Obligation Prohibited. Notwithstanding any contrary provision, the Trustee shall not make any distribution that would discharge any legal obligation I may have.

7.26 Governing Law.

A Generally. To the extent consistent with the other provisions of this instrument, (i) the Trustee shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this instrument shall be governed by Texas law.
B Change Of Governing Law. The Trustee of any trust may designate any other jurisdiction's law as the governing law with respect to the administration of that trust, on the following conditions: (i) The change of governing law must be in the best interests of the trust's beneficiaries and must not jeopardize any otherwise allowable estate tax deduction or generation-skipping transfer tax exemption. (ii) The Trustee (or at least one Co-Trustee) of the trust must be domiciled (in the case of an individual Trustee) or have its principal place of business (in the case of a bank or other corporate trustee) in the designated jurisdiction. (iii) The designated jurisdiction may be any nation, state, district, territory, political subdivision, or similar jurisdiction. (iv) The designation must be by signed, acknowledged declaration which states the effective date of the designation and is filed among the trust records. (v) There is no limit on the number of successive designations of governing law for any trust. (vi) Notwithstanding any designation, Texas law shall continue to apply to the extent that the powers of the Trustee are broader under Texas law than under the designated jurisdiction's law.

C Advance Notice And Consent. Unless waived, the Trustee desiring to change the governing law of a trust must give thirty days' advance written notice in recordable form: (i) to me, if I am then living, otherwise to my wife, if she is then living, otherwise to the beneficiary for whom the trust is named, if any, otherwise to each adult beneficiary of the trust who is then permitted to receive distributions from the trust, if any, and (ii) to the Trustee Appointer. The Trustee may not change the governing law of any trust without the prior written consent of the Trustee Appointer.

8 WITHDRAWAL RIGHT AND TAXABLE TRUST PROPERTY

8.1 Withdrawal Right. Each beneficiary having a Withdrawal Right with respect to a Gift (defined below) may direct the Trustee to distribute trust property to the beneficiary up to the amount and upon the conditions specified in this Part. The distribution may be made either out of the property involved in the Gift or other trust property, in the Trustee's discretion.

8.2 Amount Subject To Withdrawal. The amount of a beneficiary's "Full Withdrawal Right" with respect to a particular Gift (or portion of a Gift) is the lesser of (i) the Annual Exclusion Amount and (ii) the beneficiary's Pro-Rata Share of the Gift (or portion). The amount of a beneficiary's "5 & 5 Withdrawal Right" with respect to a particular Gift (or portion of a Gift) is the lesser of (i) the Annual Exclusion Amount, (ii) the 5 & 5 Limitation, and (iii) the beneficiary's Pro-Rata Share of the Gift (or portion).

A Annual Exclusion Amount. The "Annual Exclusion Amount" is the excess of (i) Twelve Thousand Dollars ($12,000), or such other amount as may from time to time be allowed as an annual exclusion from gifts under Code Section 2503(b), over (ii) the value of all previous Gifts to the extent to or for the benefit of the same beneficiary by the same donor during the same calendar year for which the Code Section 2503(b) exclusion is allowable.

B 5 & 5 Limitation. The 5 & 5 Limitation is the excess of the Section 2514(e) Amount (determined as of the date the Withdrawal Right would lapse) over the amount of the beneficiary's Withdrawal Rights previously allowed to lapse in the same calendar year. In this instrument, the "Section 2514(e) Amount" means (i) the greater of Five Thousand Dollars ($5,000) or five percent (5%) of the aggregate value of the assets out of which, or the proceeds of which, the exercise of the Withdrawal Right could have been satisfied, or (ii) such other amount, the lapse of a power of appointment over which will not be treated as a release of the power, as may from time to time be allowed under Code Section 2514(e).

C Pro-Rata Share. A beneficiary's "Pro-Rata Share" of a Gift (or portion of a Gift) is the value of the Gift (or portion) divided by the total number of beneficiaries having a Withdrawal Right with respect to the Gift (or portion), with any portion of a beneficiary's Withdrawal Right limited by the Annual Exclusion Amount or 5 & 5 Limitation being added proportionately to each remaining beneficiary's Pro-Rata Share.
8.3 **Gifts.** The term "Gifts" means all transfers for purposes of Code Section 2511 by all persons made during the calendar year, including the transfer to the Trustee of the initial trust property. Each separate transfer of property shall be treated as a separate Gift subject to a separate Withdrawal Right. If the donor of a Gift and the donor's spouse jointly advise the Trustee of an election to treat the Gift as if made one-half by the donor and one-half by the donor's spouse, the Gift shall be treated as two separate equal Gifts.

8.4 **Notice Of Withdrawal Right.** Within a reasonable period after receipt of any Gift, the Trustee shall give reasonable notice of the Gift and Withdrawal Right to each beneficiary who has a Withdrawal Right with respect to the Gift. Written notice shall be deemed given when sent by the Trustee to the individual entitled to notice at the address appearing on the Trustee's records for that person.

8.5 **Period Of Withdrawal Right.**

A **Generally.** Except as otherwise provided, each Withdrawal Right as to a particular Gift shall lapse on the first to occur of: (i) the date thirty days after the date on which notice is given, (ii) December 31 of the calendar year in which the Gift was made (but only if notice is given no later than December 21 of the calendar year of the Gift), (iii) the date of the beneficiary's death, and (iv) in the case of a Withdrawal Right held by my wife, the date sixty days after the date of the Gift.

B **Hanging Power.** Notwithstanding the above, a beneficiary's Withdrawal Right will terminate only to the extent that the Withdrawal Right, when added to every other withdrawal right of the beneficiary which has previously lapsed during the same calendar year, if any, does not exceed the Section 2514(e) Amount (defined above, and determined as of the date that the current Withdrawal Right would otherwise lapse). To the extent that this Subsection extends a beneficiary's Withdrawal Rights beyond the time they would otherwise lapse, the aggregate Withdrawal Rights shall lapse on the second day of January of each succeeding year, but only to the extent that the aggregate Withdrawal Rights do not exceed the Section 2514(e) Amount (determined at that time).

8.6 **Minor And Incapacitated Beneficiaries.** If a Withdrawal Right is exercisable by a person who is legally incapacitated or who has not reached legal age, then (i) if the donor of a Gift to a child of the donor advises the Trustee of an election to treat the Gift as if made one-half by the donor and one-half by the donor's spouse (and if the donor's spouse confirms the advice), then as to the Gift treated as made by each spouse, notice of the right shall be given to, and the right shall be exercisable by, the donor's spouse, and (ii) in all other circumstances notice of the right shall be given to, and the right shall be exercisable by, the natural or court appointed guardian of the minor (other than the donor). If more than one guardian of a minor exists and only one of them is a descendant of mine, then that guardian shall be the one to receive notice and decide whether to exercise the Withdrawal Right on behalf of the minor.

8.7 **Donor's Right To Alter Withdrawal Right.** Notwithstanding any contrary provision, any donor (including me) making a Gift may, by a written instrument delivered to the Trustee prior to or contemporaneously with the Gift, do any of the following with respect to Withdrawal Rights regarding the Gift: (i) alter the amount, duration, notice rights with respect to, or any other consequence or aspect of any Withdrawal Right, (ii) eliminate any Withdrawal Right, and (iii) create new Withdrawal Rights in any beneficiary. Notwithstanding the foregoing, the Trustee may refuse to accept a Gift if the Trustee believes a proposed modification of the Withdrawal Rights is unacceptable to the Trustee from an administrative or tax standpoint.

