



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

19-21

Friday, May 31, 2019

presented by

**The South Carolina Bar
Continuing Legal Education Division**

<http://www.scbar.org/CLE>

SC Supreme Court Commission on CLE Course No. 194818E

Table of Contents

Substantive Law of South Carolina	7
<i>Melody Breeden</i>	
Initial Estate Planning Interview.....	29
<i>Scott W. Hutto</i>	
Drafting Wills– Scenario 1	59
<i>Scott W. Hutto</i>	
Non-Probate Transfers.....	70
<i>Catherine H. Kennedy</i>	
Drafting Wills-Scenario 2.....	105
<i>Matthew Myers</i>	
Drafting Financial Powers of Attorney, Health Care Powers of Attorney and Living Wills	118
<i>Matthew Myers</i>	
Drafting Revocable Trusts-Scenario 3	145
<i>Patricia Scarborough</i>	
Drafting Revocable Trusts- Scenario 4.....	188
<i>Catherine H. Kennedy</i>	
Ethical Pitfalls in Estate Planning.....	235
<i>Patricia Scarborough</i>	

SC Bar-CLE publications and oral programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that the SC Bar-CLE does not render any legal, accounting or other professional service. Attorneys using SC Bar-CLE publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

©2019 by the South Carolina Bar-Continuing Legal Education Division. All Rights Reserved

THIS MATERIAL MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE CLE DIVISION OF THE SC BAR.

TAPING, RECORDING, OR PHOTOGRAPHING OF SC BAR-CLE SEMINARS OR OTHER LIVE, BROADCAST, OR PRE-RECORDED PRESENTATIONS IS PROHIBITED WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE SC BAR - CLE DIVISION.

Estate Planning Essentials

Friday, May 31, 2019

This program qualifies for 6.75 MCLE; 0.75 LEPR
SC Supreme Commission on CLE Course #: 194818E

- 8:30 a.m. Registration**
- 8:55 a.m. Welcome and Opening Remarks**
- 9:00 a.m. Substantive Law of South Carolina**
Melody Breeden
Turner Padget Graham & Laney, PA
- 9:45 a.m. Initial Estate Planning Interview**
Scott W. Hutto
Hutto Law Firm, PA
- 10:15 a.m. Break**
- 10:30 a.m. Drafting Wills- Scenario 1**
Scott W. Hutto
- 11:15 a.m. Non-Probate Transfers**
Catherine H. Kennedy
Turner Padget Graham & Laney, PA
- 12:00 p.m. Lunch**
- 12:30 p.m. Drafting Wills-Scenario 2**
Matthew Myers
Sweeney, Wingate & Barrow, PA
- 1:15 p.m. Drafting Financial Powers of Attorney, Health Care Powers of Attorney and Living Wills**
Matthew Myers
- 2:15 p.m. Break**
- 2:30 p.m. Drafting Revocable Trusts-Scenario 3**
Patricia Scarborough
Evans Carter Kunes & Bennett, PA
- 3:00 p.m. Drafting Revocable Trusts-Scenario 4**
Catherine H. Kennedy
- 3:30 p.m. Panel Discussion and Planning Scenarios Wrap-up**
- 4:00 p.m. Ethical Pitfalls in Estate Planning**
Patricia Scarborough
- 4:45 p.m. Adjourn**

Estate Planning Essentials

SPEAKER BIOGRAPHIES (by order of presentation)

Scott W. Hutto

*Hutto Law Firm
(course planner)*

Scott W. Hutto is the sole shareholder of Hutto Law Firm, P.A., located in Georgetown, South Carolina. Scott practices in the areas of estate planning, probate administration, probate litigation and corporate planning. Scott received his B.A. degree, cum laude, from Wofford College in 1991 and his J.D. degree from the University of South Carolina in 1998. He is a member of the American Bar Association, the South Carolina Bar and the Georgetown County Bar. In 2005, Scott was initially certified as a Specialist in Estate Planning and Probate Law by the South Carolina Supreme Court and was re-certified in 2015. Scott is also a Fellow of the American College of Trust and Estate Counsel (ACTEC). He has served two terms as a member of the Estate Planning and Probate Law Specialization Advisory Board, and he is a frequent speaker on the topics of estate planning and probate administration. Scott is active in his community and is Co-chair of Georgetown Bridge to Bridge ½ Marathon Committee and a board member of the Tideland Community Hospice Foundation. Scott is a past board member of the following organizations: Probate, Estate Planning and Trust Section of the South Carolina Bar, Georgetown County Board of Education, Waccamaw Community Foundation, Friendship Place, Freedom for Kids Playground, Arial, A Ministry of Proclamation and All Saints Church, Pawleys Vestry. He is a member of Prince George, Winyah Church. Before attending law school, Scott served four years as an Air Defense Officer in the United States Army. Scott has been married to his wife, Laura, for Twenty-seven years, and they have two children.

Catherine H. Kennedy

*Turner Padget Graham & Laney, PA
(course planner)*

Catherine Hood Kennedy is a certified specialist in Estate Planning and Probate Law, practicing with the firm of Turner Padget Graham & Laney, PA., in its Columbia office. Ms. Kennedy received her J.D. degree, cum laude, from the University of South Carolina School of Law. She is a past-chair of the Probate and Estate Planning Section of the Bar, is a fellow of the American College of Trust and Estate Counsel, is listed in Best Lawyers in America--Trust and Estates and Litigation-Trusts and Estates and has been named a South Carolina Super Lawyer in Estate and Trust Litigation. From 1987 to 1999, she served as the Richland County Probate Judge.

Ms. Kennedy frequently testifies before legislative committees on changes in South Carolina

probate and trust law and serves as an expert witness in probate matters. She served on the committee studying the Uniform Trust Code, which resulted in the enactment of the South Carolina Trust Code in 2005 and chaired the Bench/Bar committee that recommended the changes to the South Carolina Probate Code, which become effective in 2014 and 2016. She is the author of the chapter on estate planning in A Practical Guide to Elder and Special Needs Law in South Carolina.

Since 2000, Ms. Kennedy has been a South Carolina certified mediator and arbitrator. She was involved in drafting S. C. Probate Court Rule 5, which provides for mediation in the probate courts. Ms. Kennedy has served in the South Carolina Bar's House of Delegates since 2002 and is currently a member of the Board of Governors of the Bar.

Melody Breeden

Turner Padgett Graham & Laney, PA

Melody Breeden is a Shareholder at Turner Padgett Graham & Laney, PA. She has been practicing estate planning and probate law primarily in the Myrtle Beach area since 2002. Melody is licensed in both North and South Carolina. Melody is certified as a Specialist in Estate Planning and Probate Law by the South Carolina Supreme Court. Melody is a fellow of the American College of Trust and Estate Counsel. Melody is also certified by the South Carolina Board of Arbitrator and Mediator Certification as a Civil Court Mediator. Melody is the 2018/2019 Chair of the Probate, Estate Planning and Trust Council of the South Carolina Bar. She serves on the South Carolina Estate Planning and Specialization Advisory Board.

Melody is a member of the following Bar Associations: the American Bar Association, the Horry County Bar Association, the North Carolina State Bar, the North Carolina Bar Association, and the South Carolina Bar. She is a Member of the SC Bar House of Delegate.

Melody is also a member of the following organizations: Elder Law Committee of the South Carolina Bar; Grand Strand Area Estate Planning Council; Horry County Probate Court Advisory Council; Chair of the Coastal Planned Giving Advisory Council of Coastal Carolina University; and National Association of Elder Law Attorneys (NAELA).

Melody is a Practical Law Contributor for Thomas Reuters on the topics of Health Care Powers of Attorney, Ancillary Probate, Signature Pages for Wills & Self Proving Affidavits, Wills, Probate, Revocable Trusts, and Powers of Attorney for South Carolina.

Matthew Myers

Sweeney, Wingate & Barrow, PA

Matt focuses his practice in the general areas of trusts, estates, probate, taxation, business entities, and nonprofits, including planning, administration, litigation, and transactions in each of these areas. He is a certified specialist in Estate Planning and Probate Law, a member of the Columbia Estate Planning Counsel and the Columbia Tax Study Group, and the author of "The South Carolina Personal Representative Handbook," as published by the South Carolina Bar Association.

In law school, Matt served as an editor for the Real Property Probate and Trust Journal, before going on to obtain an advanced degree in taxation from the University of Florida. Prior to law

school, Matt studied economics at the University of South Carolina Honors College and subsequently worked in the banking industry for several years as a commercial loan officer and credit analyst.

Matt is a native of Darlington, South Carolina, and is married to the former Sarah Grove of Whiteville, North Carolina. They have two children and are members of Shandon United Methodist Church.

Patricia Scarborough

Evans Carter Kunes & Bennett, PA

F. Patricia Scarborough is a shareholder with the law firm of Evans, Carter, Kunes & Bennett, P.A. in Charleston, South Carolina. Patty focuses her practice in the areas of estate planning, probate administration, tax planning, business planning and charitable organizations.