8.8 **Taxable Trust Property.** "Taxable Trust Property" means all trust property, if any, which is included in my gross estate for federal estate tax purposes and with respect to which a federal estate tax marital deduction is available, by election or otherwise, if distributed to the Contingent Marital Trust. For this purpose, "trust property" means all property of the Ward M. Cleaver 2009 Irrevocable Trust (including property distributable to the Trustee at or as a result of my death under my Will, by beneficiary designation, or otherwise) and the proceeds of any sale or other disposition of that property. However, assuming I survive for three years after the initial funding of this trust, I expect that no trust property will be includable in my gross estate and that there will be no Taxable Trust Property.
8.9 Statement Of Intent. I intend that the distribution of Taxable Trust Property to the Contingent Marital Trust qualify in full for the federal estate tax marital deduction and any similar state death tax marital deduction. My wife may require the Trustee to make property held in the Contingent Marital Trust productive of income within a reasonable time. For each calendar year in which an interest is held by the Contingent Marital Trust in any Plan Benefits (meaning qualified benefit plans or individual retirement accounts or other Nonprobate Assets subject to the Minimum Required Distribution Rules): (i) the Trustee shall allocate distributions from each Plan Benefits interest (A) to trust income, to the extent of the income earned that year by the interest, and (B) to trust principal, to the extent of any excess distributions; and (ii) to the extent that distributions from a Plan Benefits interest are less than the income earned by the interest, my wife may require the Trustee to remedy the shortfall by demanding additional distributions, allocating principal receipts from other assets to trust income, or taking other appropriate measures, at the Trustee's option. This instrument shall be administered and interpreted in a manner consistent with this intent. Any provision of this instrument which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent. However, this Section shall not require that the election provided for in Code Section 2056(b)(7) be made in whole or in part with respect to the Contingent Marital Trust.

9 GENERAL PROVISIONS

9.1 Disclaimers. Except as otherwise provided, if a beneficiary under this instrument is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this instrument, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.

9.2 Testamentary Powers Of Appointment Created In This Instrument. Except as otherwise provided, the following provisions shall apply to every Testamentary Limited Power of Appointment ("Limited Power") and Testamentary General Power of Appointment ("General Power") (collectively, "Power of Appointment") created in this instrument which may be exercisable at any particular time by any person (the "Donee").

A Exercise Of Powers Of Appointment. Every exercise of a Power of Appointment must specifically refer to the Section in this instrument creating the Power of Appointment. A Power of Appointment may be exercised solely by language in the duly probated Will of the Donee. The Trustee may assume the Donee had no Will if, six months after the Donee's death, the Trustee has no actual knowledge of the existence of a Will.

B Permissible Appointees Of Limited Powers. The Donee may exercise a Limited Power only in favor of any one or more then living or subsequently born individuals and other entities who are members of the group or class specified, in such proportions among them (even to the complete exclusion of any one or more of them) and subject to such trusts and such other conditions as the Donee may choose. Notwithstanding any contrary provision, the Donee of a Limited Power shall never have the power to exercise the Limited Power in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, nor may he or she appoint trust property in discharge of his or her legal obligations.

C Permissible Appointees Of General Powers. The Donee may exercise a General Power in favor of his or her estate or the creditors of his or her estate, as well as any one or more then living or subsequently born individuals or other entities in such proportions and subject to such trusts and such other conditions as the Donee may choose.
9.3 Determination Of Incapacity. Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.

A Fiduciaries. For purposes of qualification to serve as a Trustee or in any other fiduciary capacity under this instrument, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.

B Beneficiaries. An adult individual beneficiary under this instrument shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.

9.4 Definitions. In connection with the construction and interpretation of this instrument the following definitions apply, unless otherwise expressly provided.

A Children And Descendants. Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

B Spouse And My Wife. A "spouse" of a person does not include any individual who, at the relevant time, is divorced or legally separated from the person, or engaged in pending divorce proceedings with the person. A "surviving spouse" of a person means the individual, if any, who was the person's "spouse" at the time of his or her death. References in this instrument to June A. Cleaver or "my wife" mean her; provided that we are not divorced, legally separated, nor engaged in pending divorce proceedings as of the relevant time, in which case all provisions in this instrument in favor of my wife or appointing her in any fiduciary capacity shall be void and this instrument shall be construed as if she predeceased me.

C Heirs. A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law as to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.

D Per Stirpes. Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.

E Pronouns. Pronouns, nouns and terms as used in this instrument shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.

F Survive. If my wife survives me by any period of time or if we have both died and the order of our deaths cannot be determined, she shall be presumed to have survived me for all purposes. In all other cases a requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days.
G GST Taxable Portion. The "GST Taxable" portion of any terminating trust is, collectively, each portion or fraction of the trust, if any, with a positive inclusion ratio that would pass to a skip person with respect to the presumed or actual transferor of the trust in a transfer subject to the generation-skipping transfer tax (all as determined under Chapter 13 of the Code) if no Powers of Appointment over any part of the trust existed.

H Code. References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.

9.5 Notice. Any notice required to be given or delivered under this instrument shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Trustee's records for the person or organization.

9.6 Actions By And Notice To Incapacitated Persons. Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom I am more closely related.

9.7 Headings. The headings employed in this instrument are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this instrument.

I have signed this instrument this ____ day of ______________, 2009.

WARD M. CLEAVER, Grantor

The undersigned accepts the above trusts as of the day and year last written above.

JUNE A. CLEAVER, Trustee

STATE OF TEXAS
COUNTY OF HARRIS

This instrument was acknowledged before me on this ____ day of ______________, 2009, by Ward M. Cleaver, as Grantor.

Notary Public, State of Texas
This instrument was acknowledged before me on this ____ day of _____________, 2009, by June A. Cleaver, as Trustee.

Notary Public, State of Texas
C. FAQs Memo: Beginning The Probate And Estate Administration Process

What is the first step in the probate and estate administration process? 
The first step in the probate and estate administration process is to schedule an appointment with a probate and estate attorney to discuss your particular situation. The initial estate administration conference provides an opportunity for your attorney to obtain information about the deceased and his or her family, assets and existing estate plan. It is your opportunity to get the attorney's preliminary recommendations and to get to know the attorney. It is a "no-obligation" meeting that generally lasts about an hour. At the conclusion of the meeting, the attorney will make recommendations about the appropriate course of action for the estate. If you elect to hire the attorney at that time, you will be asked to sign a formal engagement agreement and provide an initial retainer.

What should I bring with me to the initial conference? 
You should bring the original of the deceased's Will and/or Living Trust, if any, and any Codicil or other existing estate planning documents. If you have one, bring a copy of the death certificate. You should also bring a Preliminary Estate Questionnaire (attached as Exhibit A) filled in with as much information as possible. A summary financial statement, listing major assets and liabilities with approximate values, is also very helpful in charting an anticipated course. Some people use a computer program or an existing financial statement. As an alternative, you can use the Summary Financial Statement attached as Exhibit B.

Is there anything else I should bring to the initial conference? 
If the deceased was a business owner, you should bring financial statements for the business and copies of the business's organizational documentation, such as corporate articles and bylaws, partnership agreements and certificates, and any buy-sell agreements. If the deceased was the beneficiary under someone else's Will or trust, you should bring a copy of that document. In addition, if the deceased ever signed a premarital agreement or other marital property contract, that document should be brought along as well. However, if these documents are not readily available, you can provide them after the initial conference.

What else should I do before the initial conference? 
Generally, you should do what you can, within reason, to prevent any damage, theft or loss from occurring. For example, if the deceased owned a home, it should be securely locked and only authorized persons should have access. If the deceased owned a car, it should be garaged or parked in a safe location. Pets and livestock should be cared for. Utility bills and casualty insurance premiums should be paid to prevent termination or cancellation.

Is there anything I should NOT do before consulting an attorney? 
You should NOT hurry to assume ownership of property you expect to inherit; otherwise, important tax savings and other options may be permanently lost. In particular, there is a very important post-death planning device called a "qualified disclaimer" that we often recommend to our clients. However, a disclaimer will not be "qualified" if the beneficiary has "accepted" ownership of the disclaimed assets. For example, if a surviving spouse files a claim with the insurance company, receives a check for the insurance proceeds, and deposits that check in his or her personal account, then the surviving spouse has most likely accepted the insurance and the disclaimer option is lost. Likewise, if the surviving spouse is named as the primary beneficiary of a retirement plan or an IRA and, following the first spouse's death, does a "spousal IRA rollover" of the deceased spouse's IRA into a new IRA in his or her name, the spouse has effectively accepted that gift, and the disclaimer option is again precluded.

Rule of Thumb: Do not transfer funds or change the name on accounts or other property until after you have discussed the matter with a probate and estate attorney.
Is Probate always necessary; is it possible to "avoid probate"?

The answer to this question depends on what exactly you mean by the term "probate."

Viewed narrowly, "probate" means the process of validating the deceased's Will and complying with the requirements of the local Probate Court. This includes: filing the deceased's Will and an "Application for Probate" with the Probate Court; attending a hearing at the Probate Court at which time the judge approves or "probates" the deceased's Will and formally appoints his or her Executor; and, a few months later, filing an Inventory of all the property that passes under the deceased's Will. By this narrow definition, "probate" is necessary whenever you own any property that is governed by the deceased's Will; it can be avoided if all your property passes outside of the deceased's Will. For example, if the deceased owned no real estate and his or her only assets were life insurance payable directly to named beneficiaries and accounts or other assets held with so-called "rights of survivorship" that passed directly to the other account holder(s), it might not be necessary to probate the Will.

Viewed broadly, "probate" means all the above plus the entire process of concluding the deceased's affairs after his or her death; e.g.: finishing up all the deceased's unfinished business; locating all the deceased's assets; ensuring that all debts are provided for; paying the funeral and probate expenses; filing an estate tax return (if required) and all other required tax returns, if any; setting up any trusts for the beneficiaries (per the deceased's Will or other applicable documents); and, finally, preparing the deeds and making the other assignments necessary to distribute the deceased's assets to the appropriate beneficiaries (or to the trusts created for them). By this broad definition, "probate" can never—and should never—be avoided.

What is an Executor, Administrator, Trustee, fiduciary, or personal representative?

"Fiduciary" is a generic term for a person who manages assets that belong to others. Most Wills appoint two types of fiduciaries: an Executor and a Trustee. Every trust agreement appoints a Trustee.

An "Executor" is generally responsible for collecting the deceased's assets, handling the deceased's debts, filing any required tax returns, winding up the deceased's affairs, and carrying out the provisions of the Will (i.e., setting up any trusts created in the Will, distributing assets to recipients named in the Will, etc.). Where the Will does not name an Executor or no named Executor is able to serve (or there is no Will), the Court appoints an "Administrator" to handle these duties. An Executor or Administrator who is "Independent" is a special type of personal representative who is authorized to administer the estate without Court supervision. The term "personal representative" is a generic term for both Executors and Administrators.

A Trustee is the person responsible for the more long-term job of administering trusts (i.e., managing investments, making distributions to the beneficiaries of the trust, etc.).

The same person can be both a Fiduciary and a beneficiary; the same person can be both an Executor and a Trustee; and different trusts can have different Trustees. The powers, duties and liabilities of personal representatives are set forth in the Texas Probate Code; Trustees are governed by the Texas Trust Code. In both cases, the Will or trust agreement can create special additional powers, duties and liabilities. Regardless of the specific title held, the job of a fiduciary should not be taken lightly. The duties and obligations imposed on fiduciaries are stringent and complex, and the failure to fully discharge those duties and obligations may lead to personal liability, Court removal or other sanctions.

What steps are involved in the estate administration process?

For most estates, the administration process involves three basic—and somewhat overlapping—steps: (1) probate and estate administration, (2) compliance and reporting, and (3) funding. Probate and estate administration includes: determining whether formal probate is necessary or desirable, or whether the estate will "avoid probate"; preparing the required Court pleadings and documents; scheduling and attending a Court hearing in which the Will is "admitted to probate" and the personal representative becomes authorized to act; and assisting in the collection and administration of estate assets. Compliance and reporting includes: determining whether federal estate and state inheritance tax returns are required; determining whether and to what extent an "Inventory" is required; and preparing the tax returns...
and the Inventory as necessary. Funding is essentially the winding up and distribution of the estate and the actual implementation of the deceased’s estate plan. This includes: verifying the gifts made, the trusts created, and other requirements of the estate plan; establishing the required trusts; making the tax and other computations provided for in the estate plan; allocating income, expenses and taxes among the estate beneficiaries; satisfying all gifts and making the final distribution of estate assets; and closing the estate administration. All of the above steps are governed by the Will and other applicable estate planning documents, if any, and all applicable laws, including the Texas Probate Code, the Texas Trust Code, the Texas Tax Code, and the Internal Revenue Code.

**How long will the estate administration process take?**

The probate hearing is usually completed within about one month after the attorney is hired. Estate and inheritance tax returns are usually completed and filed 9 to 15 months from the deceased's date of death, and the IRS typically completes its review of the estate tax return and issues its “closing letter” about 6 months later. Funding and closing the estate generally requires anywhere from a few weeks to several months after the IRS issues the closing letter.

**What circumstances delay or complicate the estate administration process?**

The above time estimates will not apply in every estate; depending on the number of complicating circumstances present, the administration process for any particular estate could take substantially longer. These complicating circumstances include:

- **Unavailability of accurate financial information** (e.g., complex or extensive property and investments and/or poor books and records; lost signature cards, account agreements or other records; failure by the executors or family to deliver requested information in a timely and organized fashion).

- **Problem assets and/or hard-to-value assets** (e.g., property in other states; mineral interests; annuities; joint/survivorship accounts; partial interests in land or other assets; interests in a family business, private partnership or other asset that is not traded on a public exchange; stocks held individually, i.e., actual certificates, rather than in brokerage accounts. *Note: It is usually the nature of the assets, not the overall value of the estate, that causes delays or complications.*

- **Community property/separate property issues** (e.g., the deceased and/or surviving spouse had significant property before they were married but they did not have a premarital agreement; there was a premarital agreement but it was not prepared by attorneys who were experts in marital property issues; the deceased and his or her surviving spouse lived in states other than Texas during their marriage).

- **Family and personal complications** (e.g., a deceased or surviving spouse who is not a U.S. citizen; prior marriages; children from prior marriages; “dysfunctional” families; actual or threatened Will/trust contests).

- **Problems with the Will** (e.g., the Will was not prepared and signed in Texas; the Will includes provisions that are potentially ambiguous; a family member questions the validity of the Will; the deceased prepared his or her own Will; there isn’t a Will).

- **Problems with the IRS** (e.g., the IRS audits the estate tax return or prior income or gift tax returns; the deceased failed to file income or gift tax returns; the deceased had tax liens or deficiencies).

- **Clients who desire additional legal consultation** (e.g., family members or executors who desire detailed or frequent explanations of the attorney's decisions and actions, or who disregard the attorney's advice; co-fiduciaries who disagree, don’t communicate or otherwise require extra efforts by the attorneys; financially inexperienced fiduciaries; out of state fiduciaries).

- **Complications with prior estate planning by for the deceased** (e.g., substantial lifetime taxable gifts; irregularities with gift tax returns; survivorship accounts or beneficiary designations that are not properly coordinated with the estate plan; trusts created by or for the deceased that were not administered properly; unfunded trusts or other problems with the estate of a previously deceased
spouse or other family member).

Also, the estate administration process does not always proceed at an even pace: At times there may be significant visible progress. At other times it may appear that little is being accomplished; however, in these cases attorneys and staff are often working hard "behind the scenes" or waiting on others to provide information or documents necessary to proceed. In any case, the ultimate goal is the same: to conclude the estate administration process promptly yet avoid the unnecessary legal fees that result from trying to move the process along faster than the circumstances dictate.

**How much will the estate administration process cost?**

In my experience, legal fees for "typical" estates vary from 1/2% to 3% of the assets involved in the estate administration, depending on the number of complicating circumstances present. (These circumstances are discussed above.) The legal fees for estates with none of these circumstances are usually near the low end of the range. The legal fees for estates with only a few complicating circumstances are usually in the middle of the range. As the number of complications increases, the legal fees tend toward the high end, and major problems or unforeseen difficulties can push the fees higher. However, it is rarely possible to accurately predict how many complications will arise in any particular estate; therefore, it is very difficult to provide a meaningful and precise fee estimate for a particular estate. As often as not, when several attorneys provide widely varying fee estimates, the attorneys with the low estimate are simply more hopeful than the others that the estate will have no complications. Unfortunately, estimates based on optimism (or inexperience or salesmanship) typically say very little about what the total legal fees will actually be at the end of the day. In my view, the best predictor of legal fees for any specific estate is the experience and expertise of the attorney and his or her support staff, and their ability to spot, preempt and otherwise handle whatever complications the particular estate may have in store. For this reason, I urge you to select an attorney based on reputation, experience, demonstrated ability, trusted recommendation, etc.

**Note:** Attorney fees (and most other probate and estate administration expenses) are fully deductible as either income tax or estate tax deductions. This means that the net out of pocket cost to the estate and the heirs can be 39% to 48% less than the amount paid to professionals, depending on the estate’s income and estate tax situation.