Patty received her J.D. from the University of South Carolina School of Law in 2005 and her LL.M. in Taxation from the University of Florida School of Law in 2006. She is a member and past Chairman of the Tax Law Section of the South Carolina Bar, and has been certified by the South Carolina Supreme Court as a Specialist in both Taxation Law and Estate Planning and Probate Law.



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Substantive Law of South Carolina

Melody Breeden

Substantive Law of South Carolina

Melody J. E. Breeden
Turner Padget Graham & Laney, PA
Post Office Box 2116
Myrtle Beach, SC 29578
(843) 213-5530
MBreeden@Turnerpadget.com

I. The South Carolina Probate Code governs wills in South Carolina (S.C. Code Ann. §§ 62-1-101 to 62-8-403).

II. Definitions.

A. It is important to familiarize yourself with some of the basic definitions in the Probate Code before you begin drafting estate planning documents. A few of the important definitions in the Probate Code include:

1. Child.

a. The definition of child excludes stepchildren, foster children, and grandchildren. S.C. Code Ann. § 62-1-201(3). Child is further defined in S.C. Code Ann. § 62-2-109 to specially include adopted children.

2. Issue.

a. The definition of issue includes natural or legally adopted descendants. S.C. Code Ann. § 62-1-201(24).

3. Parent.

a. The definition of parent includes any person entitled to take under this code but excludes stepparent, foster parent, or grandparent. S.C. Code Ann. § 62-2-201(31).

4. Personal Representative.

a. The definition includes executor, administrator, special administrator and related terms. S.C. Code Ann. § 62-2-201(33).

III. Capacity to Make a Will.

A. Before you can even begin drafting any estate planning documents, you must first assess the individual's capacity.

B. Any individual who is of sound mind and who is not a minor may make a will. S.C. Code Ann. § 62-2-501.

C. A minor cannot create a will. In South Carolina, a person is not a minor if the person is either:

1. 18 years of age or older.
2. Emancipated by court order.
3. Legally married.

(S.C. Code §§ 62-1-201(27) and 62-2-501).

- D. For the testator to have the mental capacity sufficient to make a will, the testator must understand:
1. The nature and extent of the testator's assets.
 2. The object of the testator's bounty.
 3. How the testator wants assets to pass at death.

(*In re Washington's Estate*, 46 S.E. 2d 287, 289 (S.C. 1948)).

IV. Execution Requirements of a Will.

- A. The will must be signed by at least two individuals that witnessed either the signing of the will or the testator's acknowledgment of the signature of the will (S.C. Code Ann. § 62-2-502(3)). It is preferred that all witnesses and the testator are in the same room at the same time while the will is being executed.
- B. A will must be signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction (S.C. Code Ann. § 62-2-502(2)).
- C. A subscribing witness receiving a gift under the will (or the spouse or issue of which receives a gift under the will) can attest or prove a will. However, unless there are two additional disinterested witnesses, the interested witness or the interested witness's spouse or issue generally cannot take under the will anything more than that to which the person is entitled in intestacy (S.C. Code Ann. § 62-2-504). Therefore, it is a better practice to use two disinterested witnesses to any interested witness or that witness's spouse or issue losing a benefit under the will.
- D. A notary is not required for a will to be valid, but is required to make the will self-proving (S.C. Code Ann. § 62-2-503). It is advisable to make a will self-proving at the time of execution.
- E. A valid will does not require a self-proving affidavit. However, with a few exceptions, a will that includes this affidavit may be admitted to probate without having to submit additional proof that the will was properly executed. (S.C. Code Ann. § 62-2-503.) It is advisable to include a self-proving affidavit with every South Carolina will. A will without the attestation and self-proving affidavit may require an additional sworn statement or affidavit from a person with knowledge of the circumstances of the will's execution to probate the will (S.C. Code Ann. § 62-3-303(c)).
- F. A subscribing witness receiving a gift under the will (or the spouse or issue of which receives a gift under the will) can attest or prove a will. However, unless there are two additional disinterested witnesses, the interested witness or the interested witness's spouse or issue generally cannot take under the will anything more than that to which the person is entitled in intestacy (S.C. Code Ann. § 62-2-504). Therefore, it is a better practice to

use two disinterested witnesses to any interested witness or that witness's spouse or issue losing a benefit under the will.

- G. The attestation clause states that the will was signed or acknowledged by the testator in the presence of the witnesses and that the testator declared to each of the witnesses that the document is the testator's will (S.C. Code Ann. § 62-2-503). It is common practice in South Carolina to include the following attestation, along with a self-proving clause, as provided by statute:

I, [TESTATOR NAME], the testator, sign my name to this instrument this [DAY] day of [MONTH], [YEAR], and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older (or if under the age of eighteen, am married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

We, [FIRST WITNESS NAME] and [SECOND WITNESS NAME], the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare, generally and to the undersigned authority, that the testator signs and executes this instrument as the testator's last will and that the testator signs it willingly (or willingly directs another to sign for the testator), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older (or if under the age of eighteen, was married or emancipated as decreed by a family court), of sound mind, and under no constraint or undue influence.

- H. South Carolina permits holographic or handwritten wills. However, to be valid, holographic wills must meet the statutory requirements for a will (S.C. Code Ann. §§ 62-2-502 and 62-2-505). For more information on the execution requirements for a will, see Will Execution Requirements.
- I. South Carolina does not recognize oral wills. All wills must be in writing. (S.C. Code Ann. § 62-2-502).
- J. A contract to make, revoke, or to not revoke a will, if the will is executed after January 1, 2014, can only be established by either:
1. A provision of the will stating the material provisions in the contract.

2. An express reference in the will to a contract and extrinsic evidence proving the terms of the contract.
3. A writing signed by the decedent showing the contract and extrinsic evidence proving the terms of the contract.

(S.C. Code Ann. § 62-2-701).

4. The execution of joint and mutual wills does not create a presumption of a contract to not revoke the will or wills (S.C. Code Ann. § 62-2-701). Contracts to make, revoke, or to not revoke wills are rarely used in South Carolina.

V. Rights of Individuals to Inherit.

A. Surviving Spouse.

1. A testator cannot disinherit a surviving spouse without a valid waiver of spousal rights in a prenuptial agreement, postnuptial agreement, or waiver, signed by the waiving spouse (S.C. Code Ann. § 62-2-204).
2. Without a valid waiver, the surviving spouse has an elective share right to claim against the probate estate of the decedent (S.C. Code Ann. § 62-2-201). The surviving spouse of a decedent that was a South Carolina resident can claim one-third of the decedent's probate estate as the surviving spouse's elective share (S.C. Code Ann. §§ 62-2-201 to 62-2-207).
3. A revocable trust is illusory for purposes of calculating a surviving spouse's elective share and the assets in the trust is included to determine the spouse's elective share (S.C. Code Ann. §§ 62-2-202(b) and 62-7-401(c)). However, the spouse is charged for gifts received because of the decedent's death (including those from the decedent's revocable trust in calculating the elective share) (S.C. Code Ann. § 62-2-207).
4. If the decedent was not a South Carolina resident, the surviving spouse's elective share for South Carolina property is governed by the law of the decedent's domicile (S.C. Code Ann. § 62-2-201(b)).
5. In certain cases, a spouse married to the testator may have certain rights to claim an intestate share of the decedent's estate.
6. The drafting attorney should ensure that the testator is aware of the surviving spouse's rights, if applicable, and draft accordingly.

B. Effect of Divorce.

1. On divorce or annulment, the former spouse is not considered a surviving spouse (unless the spouses remarry and are married at the decedent's death). On divorce or annulment, provisions in a testator's will that affect the testator's former spouse also are void. The former spouse is treated as if the spouse predeceased the testator. (S.C. Code Ann. §§ 62-2-507 and 62-2-802).
2. However, many attorneys recommend that the testator execute a new will after a divorce is final or in anticipation of a pending divorce.

C. Effect of Marriage After Execution of Will.

1. If a testator fails to provide by will for the testator's surviving spouse that married the testator after the execution of the will, the omitted spouse can claim the omitted spouse's elective share of the probate estate, unless either of the following apply:
 - a. It appears from the will that the omission was intentional.
 - b. The testator provided for the surviving spouse by transfer outside the will and the testator intended that the transfer be instead of a devise in the will.(S.C. Code Ann. § 62-2-301).
2. The surviving spouse's statutory share of the probate estate is one-half of the probate estate if there are surviving issue and all of the probate estate if there are no issue (S.C. Code Ann. § 62-2-102).
3. To make this claim, the omitted spouse must file and serve a summons and petition within the statutory deadlines (S.C. Code Ann. § 62-2-301(c)).
4. However, the surviving spouse can waive this claim in a prenuptial agreement, just as the spouse can waive an elective share claim (S.C. Code Ann. § 62-2-204).
5. Many attorneys recommend that the will be updated by the testator after marriage, so that the testator's intentions to provide or not provide for a surviving spouse are clear.

D. Rights of Children.

1. There is no right of a child to inherit from a parent unless either:

- a. The parent's estate is an intestate estate (S.C. Code Ann. § 62-2-103(1)). For more information on intestacy, see Rules of Intestacy.
- b. In certain cases, the child was born after the testator executed the testator's will.