**How are legal fees actually determined?**

Unlike many other states, Texas has no statutory attorneys fees and no percentage attorneys fees for estate administration. Instead, my legal fee for probate and estate administration are always a reasonable fee based primarily on the time my staff and I spend on behalf of the estate (including time for conferences and communications, in person, by phone, by letter or by e-mail, with the clients or others on their behalf). We generally charge our time in minimum units of ¼ hour--15 minutes. In accordance with the applicable standards for reasonable attorney fees, I also may adjust my fee for such factors as the complexity, novelty, and magnitude of the issues involved, the speed with which the clients need or desire my services, the value to my clients of the results achieved, the extent to which one client may benefit from work I have done for other clients, the extent to which work I do for one client may benefit other future clients, etc. In addition to my legal fees, I bill for expenses, including court filing fees, photocopying, long distance, faxes, messenger services, travel, staff overtime (when requested or as circumstances dictate) and other miscellaneous expenses. Because I bill monthly, my clients are kept informed of the fees on a regular basis.

**How do I manage professional fees?**

Every client desires to minimize attorney, CPA, appraiser, and other professional fees. There are several things you can do to help keep the fees lower. First, remember that professionals normally bill in ¼ hour increments: A 5 minute telephone call costs as much as a 15 minute call, so, manage your phone calls and questions wisely. Second, take advantage of the lower billing rates of support staff by calling them instead of calling the attorney when you have a question. Even if they cannot immediately answer the question, they can often synthesize your issues into clear questions that they can pose to the attorney. Finally, it can create inefficiency (and increase the bill) when an estate administration progresses too slowly or when you try to conclude the administration too quickly. Thus, you should try to respond to requests for information promptly, and resist the temptation to push for fast results when matters are moving more slowly than you prefer. Of course, whenever you have questions about a professional’s bill you should not hesitate to ask. Finally, it's good to keep professional
fees in perspective: *Maximizing value and not simply minimizing fees is the most important goal.* In the long run, you will be better off if it is done the "right" way rather than by cutting corners or ignoring planning options and other issues.

**Why do attorneys handle probate and estate administration matters?**

As the discussion above indicates, most aspects of the probate and estate administration process involve questions of law. Even the federal estate tax return—which may appear comparable to a balance sheet or an income tax return—includes primarily legal issues (such as Will and trust interpretation, marital property issues, analysis of corporate, partnership and other agreements and their effect on proper asset valuation, estate inclusion, proper elections and allocations, etc.). Just as most attorneys are not familiar with the relevant tax issues, most accountants are not familiar with the relevant legal issues. (Many experienced accountants have never prepared an estate tax return.) By contrast, when the estate administration is handled by an experienced probate and estate attorney with a skilled support staff, the day-to-day tasks can be handled at the lower hourly rates of the paralegals and other staff, yet the attorney's direct supervision keeps him or her familiar with the estate, substantially reducing the risks that legal issues will be missed and substantially increasing the odds that valuable planning opportunities will be identified and considered.

In the right circumstances, e.g., where the CPA is experienced in estate tax return preparation, and has special knowledge of the assets and background of the particular estate, it can be appropriate for the CPA to prepare the estate tax return. However, it is imperative that the attorney remain in charge of the probate and estate administration, work closely with the CPA, and have an opportunity to review the estate tax return several months before it is due, so that duplication of effort and the risk of missing legal issues can be minimized.
EXHIBIT A

Preliminary Estate Questionnaire - Estate of __________________________, Deceased ("D")

General Information  (Note: The Death Certificate will include most of the following general information.)

D’s full legal name:  __________________________________________
D’s other legal names, (e.g., alias name):  __________________________________________
D’s place of birth (city, county, state):  __________________________________________
D’s date of birth:  __________________________________________ D’s date of death:  __________________________________________
D’s place of death (city, county, state):  __________________________________________
D’s "domicile" (permanent residence) at death (address, city, county, state):  __________________________________________

When did D established the above domicile? (month, year):  __________ D’s Soc.Sec.No.:  __________

Will; Executor

Did D have a Will? Yes / No If so, bring the original Will (and all Codicils, if any) with you.

Is the primary Executor(s) named in the Will, if any, living and willing and able to serve? Yes / No

Has any named Executor ever been convicted of a felony? Yes / No

Please provide the following information for the person(s) who will serve as initial (co)executor(s) (use an additional sheet if there are 3 or more):

<table>
<thead>
<tr>
<th>Executor</th>
<th>Coexecutor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full Name:</td>
<td></td>
</tr>
<tr>
<td>relation to D:</td>
<td></td>
</tr>
<tr>
<td>Address:</td>
<td></td>
</tr>
<tr>
<td>phone(s):</td>
<td></td>
</tr>
<tr>
<td>Email:</td>
<td></td>
</tr>
<tr>
<td>Soc.Sec.No.:</td>
<td></td>
</tr>
</tbody>
</table>

Surviving Spouse

Was D married at death? Yes / No If so, complete the following information for D’s surviving spouse. (Notes: (i) a "common law" marriage counts as a legal marriage, and (ii) D would still be validly married even if legally separated or involved in a pending divorce at the date of death.)

Name:  __________________________________________ Date of this marriage:  __________________________________________

Address, and phone number:  __________________________________________

Marital History

Was D ever married to any person other than the surviving spouse (if any) identified above? Yes / No If so, provide the following information for each prior spouse (continue on back if necessary).

<table>
<thead>
<tr>
<th>First prior spouse</th>
<th>Second prior spouse</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full Name:</td>
<td></td>
</tr>
<tr>
<td>Marriage Ended</td>
<td></td>
</tr>
<tr>
<td>by divorce / death of prior spouse (circle one)</td>
<td>by divorce / death of prior spouse (circle one)</td>
</tr>
<tr>
<td>on (date):</td>
<td>on (date):</td>
</tr>
<tr>
<td>in (city, county, state):</td>
<td>in (city, county, state):</td>
</tr>
</tbody>
</table>
### EXHIBIT B
Summary Financial Statement - Estate of _________________________, Deceased

<table>
<thead>
<tr>
<th>Assets</th>
<th>Beneficiary, POD¹ (if any)</th>
<th>How Titled</th>
<th>Approximate Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residence in ___________ County, _____</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other real estate (vacation home, rental property, etc.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oil, gas and other mineral interests</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stocks, bonds, mutual funds and other investments</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash, CDs, money market accounts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Automobiles and other vehicles</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Valuable collections/collectibles/heirlooms</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other household furnishings and personal effects</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retirement assets, such as 401(k) plans, profit sharing plans, pension plans, IRAs, etc.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Life insurance proceeds</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Closely held business interests</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other miscellaneous assets</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Assets</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities (Debts)</th>
<th>Approximate Current Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage on Residence</td>
<td></td>
</tr>
<tr>
<td>Other real estate mortgages</td>
<td></td>
</tr>
<tr>
<td>Personal debt (credit cards, car notes, etc.)</td>
<td></td>
</tr>
<tr>
<td>Accrued taxes</td>
<td></td>
</tr>
<tr>
<td>Other debts</td>
<td></td>
</tr>
<tr>
<td><strong>Total Liabilities</strong></td>
<td></td>
</tr>
</tbody>
</table>

**Net estate** (Total Assets minus Total Liabilities)

¹Please indicate all items: (i) payable to a named beneficiary, or to a "pay on death" or "transfer on death" payee, or (ii) held as "joint tenants" and/or with "rights of survivorship."
D. Personal Effects Memo

MEMORANDUM

To: Mr. and Mrs. Jon Jones
From: Bernard E. Jones
Subject: Making a Personal Effects Memo to Your Wills
Date: October 29, 2009

Your Wills specify that you may make gifts of your personal effects pursuant to a separate "personal effects memo." This memorandum sets out the steps that you should follow to ensure that your personal effects memo is effective. This memorandum also includes a sample personal effects memo that you may use as a guideline when preparing your own personal effects memo.

Legal Background: Understanding "Holographic Codicils"

Technically speaking, when you prepare a personal effects memo, you are making a "holographic Codicil" to your Will. A Will or Codicil is "holographic" if it is wholly in the handwriting of the "testator" (the person making the Will or Codicil). It is quite easy to make a valid holograph. At times, however, these holographs end up being ambiguous and may require costly court proceedings to determine exactly what the testator meant. Without review by an attorney who is experienced in the preparation of Wills and Codicils, there will always be some risk with any holograph, no matter how careful you may be. However, the instructions and sample form in this memorandum should help you avoid accidental ambiguity. If you follow them carefully and avoid complexity, you should be able to keep the risks to reasonable levels.

Preparing Your Personal Effects Memo

You should adhere to the following guidelines in preparing your personal effects memo.

Wholly in your own handwriting. It should be 100% in your own handwriting. You should start with an absolutely blank piece of paper. It is alright to use ruled paper (paper with lines on it) but, otherwise, there should be no printed writing, typewriting or any marks on the paper made by anyone else. This means no witnesses' signatures and no Notary Public signature or seal.

Titled and dated. It should be titled "Codicil" and it should be dated as of the date that you sign it.

Only one at a time. You should have only one personal effects memo in effect at any time. If you make one and then, at a later date, you desire to change it, start from scratch. The new one should revoke all prior holographic Codicils and restate the gifts from prior ones that you wish to retain. Do not amend a personal effects memo by marking it up at a later date.

Carefully describe the subject of the gift. Use a detailed description of the item you wish to give. If you have several sets of dishes, don't say "my china." Instead, identify the particular china you are giving; e.g., "my set of

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1 The word "Codicil" is the technical name for an amendment to a Will. While a Will usually starts out "I revoke all my prior Wills and Codicils . . .," a Codicil usually starts out "I amend my current Will as follows . . ."
Rosenthal 'Firewalk' china that I inherited from my Aunt Mae, including all service pieces." Don't say "my tools." Instead, say "my woodworking, carpentry, mechanical, and electrical tools, and all other tools of mine, whether typically located in my garage, my work shed or elsewhere, and including both hand tools and power tools." Don't say "my cocktail ring." Instead, say "my 14K yellow gold cocktail ring, with 12 diamonds, 1.33 K total diamond weight." (With jewelry in particular, you can often find a good description on your insurance schedule.) If you want to exclude certain items from a gift, be specific about what you intend to leave out, e.g., "my hand tools but not any power tools."

**Be careful with "contents gifts."** Be careful when giving items that might contain other items. For instance, you might say "my oak china cabinet, but not any of the contents." You could specifically include the contents of an item in a gift of the item, but this can be risky if the contents change over time or even if there is simply a disagreement as to the contents at your death. As a rule, it is best to be specific as to each and every item, e.g., "my hope chest given to me by my parents and my photo albums and my wedding dress, both of which are usually kept in my hope chest, but not any other items that may be in my hope chest at my death."

**Stick to personal effects.** Although it is possible to use a holographic Codicil for more than personal effects, you should avoid the temptation to make other revisions to your Will yourself. It is simply too easy to create a contradiction or impair an otherwise well conceived estate plan when someone other than an estate planning attorney tries to revise an estate plan through a holographic Codicil.

**Don't give away someone else's property.** Be sure that the item you give away is really yours. If you are married, most of your property, including personal effects, may be community property owned one-half by you and one-half by your spouse.² If you purport to give both halves of an item of community property (or other jointly owned property) you can create significant problems for your surviving spouse (or the other co-owner). To play it safe, specify that you are only giving away your interest in the property.

**Watch out for debts.** If you make a gift of property and that property is subject to a lien to secure a loan, then the recipient may be entitled to receive the property free and clear of the debt; your executor may be required to pay off the debt out of other property. Thus, if you make a gift of a boat, car, or other encumbered item, and you do not want the debt to be paid off by your executor prior to transferring the property, be sure you make the gift "subject to all liens, if any." Likewise, if you do want the debt paid off out of other property, you should make the gift "free of all liens, if any."

**Identify the recipient of the gift.** Be sure to identify the recipient by name (and relation, where appropriate) so that there is no question who gets the gift. Thus, a gift could be "to my brother Sam Smith." Do not simply say "to my brother." Do not use first names only; use full names and use current full names (if someone has changed her name, it is always preferable to use the current name).

**Make the gift conditional upon survival.** NEVER give an item to someone unconditionally. Every gift should be made "if he/she survives me." When there is someone else whom you desire to receive the gift if the named individual does not survive you, be specific. For instance, you could say "to my brother Sam Smith, if he survives me; otherwise, to his son, Charlie Smith, if he survives me."

**Consider your spouse's survival as a condition.** You might want to make a gift only if your spouse does not survive you. In this case you should specifically state that you make the gift "if my husband/wife fails to survives me." If all the gifts in your memo will have this condition, you should include a global statement that "I make all the following gifts only on condition that my husband/wife fails to survives me."

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² As a rule, everything you acquire during marriage will be community property. One important exception is that any item received as a gift or inheritance is separate property, belonging 100% to the recipient. This exception applies to gifts from one spouse to another. So, for instance, if you have a ring or a piece of artwork that your spouse or someone else gave you as a gift, you probably own it 100% and you should be able to make a gift of it without worrying that your spouse may have a ½ community ownership interest. On the other hand, if you have an item that you purchased, the item is probably community property, owned ½ by you and ½ by your spouse.
Drafting Down (KISS Revisited)  Chapter 13

Write legibly. Your memo won’t do much good if no one can read it. If your handwriting is illegible, print. However, your signature at the bottom should be your normal signature. (It should be the same as the signature on your Will.)

Be careful with multiple pages. If you cannot fit it all on a single page, (i) at the top of the second and every subsequent page, indicate "Codicil of [your name]," (ii) number each page as "page 1 of 3" . . . "page 2 of 3" . . . etc., (iii) date every page, and (iv) staple all the pages together.

Storage of Your Personal Effects Memo

If you choose to make a personal effects memo you should keep the original memo with the original of your Will. You may wish to make a photocopy to keep with a photocopy of your Will. If we are keeping the original of your Will, you may wish to send us the original of your memo; however, we will not review the memo (nor will we bill you for review) unless you specifically request that we do so. Instead, we will simply place it in our Will vault with the original of your Will.

One Potential Disadvantage of Holographic Codicils

In most family settings, holographic codicils are followed by family members without having them formally admitted to probate as a Codicil to the Will. In these circumstances, the handwritten instructions simply serve as a guideline which the family follows. In a less harmonious setting, however, the very fact that a holographic Codicil exists may mean an increase in the cost and trouble of probate.

After your death, your Will must be "admitted to probate" before it has any legal effect. A typical typewritten, witnessed Will can be admitted to probate in a very short court proceeding based on the testimony of a single individual (such as your named executor). By comparison, in order for a holographic Codicil to be admitted to probate, two disinterested persons who are familiar with your handwriting must appear in court and testify that the holograph is in fact in your handwriting. This added requirement means additional attorney time (and cost) to prepare the additional court documents needed, additional effort to locate witnesses and schedule a hearing date that is convenient for everyone, and a somewhat longer hearing.

Non-Binding Alternatives to a Holographic Codicil

One alternative to a holographic codicil is a non-binding letter indicating the persons whom you wish to receive certain personal effects items. For example, if your Will leaves your personal effects to your surviving wife, you could leave a note with your Will stating that you request but do not require that your cousin receive your stamp collection. In this case, your wife would inherit the stamp collection with no legal obligation to give it to your cousin; you would be relying on your wife's unenforceable promise to honor your wishes. If your wife failed to survive you, your personal effects would pass to the alternate taker(s) under your Will, and you would be relying on his or her (or their) integrity to honor your wishes.

Caution: If you intend to write a non-binding letter, be sure that you do not inadvertently make it a binding holographic Codicil to your Will. Remember, if it is all in your own handwriting and it indicates your intentions as to whom is to receive any of your property at your death, it may be treated as a holographic Codicil. Therefore, if you choose to follow the non-binding approach, don't say "I want my cousin to receive my stamp collection." Instead, say "I request but do not require that my cousin receive my stamp collection" and specifically state: "This letter sets forth merely my non-binding wishes. This letter is not a Codicil to my Will."

Another alternative to a holographic codicil is to verbally express your wish that a particular item go to a particular individual. When you die, you trust your survivors to honor that wish.

You must remember, however, that a non-binding letter or a non-binding verbal request is just that: non-binding. There is no legal certainty that your wishes will be honored.
Sample Personal Effects Memo

The following is a sample personal effects memo (holographic Codicil). In the sample, dates and Section numbers are filled in to make it easier to read. In making your own, be sure you fill in the correct dates and section references.