2. After-Born Child.

- a. If a testator fails to provide in the testator's will for any children born or adopted after the date of execution of the will, the omitted child can claim the omitted child's statutory share of the estate, unless any of the following apply:
 - i. It appears from the will that the omission was intentional.
 - ii. When the will was executed, the testator devised substantially all of the testator's estate to the testator's spouse.
 - iii. The testator provided for the child by transfer outside the will and the testator intended that the transfer be in lieu of a devise in the will.

(S.C. Code Ann. § 62-2-302).

- b. To make this claim, the omitted child must file and serve a summons and petition within the statutory deadlines (S.C. Code Ann. § 62-2-302(d)).
- c. The testator should review and may decide to update the testator's will when life-changing events occur, such as the birth or adoption of a child. Many attorneys draft wills to expressly include after-born heirs in the definition of heirs. Counsel should discuss this issue with the testator and draft accordingly.

VI. Personal Property Memorandum.

- A. A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will. This list or statement may not include money or property used in trade or business. The list or statement must be either in the testator's handwriting or signed by the testator. It must also describe the items and beneficiaries with reasonable certainty. The writing may be prepared before or after the testator executes the will. (S.C. Code Ann. § 62-2-512). Testator's

frequently use this type of writing with a will. This writing is typically referred to as a personal property memorandum

VII. No-Contest Clause.

- A. No-contest clauses (also known as *in terrorem* clauses) are provisions in a will which penalize an interested party contesting the will or institutes proceedings related to the estate. These clauses generally provide that the interested party forfeits the interested party's bequest if the contest or proceeding is unsuccessful. No-contest clauses are permitted in South Carolina but are unenforceable if probable cause exists for instituting the proceeding (S.C. Code Ann. § 62-3-905). In South Carolina, a no-contest provision is often included in a will to deter challenges to a testator's dispositive plan.

VIII. Rule Against Perpetuities.

- A. A nonvested property interest is invalid unless one of the following applies:
1. When the interest is created, it vests or terminates no later than 21 years after the last life in being at the creation of the interest.
 2. The interest vests or terminates within 90 years after its creation.
- (S.C. Code Ann. § 27-6-20(A)).

IX. Naming a Personal Representative.

- A. The personal representative is the person in charge of the South Carolina estate. A personal representative includes an executor, administrator, successor personal representative, special administrator, and any person performing substantially the same function under applicable law (S.C. Code Ann. § 62-1-201(33)).
- B. A person may not serve as personal representative if any of the following apply:
1. The person is under age 18.
 2. The court finds the person to be unsuitable in formal proceedings.
 3. The proposed personal representative is a corporation and the corporation is not doing business in South Carolina (a corporation includes an officer, employee, or agent of a foreign corporation, if the person is acting on behalf of the corporation).

4. The person is a probate judge and the estate is the estate of any person within the probate judge's jurisdiction that is not a family member.

(S.C. Code Ann. §62-3-203(e)).

C. Bond.

1. If you want the Personal Representative to be required to post a bond for serving, you need to draft accordingly. (S.C. Code Ann. § 62-3-603).

D. Powers of Personal Representative.

1. Section 62-3-711 sets forth the statutory powers of the Personal Representative. The power to sell real property must be specifically authorized in the will along with the sale of personal property valued in excess of \$10,000.00.

E. Compensation of Personal Representative.

1. Unless otherwise approved by the probate court, the personal representative receives a fee for the personal representative's services that does not exceed the total of both:
 - a. Five percent of the appraised value of the personal property plus the sales proceeds of real property.
 - b. Five percent of the income earned by the probate estate.

(S.C. Code Ann. §§ 62-3-719(a) and 62-3-719(b)).
2. The parties can contract for a different amount of fees and the document can specify a different fee or no fee at all (S.C. Code Ann. § 62-3-719(c)). If there is more than one personal representative, the fee is split among them. The fee is normally split evenly, but the probate court can apportion the fee. (S.C. Code Ann. § 62-3-719(e)). If your client does not wish for the Personal Representative to receive a fee, or wants them to take a different fee, it should be addressed in the document.
3. Most corporate fiduciaries have published fee schedules and may not agree to serve unless the fee schedules are expressly incorporated into the will. It is common for a South Carolina will to contain language regarding the fee for the personal representative.
4. If the original named personal representative does not wish to serve, ceases to serve, or cannot serve, the successor personal

representative named in the will may serve (S.C. Code Ann. §§ 62-2-601 and 62-3-613).

5. The priority of appointment as personal representative is:
 - a. The person named as personal representative in the will or the person nominated by a power granted in the will.
 - b. The surviving spouse of the decedent that is a devisee. A devisee is any person designated to receive a devise (a testamentary disposition) in a will or trust (S.C. Code Ann. §§ 62-1-201(7) and 62-1-201(8)).
 - c. Other devisees of decedent.
 - d. The surviving spouse of the decedent (even if not a devisee).
 - e. Other heirs of the decedent.
 - f. 45 days after death, any creditor of the decedent that properly presents a creditor's claim under the South Carolina Code Section 62-3-804.
 - g. Four months after death, on application of the South Carolina Department of Revenue, a person suitable to the court.

(S.C. Code Ann. § 62-3-203).
6. Unless the decedent expresses a contrary intent in the decedent's will, a person with priority to act under the statute may nominate another person to serve as personal representative. That nominated person has the same priority as the person making the nomination. (S.C. Code Ann. § 62-3-203(a)(8)).
7. Unless the will provides otherwise, if two or more persons are appointed co-representatives, they must act jointly except in certain circumstances, such as:
 - a. When any co-representative receives and receipts for property due the estate.
 - b. When emergency action is necessary to preserve the estate and the agreement of all co-representatives cannot readily be obtained in reasonable time.

- c. When a co-representative is delegated to act for the others (by written, signed notice setting out the duties delegated and filed with the court).

It is important to know how the Testator wants this addressed and draft accordingly.

X. Beneficiary Does Not Survive (Lapse).

- A. Unless a contrary intent appears in the will, if a beneficiary does not survive the testator (or is treated as if the beneficiary predeceased the testator), the devise to that beneficiary:
 - 1. Does not lapse if the devisee was testator's great-grandparent or a lineal descendant of a great-grandparent. In this case, the devise is distributed to the beneficiary's issue surviving the testator as follows:
 - a. if the surviving issue are all of the same degree of kinship to the devisee, they take equally; or
 - b. if the surviving issue are of unequal degree of kinship to the devisee, then those of more remote degree take by representation.
(S.C. Code Ann. §§ 62-2-106 and 62-2-603(A)).
 - 2. Lapses for any devisee that was not the testator's great-grandparent or a lineal descendant of a great-grandparent and is not a residuary devisee. In this case, the property passes as part of the residue. (S.C. Code Ann. § 62-2-604(A)). For a residuary devisee, if the residue is devised to two or more persons, the share of the residuary devise that fails passes to the other residuary devisee or devisees in proportion to their interests in the residue (S.C. Code Ann. § 62-2-604(B)).
 - 3. Attorneys often include language, such as "if [he/she] shall survive me," to clarify that the devise to a particular beneficiary is contingent on that beneficiary's survival, and that the assets do not pass to the heirs of the devisee if the devisee does not survive.

It is important to understand what happens if someone predeceases and to draft accordingly.

XI. Gift Not Owned by Testator at Death (Ademption).

- A. In South Carolina, if the decedent, at the time of the decedent's death, does not own the specific asset devised, the devise generally adeems (that is, is not made), except as otherwise provided by statute (for example, where the beneficiary may receive certain sums or property the testator received for the sale, condemnation, or exchange of, or from

insurance payments on, the devised property) (S.C. Code Ann. §§ 62-2-605 and 62-2-606).

XII. Not Enough Assets (Abatement).

A. When there are not enough assets in the estate to pay all obligations and dispositions under the will and any claims or statutory shares, the various bequests in the will abate (are reduced or eliminated) for payment. Unless the will expresses an order of abatement or if the testamentary plan can otherwise be defeated, shares of distributees abate in the following order, without any preference between real and personal property:

1. Property not disposed of by the will.
2. Residuary devises.
3. General devises.
4. Specific devises.

(S.C. Code Ann. § 62-3-902).

XIII. Gifted Property Encumbered.

A. A specific devise passes subject to any mortgage, pledge, security interest, or other lien existing at the date of death without right of exoneration, regardless of a general directive in the will to pay all debts (S.C. Code Ann. § 62-2-607). If the testator wants a debt paid from other estate assets before distribution of the devise, the testator must specifically say so in the will. Many people often assume that the mortgage is paid off out of estate assets, but this is not the case unless the document specifically states that the mortgage is paid off out of estate assets.

XIV. Simultaneous Death.

- A. Unless the will provides otherwise, beneficiaries generally must survive the testator by 120 hours to receive their bequests, subject to certain limited exceptions (S.C. Code Ann. §§ 62-1-502 and 62-1-506).
- B. Many attorneys include a provision in the will dealing with simultaneous deaths and specifying the rules that apply to determine which person died first.

XV. Intestacy.

A. The intestate share of the surviving spouse is:

1. The entire intestate estate, if there are no surviving issue of the decedent.
 2. One-half of the entire intestate estate, if there are surviving issue.
(S.C. Code Ann. § 62-2-102).
- B. That part of the intestate estate not passing to the surviving spouse or the entire intestate estate, if there is no surviving spouse, passes to the following persons, in the following order:
1. To the issue of the decedent as follows:
 - a. equally, if they are the same degree of kinship; and
 - b. those of more remote degree of kinship take by representation, if they are of an unequal degree of kinship.
 2. If there are no surviving issue, to the decedent's parents equally.
 3. If there are no surviving issue or parents, to the issue of the parents or either of them by representation.
 4. If there are no surviving issue, parents, or issue of parents, but the decedent is survived by one or more grandparents or issue of the grandparents, half of the estate passes to the paternal grandparents, if both survive, or to the surviving paternal grandparent or to the issue of the paternal grandparents if both are deceased and the other half passes to the maternal relatives in the same way. If there are no surviving grandparents or issue of grandparents on one side of the family, then the entire estate passes to the side of the family with survivors. If there are no surviving grandparents or issue of grandparents, the statute provides for additional intestate distributions

(S.C. Code Ann. §§ 62-2-103 and 62-2-105).
 5. Many attorneys draft the will with contingent provisions intended to distribute all of the testator's property (that is, so that no property passes in intestacy).
- XVI. Out of State Wills. A written will is valid if it complies with the laws at the time of execution of the place where either:
- A. The will is executed.
 - B. The testator is domiciled at the time of execution or at the time of death.

(S.C. Code Ann. § 62-2-505).

- C. It is advisable to have a South Carolina attorney review an out-of-state will that is meant to be probated in South Carolina. It may be appropriate to prepare a South Carolina will for a testator that has moved to South Carolina from out of state. It is easier to probate and administer a South Carolina will in South Carolina rather than administering and probating an out-of-state document.

XVII. Trusts.

- A. The South Carolina Trust Code, Sections 62-7-101 to 62-7-1106 of the South Carolina Code Annotated, governs South Carolina trusts.
- B. The South Carolina Probate Courts generally have exclusive original jurisdiction over trusts (S.C. Code Ann. §§ 62-1-302(a)(3) and 62-1-302(c)). The probate courts must remove certain matters relating to trusts to the circuit court, on motion by a party, or by the court on its own motion, made within 10 days after all responsive pleadings are filed (S.C. Code Ann. § 62-1-302(d)).
- C. In South Carolina, the minimum age to make a trust is the same minimum age that is required to make a will (S.C. Code Ann. § 62-7-601). A person not a minor may make a will (S.C. Code § 62-2-501). For these purposes, a minor is anyone under age 18, except for those persons that are either:
 - 1. Emancipated by Order of Family Court.
 - 2. Married.(S.C. Code Ann. § 62-1-201(27)).
- D. In South Carolina, the same mental capacity required to make a will is required to make a trust (S.C. Code Ann. § 62-7-601). In South Carolina, a person of sound mind may make a will (S.C. Code Ann. § 62-2-501). The capacity needed to make a will is that the testator must understand:
 - 1. The nature and extent of the testator's assets.
 - 2. The object of the testator's bounty.
 - 3. How the testator wants assets to pass at death.

(In re Washington's Estate, 212 S.C. 379, 385-6, 46 S. E. 2d 287, 289 (S.C. 1948)).

 - 4. In South Carolina, a trust must have a trustee (S.C. Code Ann. § 62-7-401).

E. Beneficiary Requirements.

1. In South Carolina, a trust must have a definite beneficiary unless it is a:
 - a. Charitable trust.
 - b. Trust for the care of an animal.
 - c. Trust for a noncharitable purpose as provided in Section 62-7-409 of the South Carolina Code Annotated.

(S.C. Code de Ann. §§ 62-7-402, 62-7-408, and 62-7-409).

F. Trust Property Requirements.

1. A trust must be funded with assets (S.C. Code Ann. § 62-7-401). In South Carolina, the initial funding amount can typically be as small as \$5.00. The trustee only has control over the property that has been transferred to the trustee by deed or otherwise (for example, the trust can be funded during the settlor's lifetime by an assignment of assets and at the settlor's death by transfers by will or beneficiary designation).
2. Unless the trust terms expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust (S.C. Code Ann. § 62-7-602). This section does not apply to trusts created before the effective date of this statute, January 1, 2014, which are irrevocable unless the trust provided for a power of revocation (S.C. Code Ann. § 62-7-602, cmts.)
3. South Carolina permits oral trusts for personal property, which may be established by clear and convincing evidence (S.C. Code Ann. § 62-7-407). However, a trust for real estate must be in writing (S.C. Code Ann. § 62-7-401(a)(2)).
4. Attorneys generally create written trust agreements rather than oral ones for clarity and if the trust holds real property interests.
5. If the trust agreement is in writing, the trust may be signed by the settlor or in the settlor's name by some other person at the settlor's direction and in the settlor's presence (S.C. Code Ann. § 62-7-402(b)).

G. Trustee's Signature.

1. Although it is standard practice in South Carolina for the trustee to sign the trust instrument, there is no requirement in South Carolina for the trustee to sign the trust instrument.

H. Witness Requirements.

1. Although it is standard practice in South Carolina for the trust agreement to be witnessed by two witnesses, there is no witness requirement for a trust in South Carolina.

I. Notary Requirements.

1. Although it is standard practice in South Carolina for a trust agreement to be notarized, there is no notary requirement for a trust in South Carolina.

J. Qualification as Trustee.

1. There are no statutory requirements to serve as a trustee in South Carolina. However, trustees may be removed if the trustee is unfit, unwilling, or persistently fails to administer the trust effectively (S.C. Code Ann. § 62-7-706(b)).
2. The terms of the testamentary trust under the testator's will may set out the way in which the named trustee accepts the role of trustee. If the trust terms are silent or not exclusive, the trustee accepts the trusteeship by either:
 - a. Accepting delivery of the trust property.
 - b. Exercising powers or performing duties as trustee.
 - c. Otherwise indicating acceptance of the trusteeship.(S.C. Code Ann. § 62-7-701).
3. If a designated trustee does not accept the trusteeship within a reasonable time after knowing of the designation, the person is deemed to have rejected the trusteeship. A person designated as trustee may, without accepting the trusteeship, do the following:
 - a. Act to preserve the trust property, but then, within a reasonable time after acting, send a rejection of the trusteeship to the settlor, or if the settlor is dead or lacks capacity, to a qualified beneficiary.

- b. Inspect or investigate trust property to determine potential environmental liability or for any other purpose.

(S.C. Code Ann. § 62-7-701).

K. Compensation of Trustee.

- 1. If the testamentary trust terms do not specify trustee compensation, a trustee is entitled to reasonable compensation under the circumstances (S.C. Code Ann. § 62-7-708(a)). If the testamentary trust terms specify the trustee's compensation, the trustee is entitled to the compensation specified. However, the court may allow more or less compensation if either:

- a. The trustee's duties are substantially different than the duties contemplated when the trust was created.
- b. The specified compensation is unreasonably high or low.

(S.C. Code Ann. § 62-7-708(b)).

- 2. Most corporate trustees have published fee schedules and generally do not serve unless these schedule terms are incorporated into the testamentary trust.

L. Failure of Named Trustee.

- 1. If the first named trustee cannot serve, the named successor serves. If there is no named successor trustee willing and able to act, then a trustee vacancy exists. A trustee vacancy occurs if:

- a. A person designated as trustee rejects the trusteeship.
- b. A person designated as trustee does not exist or cannot be identified.
- c. A trustee resigns.
- d. A trustee is disqualified or removed.
- e. A trustee dies.
- f. A guardian or conservator is appointed for an individual trustee.

(S.C. Code Ann. § 62-7-704(a)).

2. The testamentary trust terms may state how to fill a trustee vacancy. A vacancy in the trusteeship of a noncharitable trust must be filled in the following order of priority:
 - a. By a person designated in the testamentary trust to act as successor trustee.
 - b. By a person appointed by unanimous agreement of the qualified beneficiaries.
 - i. A qualified beneficiary is a living beneficiary that on the date of the beneficiary's qualification is determined, is either a distributee or permissible distributee:
 - a) Of income or principal.
 - b) If the interests of the above distributees terminated on that date but the termination of those interests did not terminate the trust.
 - i) Of trust income or principal if the trust terminated on that date.

(S.C. Code § 62-7-103(12)).
 - c. By a person appointed by the court.

(S.C. Code Ann. § 62-7-704(c)).
3. Because a testamentary trust must have a trustee, if there is no trustee, the probate court can fill a vacancy in the trusteeship and appoint a successor trustee (S.C. Code Ann. §§ 62-7-704(b) and 62-7-704(c)).