* * *

CODICIL OF WILLIAM JOHNSON

I am William ("Bill") Johnson. On January 2, 2009, I signed my Will. In Section 2.1 of my Will, I indicated that I might leave a memorandum making certain gifts of personal effects. I now make this codicil to my Will in order to provide for certain gifts of my personal effects. I revoke all prior holographic (handwritten) Codicils to my Will, if any. If any of the following items is community property or other jointly owned property, I give only my interest in the particular item(s):

1. I give my carpentry, woodworking, mechanical and all other tools typically located in my garage (including both hand tools and power tools) to my brother, Sam Johnson, if he survives me.

2. I give my law books (including casebooks, statute books, seminar materials, periodicals, and accumulated research materials, but not including my legal forms or any computer software relating to my law practice), to my brother Joe Johnson, if he survives me.

3. I give my 1969 Fiat convertible automobile to my son, Charlie, if he survives me; otherwise to my friend, Thomas Wright, of Dallas County, Texas, if he survives me; subject, however, to all liens and other encumbrances, if any.

4. I give my jewelry to my children who survive me, in equal shares, to be distributed and divided as provided in my Will.

5. I give my collection of vinyl record albums (but not my compact discs or cassettes) in equal shares to such of Louis Knox, Marcus Smith and Harry Jones who survive me, or all to the survivor of them if only one of them survives me, to be distributed and divided as provided in my Will.

6. I give my Takamenie acoustic guitar (including all sheet music, the carrying case and other accessories) to my daughter, Susan, if she survives me.

Today's date is October 20, 2009.

William Johnson
E. Representation Agreement

[ memo/letter-head]

ESTATE PLANNING REPRESENTATION AGREEMENT

Clients: ___________________________ Date: ________________, 20___

This document is the agreement between you, the clients named above, and me, Bernard E. Jones, Attorney at Law, for estate planning legal services.

Ethical matters

You are my clients. As far as your estate planning is concerned, you are my only clients; neither your children, if any, nor any other relatives or associates of yours are my clients for this purpose. As and when you ask me to do so, I may discuss your estate plan with your family members and answer questions they may have, but this will always be in my capacity as your lawyer.

Potential conflicts of interest. By hiring me jointly, instead of each retaining your own independent counsel, you help minimize legal fees and facilitate a well-coordinated estate plan; however, you also forego the benefit of having your own lawyer to advocate your own interests. Most couples have reasonable differences of opinion about some aspect of their estate plan (e.g., with respect to property ownership or the preferred disposition of their property). As attorney for both of you I cannot take sides with just one of you; instead, I must endeavor to balance both views (sometimes playing “devil’s advocate”) and help you resolve any disagreements before they rise to the level of true conflicts of interest. I am currently unaware of any facts that might give rise to a conflict between you; however, if any conflict which could affect your estate planning arises, you have an obligation to let me know promptly. If it cannot be resolved, I may be compelled to withdraw and not serve as attorney for either of you.

Confidentiality. Generally, all information you provide to me will be kept confidential and will not be disclosed to persons outside my office without your consent. However, you authorize me to discuss your estate planning and share your confidential information: (1) with other professional advisors to either of you (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by either of you or prepared at the request of either of you; and (3) whenever your mental capacity is in question, with your children and other immediate family members, your health care providers, and other interested persons. As between the two of you, you authorize (but do not require) complete and free disclosure and exchange of all information that I receive from either of you; information I receive from one of you will be shared with the other whenever I feel it is appropriate (and will be kept in confidence when I feel it is appropriate).

Other clients. Under applicable ethics rules, I am permitted to continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to you (professionally or personally) and even if the interests of the other clients in those other matters may be adverse to you, but only as long as the matter is not substantially related to my work for you. (For example, I might prepare Wills for members of your family or business associates.)

Scope of my representation

At this time, I have agreed to prepare the following estate planning documents for you in accordance with our discussions to date (strike those that do not apply):

- Wills for both of you.
- Joint Revocable Trust / Separate Revocable Trusts for both of you.
- Declarations of Guardian for both of you (naming guardians for your children).
- Instructions for preparing beneficiary designations for your life insurance, IRAs and retirement plans, and for dealing with joint/survivorship accounts and other "nonprobate" assets (but not actual beneficiary designations or account agreements).

...
It is very important that you understand the legal effect of the documents I prepare for you. Therefore, you both agree to thoroughly review all documents I prepare for you before you sign them, and you both agree to confer with me as to any document or provision you do not understand. I agree to answer your questions and provide a reasonable amount of consultation and advice regarding your estate planning generally and the documents I prepare specifically.

**My fee**

Based on my fee schedule for estate planning services (and the specialized provisions you have requested, if any), we have agreed on a total fixed fee of $__________00. You agree to pay 50% of this fee ($__________00) up front,\(^1\) and I will begin work on your behalf when I receive this payment. The balance will be due when you sign the documents described above, or, if sooner, one month after I first deliver to you proposed drafts of the documents described above.

*The fixed fee covers:* (1) our initial conference, (2) preparation of first drafts of the estate planning documents indicated above in accordance with our discussions to date and (3) an in-office signing conference (up to one hour). The fixed fee also includes up to ________ hour(s) of additional attorney time until the date three months after I deliver the initial drafts for: (a) any additional conferences and communications relating to your estate planning (in person, by phone, or by e-mail) with you or others on your behalf, (b) any revisions to the initial drafts (e.g., where you change your mind or because information you have given me so far proves to be inaccurate or incomplete), and (c) any other legal services requested by you or related to the above (including research, inter-office conferences, extended signing conferences, etc.). (Please note that I charge my time in minimum units of ¼ hour--15 minutes.)

*There will be additional fees for:* (1) legal services listed above (in items a, b and c) that exceed the included additional hour(s); (2) all legal services provided more than three months after I deliver the initial drafts (including services listed above in items a, b and c); and (3) all drafting or reviewing actual beneficiary designations (occurring at any time). Unless we agree to a different amount, the additional fees will be based on my standard “Hourly Fee” provisions (copy attached). There is also an additional fixed fee if you don't finalize and sign your estate planning documents within six months of the date I deliver the proposed drafts. Finally, my fixed fee includes standard expenses (basic photocopying, postage, etc.) but does not include additional expenses I may incur on your behalf (such as messenger delivery charges, staff overtime when you request rush service, filing and recording fees, long distance charges, extra photocopies, etc.), which I will bill to you.

**Future legal services**

Changes likely will occur in tax, property, probate, and other laws which could impact your estate plan. I cannot--on my own--economically review the file of each client to determine the impact of court cases, rulings, and other changes in the law. Furthermore, changes likely will occur in your own family, in marital circumstances, and in your finances, all of which could impact your estate plan. Therefore, you should contact me or other competent estate planning advisors to have your plan reviewed regularly. I can frequently answer simple questions you may have for no additional fee; however, I will address significant questions and review your documents or estate plan only on your request and for a reasonable fee.

**Termination**

You have the right to terminate my employment at any time and I have the right to resign as your attorney at any time. My active role as your attorney will terminate when your documents are signed and I have sent you a confirming letter. However, no termination will waive any of the remaining provisions of this agreement, including: (1) your agreement to pay me for all work performed prior to termination, (2) your consent to complete disclosure of confidential information to either of you and to others (to the extent authorized above), and (3) my ethical duties to you, such as my duty not to disclose your confidential matters to third parties (except as authorized above).

* * *

If this document correctly reflects our agreement, please sign in the space provided below. Thank you for giving me an opportunity to provide these professional services to you. I look forward to working with you.

(Husband signature)                                                                                          Bernard E. Jones, Attorney at Law

(Wife signature)

\(^1\)For "rush" projects, the up-front retainer is 100% of the total fee.
**Hourly Fee Provisions**

When providing legal services on an “hourly fee” basis, I may provide an estimated fee (either orally or in writing), based on the information provided to me and the specific documents or services I am asked to provide. However, my actual fee is a reasonable fee based **primarily** upon the hours I expend providing legal services to you. This includes: drafting or revising instruments, researching legal issues, conferring inter-office or with you or with others on your behalf (in person, by phone, or by e-mail), etc. (Also, please note that I charge my time in minimum units of ¼ hour--15 minutes.) Currently, my hourly rate is $320; my paralegal's hourly rate is $120.

In accordance with the criteria for reasonable fees described in the Attorney Code of Professional Responsibility (adopted by the Texas Supreme Court), I also may adjust my fee, up or down, for such factors as the complexity, novelty, and magnitude of the issues involved, the skill required to perform the services, the speed with which you need or desire my services, the value to you of the results achieved, the extent to which you benefit from work I have done for other clients, the extent to which work I do for you may benefit other clients, etc.

In addition to my hourly fees for legal services rendered, I bill for expenses, including postage, photocopying, long distance and other communication charges, filing fees, messenger delivery and transportation charges, staff overtime (where you request rush service) and other miscellaneous out-of-pocket disbursements in accordance with my customary practices.

I bill monthly for fees and expenses and my bill is due upon receipt. In most circumstances I request an up-front retainer of 50% of the estimated fee, and I begin work when I receive the retainer funds. The retainer is held in my trust account and is applied to my **last** invoice. If my last bill is less than the retainer balance, I will refund the excess. I may also apply all or any part of the retainer to any interim bill; however, I will still deliver the bill to you and you agree to pay me the amount of the bill so that I may restore your retainer balance.
F. FlexDraft Brochure
Barney Jones'

**FlexDraft®**
The Estate Planning Document Assembly System

**FlexDraft** is a computerized document assembly "expert" system for the design and preparation of Wills, Trusts and other estate planning documents. Exclusively for attorneys, exclusively for Texas law, and with free regular updates included with every subscription, **FlexDraft** is the practical solution to your drafting needs in a time of change.

**FlexDraft Is From Texas Experts You Know and Trust**

Designed and written personally by Barney Jones; edited and approved for content by Mickey Davis, John Ridout and Karen Gerstner; **FlexDraft** embodies the analysis and expertise of some of the best Estate Planning practitioners in Texas. What does this mean for you?

- **FlexDraft is by Texas lawyers exclusively for Texas lawyers**; it addresses the legal issues you face every day as a Texas estate planner. Of many other systems which are generic, multi-state forms, with Texas law incorporated as an afterthought.
- **FlexDraft is by actual practitioners exclusively for actual practitioners**; it offers workable, real world solutions, not untested academic conjecture.
- **FlexDraft is used every day by Mickey Davis, John Ridout, Barney Jones & Karen Gerstner, for virtually all their Wills and trusts**; it's not just a system for sale, it's the system they use and rely on. This gives the author and editorial board (all former partners at Davis, Ridout, Jones & Gerstner, L.L.P.) a vested interest in maintaining **FlexDraft** as a state-of-the-art estate planning system.
- When you switch to **FlexDraft**, you'll have a forms system you'll be proud to tell colleagues you own.

**FlexDraft Wills and Trusts Are Client Friendly**

Your confidence in **FlexDraft** derives from your trust in the attorneys who design and maintain it, and your independent review and analysis of its provisions. Your clients' confidence in you derives from their trust in your professionalism and skill, and their comfort with the documents you draft for them. **FlexDraft** helps build client trust with its client friendly drafting style.

- **Plain English**, not legalese, is the language of **FlexDraft** documents. Your clients will appreciate the explanatory headings, concise wording, short sentences, and complete lack of "hereinafter's" and "aforesaid's." Your clients won't need law degrees to understand their Wills.
- **FlexDraft** Wills and trusts are "front loaded": All gifts, all trust terms, all fiduciary appointments—virtually everything your clients want to see— is in the first few pages of every **FlexDraft** Will and trust.
- The result? **No more explanatory memos. Instead, the first few pages of the Will or trust are the explanatory memo.** The benefits of avoiding explanatory memos are substantial:
  - Obviously, you save time and money. The memo explaining a Will often takes longer to prepare than the Will itself, yet how many clients are willing to pay double just because (from the client's viewpoint) you couldn't draft understandable documents in the first place?
  - Less obviously, but (I believe) more importantly, you avoid misleading your clients and/or laying the groundwork for a potential Will contest, by giving them a memo which, in truth, really doesn't say the same thing their Will says. (After all, if the memo did say the same thing as the Will, it wouldn't be much use.) When the front of the Will is the memo, this exposure is avoided entirely.

**FlexDraft Gives You True Document Assembly, Not Just a Stack of Forms**

**FlexDraft** uses an "expert system" approach to document design. What does this mean for you? Consider your options for drafting a Will:

- An automated forms system limits you to a few dozen pre-selected Will forms. It will probably give you the choice to include or exclude a few features and optional clauses. So long as your clients fit the mold envisioned by the author, you're covered. But if your needs ever exceed the author's imagination, your only option is to take the nearest fit, perhaps cut and paste from several different forms (and hope that the clauses you select are consistent and that you catch all the supporting boilerplate for each clause), and then custom draft your way to the solution your client needs.
- **FlexDraft** provides one Will "form" and lets you build it from the ground up, including or excluding as many options and clauses as your needs dictate. But unlike a "pick the clause" form book, **FlexDraft's expert system design guides you through the drafting process with an interactive on screen dialogue**, eliminating irrelevant issues, ensuring consistency, and including (and adjusting) the appropriate boilerplate as you go.
- The result: **FlexDraft** arms you with a virtual form file of literally thousands of Will and trust forms, each custom tailored to suit your drafting preferences.
**FlexDraft Delivers Speed and Precision Without Compromise**

The expert system design of FlexDraft enables speed and precision:

- If you really had a thousand Will forms you had to think through to draft a Will, you could count on wasting lots of otherwise billable time. But FlexDraft's expert system design ensures that only relevant questions are posed. As a result, a novice attorney can usually draft a complete, customized estate plan in 30 minutes or less; an expert can usually finish in less than 15 minutes.
- Speed does not come at the price of accuracy. FlexDraft limits errors with several features:
  - On-line explanatory "Resources" that explain numerous questions and options.
  - "Input validation" that helps prevent illogical choices (e.g., if the first vesting age for a trust is 25, it will force the second age to be 26 or older).
  - Built-in logic-checking help ensure reliable quality control.
  - Accuracy at the secretarial level is enhanced with customizable lookup tables and "QuikPics" which enable names and addresses to be input only once, and then pasted throughout the estate plan without retyping.

**FlexDraft Let's You Do Your Job Better, Without Forcing You to Do Your Secretary's Job**

Have you ever noticed how some office automation tools transform lawyers into secretaries? Document drafting systems often combine drafting (the lawyer's job) with data entry (the secretary's job). There's nothing more wasteful than a two left lawyer's job with data entry (the secretary's job). Drafting systems often combine drafting (the tools transform lawyers into secretaries? Document Have you ever noticed how some office automation

Once the secretary's job is finished, the attorney (or legal assistant) does all drafting with the mouse: the attorney can draft a complete estate plan without even touching the keyboard (except to type in dollar amounts for cash gifts—although I suppose this too could be left for the secretary to complete later).

**FlexDraft Drafts the Estate Planning Documents You Need Every Day**

Many products boast long laundry lists of forms you might use once a year, yet include only limited options for the document you draft every day. These products may be nice to have on the shelf but they don't help much with your day-to-day drafting needs.

FlexDraft takes the opposite approach by including almost unlimited options and flexibility for the building blocks of your estate planning practice: Wills, revocable trusts, irrevocable trusts, advance directives and powers of attorney. The following is a summary of just some of FlexDraft's features for different documents.

**Wills:**

- **Tax planning options**
  - Marital lead (with credit residuary) or credit lead (with marital residuary).
  - True worth, fairly representative, or minimum worth funding valuation.
  - Optional inclusion of all IRD in marital lead gifts (to eliminate gain on funding exposure).
  - Optional spousal disclaimer to bypass trust, as either primary planning tool or to enable post death fine tuning of a formula marital gift (available for outright or in-trust marital gifts).
  - Optional inclusion of Second Generation Planning (a/k/a "GST Planning") in any Will (with or without marital deduction planning), designed to comply with the "mandatory" division requirements (without which the actual trust division must generally be made before 706 filing).
- **Marital trust options**
  - QTIP or "LEPA" style marital trust (or outright marital).
  - Optional principal distributions (per ascertainable or non-ascertainable standard).
  - Optional testamentary power of appointment (to descendants, and/or surviving spouses of descendants, and/or charities).
  - Optional QDOT for any marital trust, with broad or narrow distributions and optional terminating distributions upon attaining citizenship.
- **Bypass trust options**
  - For spouse only, for children [and descendants] only, or for spouse and descendants.
  - Primary beneficiary(s) may be Spouse or children [and descendants].
  - Optional inclusion of all descendants, or only descendants of a deceased child.
  - Optional special principal distributions to children [and optionally, to descendants too]
for buying a home or starting a business, with (or without) advancements clause.