M. Multiple Trustees.

1. Unless the will provides otherwise:
 - a. If there are two co-trustees, the trustees must agree on the proposed action.
 - b. If there are more than two co-trustees unable to reach a unanimous decision, they may act by majority decision.
 - c. If a vacancy arises, the remaining co-trustees may act for the trust.

(S.C. Code Ann. §§ 62-7-703(a) and 62-7-703(b)).

- d. A co-trustee must participate in the trustee's functions unless the co-trustee is not available due to absence, illness, disqualification under other law, temporary incapacity, or proper delegation of the function to another trustee (S.C. Code Ann. § 62-7-703(c)). If a co-trustee is unavailable and prompt action is necessary, the remaining co-trustee or a majority of the remaining co-trustees may act for the testamentary trust unless the will provides otherwise (S.C. Code Ann. § 62-7-703(d)).

N. Incorporation by Reference of Trustee Powers.

1. Section 62-7-815 provides that the powers of the trustee include:
 - a. Those found in the trust agreement.
 - b. Except as limited by the trust agreement, all powers over the trust property that an unmarried, competent owner has over individually owned property.
 - c. Any other powers appropriate to achieve the proper administration of the trust and any other powers conferred by Part 8 of the South Carolina Probate Code.
2. Specific powers are granted to a trustee by statute and do not need to be specifically listed in the trust agreement, if the settlor wishes to incorporate them (S.C. Code Ann. § 62-7-816). However, in South Carolina, most trust agreements list in detail the powers of the trustee regarding the administration of real property, personal property, investment assets, bank accounts, and businesses so third parties can more easily see whether the trustee is authorized to take a certain action related to trust property.

O. Governing Law.

1. The meaning and effect of the terms of a trust are determined by either:
 - a. The law of the jurisdiction designated in the terms of the trust instrument.
 - b. If the trust instrument does not designate the law of a jurisdiction, the law of the jurisdiction having the most significant relationship with the matter at issue.

(S.C. Code Ann. § 62-7-107.)

P. Beneficiary Does Not Survive (Lapse).

1. Unless the trust agreement provides otherwise, if the beneficiary of a revocable trust is a great-grandparent or a lineal descendant of a great-grandparent of the settlor and is dead when the trust is executed, fails to survive the settlor, or is treated having predeceased the settlor, the issue of the deceased beneficiary surviving the settlor take in place of the deceased beneficiary as follows:

- a. If they are all of the same degree of kinship, they take equally.
- b. If they are of an unequal degree of kinship, then those of more remote degree take by representation (that is, the predeceased beneficiary's descendants take the predeceased beneficiary's share).

(S.C. Code Ann. § 62-7-606(A)).

2. Except as provided above, if the disposition of property under a revocable trust fails for any reason, the property becomes part of the residue of the trust. Except as provided above, if the residue of a revocable trust is to be distributed to two or more persons and the share of a residuary beneficiary fails, that share passes to the other residuary beneficiary or beneficiaries in proportion to their interests. (S.C. Code Ann. §§ 62-7-606(B) and 62-7-606(C)).

Q. Gift Not Owned By Settlor at Death (Ademption).

1. If the specific asset devised is no longer owned by the settlor at the time of death, the bequest lapses (S.C. Code Ann. §§ 62-2-605, 62-2-606, and 62-7-112).

R. Not Enough Assets (Abatement).

1. Unless the trust instrument expresses an order of abatement, if there are not enough assets, shares of beneficiaries abate as follows, without any priority between real and personal property:

- a. Property not disposed of by the trust.
- b. Residuary devises.
- c. General devises.
- d. Specific devises.

(S.C. Code Ann. §§ 62-3-902 and 62-7-112).

S. Gifted Property Encumbered.

1. A specific devise passes subject to any mortgage, pledge, security interest, or other lien existing at the date of death without right of exoneration regardless of a general directive in the trust to pay all debts (S.C. Code Ann. §§ 62-2-607 and 62-7-112). If the settlor wants the debt paid from other trust assets before distribution of the gift, it must be specifically stated in the trust instrument.

T. Effect of Divorce.

1. Unless the trust instrument expressly provides otherwise, if the settlor is divorced or the marriage is annulled after the creation of a revocable trust, generally all provisions of the trust that affect the former spouse are revoked, including the fiduciary nominations, bequests, and grants of powers of appointment. If the statute prevents property from passing to the former spouse, the former spouse is treated as having predeceased the settlor. (S.C. Code Ann. § 62-7-607).

U. Simultaneous Death.

1. Unless one of the six exceptions provided in the statute apply, survivorship by 120 hours is required for a beneficiary to be deemed to have survived the settlor (S.C. Code Ann. § 62-1-506). The most common exception listed in the statute is when the governing instrument contains language which specifically deals with simultaneous deaths and creates rules which apply when the order of death of the settlor and beneficiaries or of the beneficiaries is not known (S.C. Code Ann. § 62-1-506(1)). The trust instrument may include a provision dealing with simultaneous deaths and specifying the rules that apply to determine which person died first.



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Initial Estate Planning Interview

Scott W. Hutto

PROBATE AND ESTATE PLANNING PRACTICE ESSENTIALS

May 31, 2019

Initial Estate Planning Interview

Scott W. Hutto

Certified Specialist in Estate Planning and Probate Law
Fellow of the American College of Trust and Estate Counsel

PO Box 556 | Georgetown, SC 29442
521 Highmarket Street | Georgetown, SC 29440
843-545-5250 | Fax 843-545-5251
swh@huttolaw.com

Initial Estate Planning Interview

Estate planning is often referred to as a process, and the initial estate planning interview is one of the first steps in the process. Regardless if the clients are old friends or complete strangers, the initial interview is frequently the practitioner's first chance to spend time with the clients in a professional capacity. As a result, the practitioner should view this meeting as an opportunity to create a foundation of trust and confidence with the clients. This meeting allows the practitioner to build a base of general knowledge about estate planning concepts for the clients while at the same time learning about the intricate details of their family and finances. In today's complex world of taxes, insurance and investments, the initial estate planning interview is also a time to find out about other potential members of the estate planning team (i.e. accountants, insurance and investment advisors). Finally, the desired outcome of this meeting should be an understanding of the clients' estate planning goals and objectives and the beginning of a plan to reach them.

As a result of a decision of the South Carolina Supreme Court in Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014), a third-party beneficiary of an existing will or estate planning document may have a cause of action against the attorney who prepared the documents, in tort and contract, for any drafting error which defeats or diminishes the client's intent. Only persons who are named in the estate planning documents or are otherwise identified by their status may recover under this ruling. This ruling should cause any estate planning practitioner to think about office practices, how they ascertain and document client intent, and how they incorporate this into the billing structure for clients.

1. Events leading up to Initial Interview:

(a) Initial Client Contact: In many cases, the clients will call the lawyer, or the law firm, based upon a recommendation or referral from another lawyer, accountant, insurance agent, investment advisor or another client. In other cases, the clients may have seen an advertisement, website, social media or simply seen the law firm's name in the telephone directory. Regardless of how the clients find the lawyer, estate planning clients frequently have three common traits:

- (i) they tend to underestimate their assets or understate the complexity of their family dynamics,
- (ii) they tend to be overly certain about what they want - "I only need a simple will", and
- (iii) they tend to believe that the entire plan can be prepared for under \$100.00 – “It’s just a form on your computer – right?” Managing client expectations should begin immediately in order to maintain a good relationship.

(b) Estate Planning Questionnaire: The Estate Planning Questionnaire ("EPQ") should be designed to help organize and present data about the client’s family and assets. Additionally, it should give the practitioner a general idea of the client’s goals. However, EPQs are not perfect, and clients frequently need explanations. The EPQ also helps to serve as an important checklist for the attorney during the initial meeting. The EPQ should be provided to the clients prior to the initial estate planning interview with the hope that the clients will complete the EPQ and return it prior to the initial meeting, or at the very least, complete it prior to the meeting and bring it with them. See Initial Letter to Client and EPQ attached.

(c) Fees: Very few firms would be able to keep the doors open preparing \$100.00 estate plans. It is best to address fees at the very beginning of the relationship. However, it is often difficult, if not impossible, to know what the fees will be for an estate plan prior to meeting with the clients. Therefore, the attorney should attempt to inform the client about his or her billing practices, to include how the initial meeting is handled, with the intent of confirming the fee structure at the end of the initial meeting.

(d) Time: The initial estate planning interview is often one of the longest meetings the attorney and clients will have. Getting to know the clients, understanding their unique estate planning needs, their intent for the distribution of their estate, and formulating a plan takes time. Also, many clients simply do not understand basic estate planning principles. Therefore, allocate some time to educating your clients about basic estate planning principles and concepts - this can go a long way to earning the client’s trust and confidence. Let the clients know that this meeting may run several hours so that they can plan their schedules accordingly.

2. The Initial Estate Planning Interview:

(a) Estate Planning Disclosure: If the estate planning is going to be with a married couple, then it would be prudent to begin the meeting by discussing the various issues addressed in the attached Estate Planning Disclosure for Married Couples. The disclosure addresses conflicts of interest, sharing of confidential information, divorce, changes to the estate plan and the responsibility to monitor and review the estate plan.