- Termination on spouse’s death, with "Pot" trust option (continue as single "pot" in bypass trust) until youngest child has reached a specified age.
- Optional testamentary power of appointment in spouse automatically coordinates with termination option selected.

**Options for trusts for children and descendants**

*FlexDraft* allows you to mix or match any one or more of the following:

- "Contingent Trusts" for all beneficiaries not otherwise covered, with 1 or more vesting ages and optional power of appointment (appropriate for simple Wills).
- "Descendants' Trusts" for all descendants not otherwise covered, lifetime or staged vesting, optional inclusion of beneficiary's spouse and/or descendants, optional special principal distributions (same as in bypass trust, see above), optional testamentary power of appointment (special, general, or "GST Split").
- "Grandchildren's Trusts" for grandchildren only, with the same options as in Descendants' Trusts (this enables special treatment for grandchildren).
- "Children's Trusts" for children only, with the same options as in Descendants' Trusts (this enables special treatment for children, also useful for clients whose children are very young and who are not yet ready to contemplate trusts for their children's descendants).

**Fiduciary (Executor and Trustee) options**

- Sole fiduciaries, co-fiduciaries, or sole followed by co (executor and trustee may be different).
- Optional authority of descendants to become sole and/or co-trustee of own trust at specified ages.
- Optionally name one or more "Trustee Appointers" by name and/or by class, to select successor trustees.
- Optional corporate trustee removal (by spouse, by Trustee Appointer, or by separately named Trustee Removers).

**Administrative options**

- Short form or long form.
- Broad or narrow fiduciary exoneration.
- Broad or narrow investment authority.

**Revocable Trusts:**

*FlexDraft's* revocable trusts do not have the limitations found in most drafting systems: virtually all provisions available in Wills are also available in all revocable trusts.

In addition:

- Sole settlor revocable trusts for single or married persons, and optional joint settlor revocable trusts for married persons.
- Additional lifetime beneficiaries can include spouse and/or children.
- Available revocable "management" trust with "pour-back" to probate estate at death (where lifetime management is desired but an existing testamentary plan is too complex to redraft as a revocable trust).

**Irrevocable Trusts:**

*FlexDraft* offers perhaps the most versatile irrevocable trusts of any drafting system: virtually all trusts and trust provisions available in Wills are also available in all revocable trusts. In addition:

- ILIT (Irrevocable Life Insurance Trust) or Gift Trust (typically funded primarily with assets other than life insurance).
- Sole settlor irrevocable trusts for single or married persons, and optional joint settlor irrevocable trusts for married persons.
- All irrevocable trusts may create multiple trusts ab initio — separate share style — which may mirror Children's Trusts or Descendants' trusts in Wills, or

- single trust — pot style — which may be either dynastic or provide for termination (or division and retention in separate trusts) at: death of grantor (or surviving grantor), x years after the date of death, or date youngest child reaches a specified age (if later).
- Withdrawal rights ("Crummey powers") may go to spouse and/or children, with either spouse or children preferred (or with all on same footing); may be Full, "5&5" or "Hanging"; and may include optional advancements clause for a beneficiary who exercises a withdrawal right.

**Ancillary Documents:**

All the "standard" additional estate planning documents are included:

- Medical Power of Attorney (the statutory form, with some improvements).
- Directive to Physician and Family or Surrogates (a/k/a, "Living Will"); the statutory form, with significant improvements).
- Statutory Durable Power of Attorney.
- Pre-Need Declaration of Guardian (for self).
- Designation of Guardian (for children—with optional provision for adult incapacitated children) (note: if you prefer, guardians for children may be designated in the Wills instead).

**And More:**

Every day, *FlexDraft* gets a little bit better (because every day, the Editorial Board members want a more powerful drafting system). Future versions of *FlexDraft* will include numerous additional documents—and so long as your license is current, all updates to your edition of *FlexDraft* are free.
FlexDraft's Drafting Aids Will Let You Create Your "Standard" Forms

At present (March, 2004), FlexDraft includes several powerful drafting aids designed to enhance your control over the finished product and prevent FlexDraft's flexibility and power from being "too much of a good thing."

- Default Lookups and Formatting Preferences. During FlexDraft Setup, you can specify lists of frequently input data (names, etc.) and indicate your preferences for various aspects of document formatting.
- Basic Estate Plan Summary. This is a detailed list of the options available in FlexDraft documents. The BEPS is provided in editable format (WordPerfect) so that you can customize it to suit your personal drafting style.

Future FlexDraft updates will include additional enhancements in this area.

FlexDraft Is for You . . . Regardless of Your Experience Level or Specialization

- FlexDraft's expert system makes it ideal for general practitioners and attorneys new to estate planning, who will sharpen their skills with the interactive dialogue and built-in Resources. FlexDraft's intuitive, straight forward user interface keeps the "getting-up-to-speed" time to a minimum.
- If you are an experienced estate planning specialist, FlexDraft's incredible flexibility and power makes it the perfect choice for you as well. Switching to FlexDraft will free up hours of forms maintenance, giving you more time for . . . whatever you want. And though you may have to forego the privilege and pride (martyrdom?) of updating and controlling your forms, and accept another attorney's drafting style, you will retain control of your drafting substance: FlexDraft's flexibility means that you should be able to continue to utilize all cutting edge planning techniques you prefer.

FlexDraft: The Best Investment You'll Make This Year

Fast, precise automation means more quality client contact time and increased profitability. Free regular updates as long as your subscription is current means you'll never have to update your forms again. All this for an annual investment comparable to the fee for one typical estate plan:

- FlexDraft Standard Edition includes all the features discussed above and is available in single attorney version for an annual licensing fee of $1,295. Each additional attorney license in the same firm is $645.
- FlexDraft Express is available in single attorney version for an annual licensing fee of $1,295. Each additional attorney license in the same firm is $645.
- FlexDraft Express Edition includes: (i) Wills and revocable trusts with all the features discussed above other than GST planning, and (ii) all Ancillary Documents, but (iii) does not include irrevocable trusts. FlexDraft Express is available in single attorney version for an annual licensing fee of $1,295. Each additional attorney license in the same firm is $645.

For both editions, each attorney license entitles one assistant to the attorney (a secretary, legal assistant, etc.) to use FlexDraft without having his or her own non-attorney license, so long as the assistant and the attorney do not use the software simultaneously. Additional non-attorney licenses are available for $295.

Try FlexDraft Absolutely Free and With No Obligation for 30 Days

Fill out the Order Form (attached as the last page of this brochure) to obtain your free trial edition today. If you chose not to obtain a licensed copy, your only obligation is to uninstall FlexDraft from your computer, and return the program CD-ROM and all documentation to FlexDraft, L.L.C. (Note: all free trials are of the Standard Edition. Also, certain FlexDraft features are limited in the trial edition.)

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or contact us at:
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FlexDraft is for use by licensed attorneys only. The attorney using FlexDraft is the only person in a position to determine the suitability of FlexDraft documents for the client.

FlexDraft is not a substitute for the advice of an attorney.

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Barney Jones' FlexDraft®
the Estate Planning Document Assembly System

30 Day Free Trial ORDER FORM
PLEASe PRINT NEATLY!

Customer/Attorney:

Name: ________________________________

TX Bar #: ____________________________ (Required)

Firm Name: ____________________________

Street: ________________________________

City/State: __________________________ Zip: _____________

Phone: ____________ Fax: ____________

Email: ________________________________ (Required for online delivery)

Please send me my FREE 30-day evaluation copy of FlexDraft.

____ I prefer online delivery (upon receipt of your order, FlexDraft will email you a web address link and password enabling you to download FlexDraft– your email address must be provided; however, FlexDraft does not share email addresses with ANYBODY)

or

____ I prefer a CD-Rom delivered via U.S. Mail (please allow 2 to 6 weeks for delivery)

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