(b) Review of the EPQ: After addressing the estate planning disclosure, it makes sense to review the EPQ with the clients to make sure all questions were understood and are appropriately answered. For example, most clients believe a power of appointment and a power of attorney are the same thing. In many cases, this will also be the first time you have seen a completed EPQ. Make sure you go over the EPQ thoroughly and attempt to complete any sections left blank.

(c) Basic Estate Planning Slides: Frequently, clients know very little about basic estate planning concepts. As a result, the initial estate planning meeting is a great time to go over basic estate planning information so that the clients have a better understanding of the planning hurdles and planning options. The following topics are worth discussing with the clients early in the meeting so that the clients can make an informed decision when it comes to their estate plan and how they would like it to be structured:

- (1) probate vs. non-probate assets
- (2) probate fees and probate administration generally
- (3) current estate and gift tax laws
- (4) intestacy – how does it work
- (5) planning options
 - a. simple will
 - b. complex will with testamentary trust(s)
 - c. revocable trust
- (6) personal property memorandum
- (7) spousal elective share

- (8) children vs step-children
- (9) durable powers of attorney and health care powers of attorney
- (10) living will (Declaration of a Desire for Natural Death)

(d) Formulating a Plan: After covering the various disclosures, forms and slides, it is now time to put the pieces together to prepare a plan that meets your clients' needs and desires. Typically, this process requires pointing out the good, the bad and the ugly concerning the clients' initial thoughts as expressed on the EPQ. It also entails balancing the clients' competing desires, for example: tax avoidance, creditor protection, simplicity and “Don’t let my in-laws get a thing.” Once these issues have been addressed, the estate planner should have the information needed to (i) prepare the initial draft documents for review and (ii) provide the client with a reasonable quote for the cost of his or her services.

(e) Evaluating the Client(s) Competence. The initial estate planning interview is a good time to assess your client(s) capacity to understand the estate planning process and their ability to execute wills, trusts, durable powers of attorney, etc. The test to determine whether an individual has the capacity to make a will is whether the individual knows: (a) his or her estate, (b) the objects of his or her affection, and (c) to whom the individual wishes to give his or her property. See Weeks v. Weeks, 329 S.C. 251, 495 S.E.2d 454 (S.C. Ct. App. 1997), See also Lee’s Heirs v. Lee’s Executor, 15 S.C.L. 183 (4 McC. L.) (1827). This same test applies for the execution of a revocable trust. S.C. Code Ann. §62-7-601. However, the courts have required a higher level of competence, contractual capacity, in order to execute a power of attorney. See In the Matter of Doris W. Thames, 344 S.C. 564, 544 S.E.2d 854 (S.C. Ct. App. 2001).

South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of the contract and its effect. *In re: Nightingale's Estate*, 182 S.C. 527, 542, 189 S.E. 890, 896 (1937) (“[A] mere infirmity of mind, if it does not amount to an incapacity to understand, at the time of the execution of a contract, the nature of the act done and the effect thereof, ... does not render a person incapable of executing a valid and binding contract.”); see also 53 Am.Jur.2d *Mentally Impaired Persons* § 156 (1996) (“The test for lack of [contractual] capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction

in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests." (footnotes omitted)).

In the Matter of Doris W. Thames, 344 S.C. 564, 544 S.E.2d 854 (S.C. Ct. App. 2001).

Issues to consider when competence may be in question:

(i) Can the client hear you and understand you? Many older clients have difficulty hearing, especially if acoustics in the room are bad. Speak clearly and slow if necessary.

(ii) Is the client on medication that may affect the meeting? Older clients, and clients with disabilities, often take medications that can make them tired. Scheduling meetings around their medication regime may help to improve the meetings.

(iii) Pictures say a "1,000 words." Sometimes a diagram is much more helpful than any verbal explanation you can provide.

(iv) For clients with poor eyesight, consider having a magnifying glass.

(v) Let the client tell you what he or she wants – throw the kids out!!!

(vi) Is a letter from the client's physician warranted?

HUTTO LAW FIRM, P.A.

521 Highmarket Street
Post Office Box 556
Georgetown, SC 29442
Reply to: PO Box 556

SCOTT W. HUTTO
ATTORNEY AT LAW

CERTIFIED SPECIALIST IN ESTATE PLANNING AND PROBATE LAW
FELLOW OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

Website: www.huttolaw.com
E-mail: swh@huttolaw.com
Telephone: (843) 545-5250
Facsimile: (843) 545-5251

May 28, 2019

Mr. and Mrs. Client
Address

RE: Estate Planning Questionnaire

Dear Mr. and Mrs. Client:

I have enclosed the estate planning questionnaire we recently discussed. Please complete the questionnaire as thoroughly as possible and bring it with you to our first meeting. Additionally, please bring copies of your existing wills, trusts, and/or other estate planning documents.

It is essential that our office have detailed information about your personal and financial affairs in order to assist you with your estate plan. Please understand that all information provided to us is confidential and will not be discussed with anyone outside of our office.

If you do not have the information to fully answer a portion of the questionnaire, please provide whatever information you do have and indicate on the questionnaire that the information is incomplete.

If you have any questions prior to your appointment, please do not hesitate to call. I look forward to meeting with you Wednesday, June 3, 2019 at 2:00 pm in our Georgetown office.

Sincerely,

HUTTO LAW FIRM, P.A.

Scott W. Hutto

SWH/mms
Enclosure

**ESTATE ANALYSIS CHECKLIST
HUTTO LAW FIRM, P.A.**

Post Office Box 556
Georgetown, SC 29442
Tel: (843) 545-5250
Fax: (843) 545-5251

Telephone Numbers:

Residence: _____
Husband: _____
Wife: _____

E-Mail Addresses:

PART I - PERSONAL DATA

Client 1 Information

Full Name _____ U.S. citizen (Y/N)? _____

Known by Any Other Names? _____

Address _____

County of Residence _____ Social Security No. _____

Date of Birth _____ Place of Birth _____

Occupation _____ Annual Income _____

Previous Marriages (add details below). Name(s), date(s) and how marriage(s) terminated.

Client 2 Information (Spouse – complete if applicable)

Full Name _____ U.S. citizen (Y/N)? _____

Known by Any Other Names? _____

Address _____

County of Residence _____ Social Security No. _____

Date of Birth _____ Place of Birth _____

Occupation _____ Annual Income _____

Previous Marriages (add details below). Name(s), date(s) and how marriage(s) terminated.

Children (Client 1 or Client 2)

Is there a physical possibility of more children? _____

Are any children/grandchildren adopted? If yes, please specify. _____

Do any children/grandchildren have a disability? _____

1. **Child's Name** _____ **Date of Birth** _____

Child's Parents (If From a Prior Marriage): _____

Address _____

Education Completed _____ Occupation _____

Business Ability _____

Child's Spouse's Name _____

Child's Children: _____ Age: _____

_____ Age: _____

_____ Age: _____

_____ Age: _____

Comments: _____

2. **Child's Name** _____ **Date of Birth** _____

Child's Parents (If From a Prior Marriage): _____

Address _____

Education Completed _____ Occupation _____

Business Ability _____

Child's Spouse's Name _____

Child's Children: _____ Age: _____

_____ Age: _____

_____ Age: _____

_____ Age: _____

Comments: _____

3. **Child's Name** _____ **Date of Birth** _____
 Child's Parents (If From a Prior Marriage): _____
 Address _____
 Education Completed _____ Occupation _____
 Business Ability _____
 Child's Spouse's Name _____
 Child's Children: _____ Age: _____
 _____ Age: _____
 _____ Age: _____
 _____ Age: _____
 Comments: _____

4. **Child's Name** _____ **Date of Birth** _____
 Child's Parents (If From a Prior Marriage): _____
 Address _____
 Education Completed _____ Occupation _____
 Business Ability _____
 Child's Spouse's Name _____
 Child's Children: _____ Age: _____
 _____ Age: _____
 _____ Age: _____
 _____ Age: _____
 Comments: _____

Any Inheritances (Expected or received within last 10 years)?

	Client 1	Client 2
From Whom?	_____	_____
Approximate Value	_____	_____
Date Received	_____	_____
Were any estate taxes paid?	_____	_____
Have you received any Federal Estate/Gift Tax Credit from a deceased spouse?	_____	

Other Information:

Location of Lock Box _____

In Whose Name(s) _____

Any Property of Others in the Box? _____

Where are Other Valuable Papers Kept? _____

Name of Broker _____

Name of Accountant _____

Name of Life Insurance Agent _____

Other States in which Client 1 or Client 2 Have Resided:

Have either of you resided in any of the following states during your marriage?

<u>STATE</u>	<u>YES / NO</u>	<u>STATE</u>	<u>YES / NO</u>
Arizona	_____	New Mexico	_____
California	_____	Nevada	_____
Idaho	_____	Texas	_____
Louisiana	_____	Washington	_____
		Wisconsin	_____

PART II - MISCELLANEOUS PERSONAL INFORMATION.

1. Have you or your spouse made any substantial gifts (in excess of \$10,000.00 to any one person during any calendar year) in the past or placed property in joint names with someone other than your spouse? _____

Did you or your spouse file a gift tax return for the above gift(s)? _____

2. Do you or your spouse have any powers of appointment granted under someone else’s will or trust? _____

3. Are you or your spouse the beneficiary under any trust? _____

4. Do you and your spouse have a pre-nuptial or post-nuptial agreement of any kind concerning the disposition of assets in the event of death or divorce? YES _____ NO _____

** Please attach a copy if any.

5. Are there any existing conflicts in your marriage or family that will affect your estate planning? If yes, please describe: _____

PART II - FINANCIAL DATA

(Please provide copies of financial statements)

A. ASSETS (Not Including Life Insurance) - Use additional sheets if necessary.

	<u>Estimated Market Value</u>		
	(Client 1)	(Client 2)	(Joint)
Cash.....	\$ _____	\$ _____	\$ _____
Checking Accounts.....	\$ _____	\$ _____	\$ _____
Savings Accounts.....	\$ _____	\$ _____	\$ _____
Tangible Personal Property.....	\$ _____	\$ _____	\$ _____
Investment/Brokerage Accounts.....	\$ _____	\$ _____	\$ _____
Stocks (outside of brokerage accts).....	\$ _____	\$ _____	\$ _____
Bonds (outside of brokerage accts).....	\$ _____	\$ _____	\$ _____
Notes & Mortgages Receivable.....	\$ _____	\$ _____	\$ _____
Residence.....	\$ _____	\$ _____	\$ _____
Real Estate in This State.....	\$ _____	\$ _____	\$ _____
Real Estate in Other States.....	\$ _____	\$ _____	\$ _____
Business Interests.....	\$ _____	\$ _____	\$ _____
Pension, Profit Sharing, IRA, Etc.....	\$ _____	\$ _____	\$ _____
Other Property.....	\$ _____	\$ _____	\$ _____
TOTAL ASSETS (less life insurance)	\$ _____	\$ _____	\$ _____

B. LIFE INSURANCE: *(Include Face Value of Policy in Policy Owner's Assets)*

<u>Company</u>	<u>Insured</u>	<u>Beneficiary</u>	<u>Owner</u>	<u>Cash Value</u>	<u>Face Amount</u>
_____	_____	_____	_____	\$ _____	\$ _____
_____	_____	_____	_____	\$ _____	\$ _____
_____	_____	_____	_____	\$ _____	\$ _____
_____	_____	_____	_____	\$ _____	\$ _____

C. LIABILITIES:

	(Client 1)	(Client 2)	(Joint)
Notes and Mortgages Payable.....	\$ _____	\$ _____	\$ _____
Life Insurance Loans.....	\$ _____	\$ _____	\$ _____
Other Debts.....	\$ _____	\$ _____	\$ _____
TOTAL LIABILITIES	\$ _____	\$ _____	\$ _____

Please provide copies of bank/brokerage statements, IRA statements, insurance policies, etc.

REAL ESTATE (Please provide copies of deeds if you have them)

Primary Residence

1. Residence Address _____
Brief Description _____

Legal Title (Whose Name on Deed) _____
Fair Market Value _____ Assessed Value _____
Mortgage: Amount _____ Mortgagee _____
Basis Information (cost, date of acquisition, cost and date of improvements)

Other Property

2. Address _____
Brief Description _____

Legal Title (Whose Name on Deed) _____
Fair Market Value _____ Assessed Value _____
Mortgage: Amount _____ Mortgagee _____
Basis Information (cost, date of acquisition, cost and date of improvements)

3. Address _____
Brief Description _____

Legal Title (Whose Name on Deed) _____
Fair Market Value _____ Assessed Value _____
Mortgage: Amount _____ Mortgagee _____
Basis Information (cost, date of acquisition, cost and date of improvements)

PART III - TESTAMENTARY INSTRUCTIONS

1. Testamentary wishes for Client 1:

Desired disposition of assets if you are survived by your spouse:

Desired disposition if you are **not** survived by your spouse:

Desired disposition if no immediate family survive you:

Any specific bequests to individuals or charities (please provide detail):

2. Testamentary Wishes for Client 2:

Desired disposition of assets if survived by your spouse:

Desired disposition if you are **not** survived by your spouse:

Desired disposition if no immediate family survive you:

Any specific bequests to individuals or charities (please provide detail):

3. PERSONAL REPRESENTATIVE (also known as “Executor”)

List below the person(s) or corporation whom you wish to serve as personal representative(s).

Name of Primary Personal Representative(s)	Address
(Client 1)_____	_____
_____	_____
(Client 2)_____	_____
_____	_____

List below alternate personal representative(s) in order of priority

Name of Alternate Personal Representative(s)	Address
(Client 1)_____	_____
_____	_____
(Client 2)_____	_____
_____	_____

4. Guardians for Minor Children

Please list the name(s) of the individuals you would want to serve as guardians for your children if both parents were deceased or unable to properly care for the children.

	Name	Address
Primary Guardian	_____	_____
	_____	_____
Alternate Guardian	_____	_____
	_____	_____

5. Trusts for Minor Children

a. Do you wish to establish a trust for minor children to hold and manage their assets until they reach an age designated by you? [] Yes [] No

b. When should the trust terminate? When the child reaches the age of _____ years.

Please list the name(s) of the individuals you would want to serve as Trustee:

Primary Trustee:	_____

Alternate Trustee:	_____

HUTTO LAW FIRM, P.A.
ESTATE PLANNING DISCLOSURE
FOR MARRIED COUPLES

1. **Conflicting Interests.** South Carolina legal ethics require that we advise you that a husband and wife may have conflicting interests when estate planning is being done that concerns their property interests. Whenever an attorney represents multiple clients, certain risks materialize. For example, the zeal and loyalty of my representation may be diminished as to your individual desires. You would lose the right to invoke the attorney-client privilege as among one another. Also, if a conflict does arise, I must withdraw, and both of you would need to retain separate counsel. This could result in significantly more fees and costs. Having had the opportunity to consider these issues, and being advised that you have a right to have your own separate attorney for estate planning, you agree to this Firm's joint representation of the two of you, and unless you advise us in writing, we are going to assume that we may continue to represent both of you in these estate planning matters.

2. **Sharing Confidential Information Between Spouses.** To assist you with your estate planning, we must obtain confidential information from each of you. Because we will be representing both of you, we will not keep information confidential from either of you. Although we could represent each of you individually, and treat you as separate clients, that is not this Firm's usual practice. Therefore, you both agree and consent to have this Firm disclose any information that either of you discloses to this Firm to the other. That means that this firm may reveal confidential information to each of you and make such recommendations to you as we deem best, to include the retention of independent legal counsel. If either of you at any time believes that a conflict exists between the two of you so that you need separate legal representation, you agree to advise us, in writing, without delay.

3. **Divorce.** We will make recommendations that may affect your property interests before or after your deaths. While hopefully remote, the possibility of a divorce must be recognized. Our recommendations could affect the income, property and support provisions in any such divorce. You have been informed as to these conflicts and you have decided that you want this Firm to represent both of you in your estate planning. You are each, of course, welcome to have your own counsel for any part or all of the matters we are discussing.

4. **Changing Your Estate Plan.** Generally, a person's estate planning documents may be changed at any time prior to death. Once the first spouse dies, the surviving spouse may, for any number of reasons, decide to change his or her estate plan. The laws of South Carolina do allow individuals to enter into a "contract to will" which would prevent the surviving spouse from changing his or her will after the first spouse's death. However, this Firm cannot represent both of you if you intend to enter into a contract to will. It is our understanding that you do not intend to enter into a contract to will at this time. Of course, there are estate planning techniques we will discuss that allow you to control the disposition of your own property.

5. **Regular Review of Your Estate Plan.** Due to the frequent changes in tax law and changes in your personal and financial life, it is impractical if not impossible for us to assume the responsibility of notifying you when changes are necessary for your estate plan. Therefore, we strongly suggest that you review your estate plan on a regular basis. We will be happy to meet with you at your request to accomplish this review.

I hereby consent to your representation of me on the terms and conditions set forth in this letter.

Signature: _____ Date: _____

Print Name: _____

Signature: _____ Date: _____

Print Name: _____

BASIC ESTATE PLANNING

Scott W. Hutto, Esq.

Certified Specialist in Estate Planning and Probate Law
Fellow of the American College of Trust & Estate Counsel

Hutto Law Firm, P.A.
521 Highmarket Street
Georgetown SC, 29440
(843) 545-5250
swh@huttolaw.com

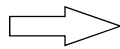
www.huttolaw.com

Scott W. Hutto, Esquire

BASIC ESTATE PLANNING

WHAT IS YOUR "ESTATE"?

$$\begin{array}{r} \text{ASSETS*} \\ - \text{DEBT} \\ \hline \text{ESTATE} \end{array}$$



What are your assets?

- stocks, bonds
- real estate
- household contents
- checking & savings
- insurance policies
- retirement plans
- assets in a revocable trust you created

*Fair Market Value

Scott W. Hutto, Esquire 2

BASIC ESTATE PLANNING

PROBATE VS. NON-PROBATE

Probate Assets are controlled by your Last Will and Testament or by the laws of intestacy if you die without a will.

- Examples:**
- Household contents.
 - Bank or brokerage accounts held in decedent's name without designated beneficiaries.
 - Real estate held in one name or as tenants-in-common.

Non-Probate Assets are controlled by beneficiary designations or rights of survivorship.

- Examples:**
- Bank or brokerage accounts held as JTWROS or with designated beneficiaries (i.e. POD or TOD).
 - Retirement plans / life insurance with designated beneficiaries.
 - Real estate held as JTWROS.
 - Assets held in trust.

Scott W. Hutto, Esquire 3

BASIC ESTATE PLANNING

PROBATE FEES

The Probate Court charges a fee based on the value of the Probate assets being administered, calculated as follows:

<u>Probate Value:</u>	<u>Filing Fee:</u>
\$ 0.00 to \$ 4,999	\$25.00
\$ 5,000 to \$ 19,999	\$45.00
\$ 20,000 to \$ 59,999	\$67.50
\$ 60,000 to \$ 99,999	\$95.00
\$100,000 to \$599,999	\$95.00 + .015% over \$100,000
\$600,000 and above	\$845.00 + .0025% over \$600,000

Scott W. Hutto, Esquire 4

BASIC ESTATE PLANNING

PROBATE FEES (Cont.)

<u>Probate Estate Value:</u>	<u>Filing Fee:</u>
\$ 100,000	\$ 95.00
\$ 300,000	\$ 395.00
\$ 600,000	\$ 845.00
\$ 1,000,000	\$ 1,845.00
\$ 2,000,000	\$ 4,345.00
\$ 3,000,000	\$ 6,845.00
\$ 4,000,000	\$ 9,345.00
\$ 5,000,000	\$ 11,845.00

Scott W. Hutto, Esquire 5

BASIC ESTATE PLANNING

FEDERAL TAX LAW

<u>Year</u>	<u>Estate Tax Exclusion Equivalent</u>	<u>Gift Tax Exclusion Equivalent</u>	<u>GST Tax Equivalent</u>	<u>Highest Estate, Gift & GST Rate</u>
2015	\$ 5,430,000	5,430,000	5,430,000	40%
2016	\$ 5,450,000	5,450,000	5,450,000	40%
2017	\$ 5,490,000	5,490,000	5,490,000	40%
2018	\$11,180,000	11,180,000	11,180,000	40%
2019	\$11,400,000	11,400,000	11,400,000	40%

- For 2019, the Gift Tax Annual Exclusion = \$15,000
- SC does not have a state level "estate tax." Numerous states maintain an "estate" or "inheritance" tax.

Scott W. Hutto, Esquire 6

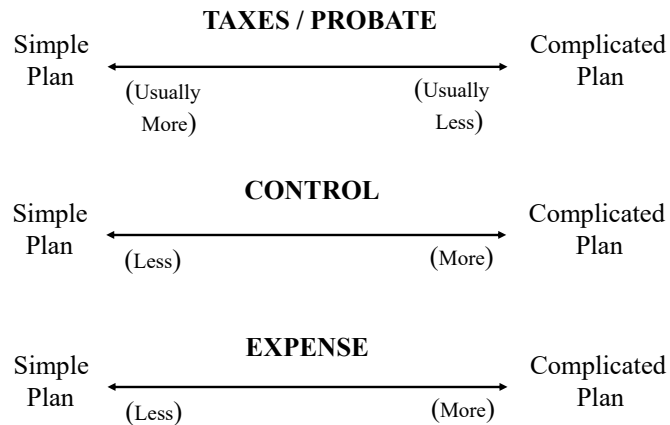
BASIC ESTATE PLANNING

INTESTACY

1. Surviving Spouse, No Descendants: 100% to Spouse
2. No Surviving Spouse, Surviving Descendants:
100% to Descendants
3. Surviving Spouse & Surviving Descendants :
50% to Surviving Spouse
50% to Surviving Descendants

Scott W. Hutto, Esquire 7

BASIC ESTATE PLANNING



Scott W. Hutto, Esquire 8

BASIC ESTATE PLANNING

PERSONAL PROPERTY MEMORANDUM

- (1) Only effective for tangible personal property.
(i.e. household contents, cars, boats, etc.)
- (2) Must be referenced in Last Will and Testament.
- (3) Can be created or modified after execution of Will.

** SC Code §62-2-805: Creates presumption that tangible personal property in joint possession of married couple is held as joint tenants with right of survivorship (JTWROS). There are numerous exceptions to the law.

Scott W. Hutto, Esquire 9

BASIC ESTATE PLANNING

SPOUSAL ELECTIVE SHARE

The surviving spouse is entitled to receive value equal to one-third (1/3) of the deceased spouse's Probate Estate. As of January 1, 2014, certain non-probate assets passing to the surviving spouse count towards the elective share claim.

For purposes of the elective share, the Probate Estate equals the decedent's property passing pursuant to a will (or the laws of intestacy), reduced by funeral expenses, administration expenses, and enforceable claims against the estate.

As a result of numerous court decisions, assets in a revocable trust will usually be included in the elective share calculation.

Scott W. Hutto, Esquire 10

BASIC ESTATE PLANNING

WHO IS A “CHILD”

1. Natural born child.
2. Adopted child?
3. Step-child?
4. Child conceived after parent’s death?

Scott W. Hutto, Esquire 11

BASIC ESTATE PLANNING

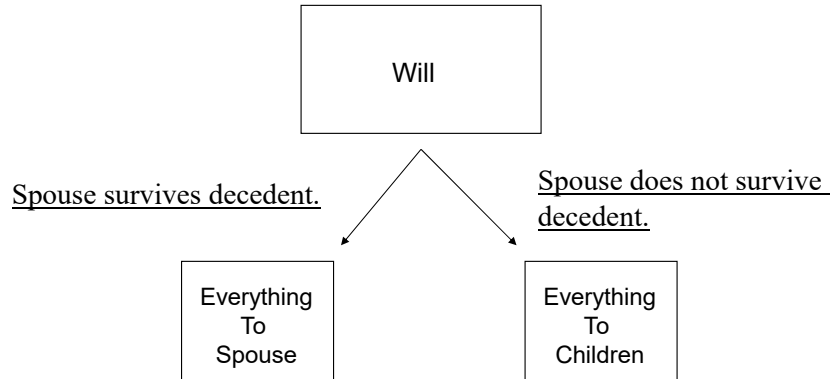
CHARITABLE PLANNING

1. Lifetime gifts to charities.
2. Gifts through Will or Trust at death.
3. Gifts via IRA, 401k, or retirement plan.
4. Gifts via “community foundation.”

Scott W. Hutto, Esquire 12

BASIC ESTATE PLANNING

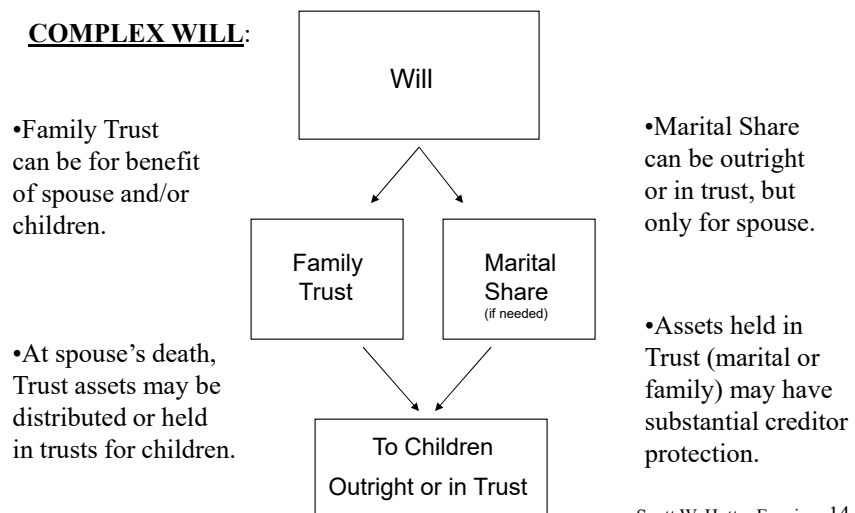
SIMPLE WILL:



Scott W. Hutto, Esquire 13

BASIC ESTATE PLANNING

COMPLEX WILL:



Scott W. Hutto, Esquire 14

BASIC ESTATE PLANNING

BENEFITS OF FAMILY/MARITAL TRUST

- (1) Assets held in trust for your spouse and children usually have greater creditor protection:
 - protection from new spouse / other family members
 - protection from lawsuits
 - protection from beneficiary's bad habits
(drugs, alcohol, gambling, etc.)
- (2) Using a trust creates more certainty as to the final beneficiaries.
- (3) Aids in planning for estate taxes.

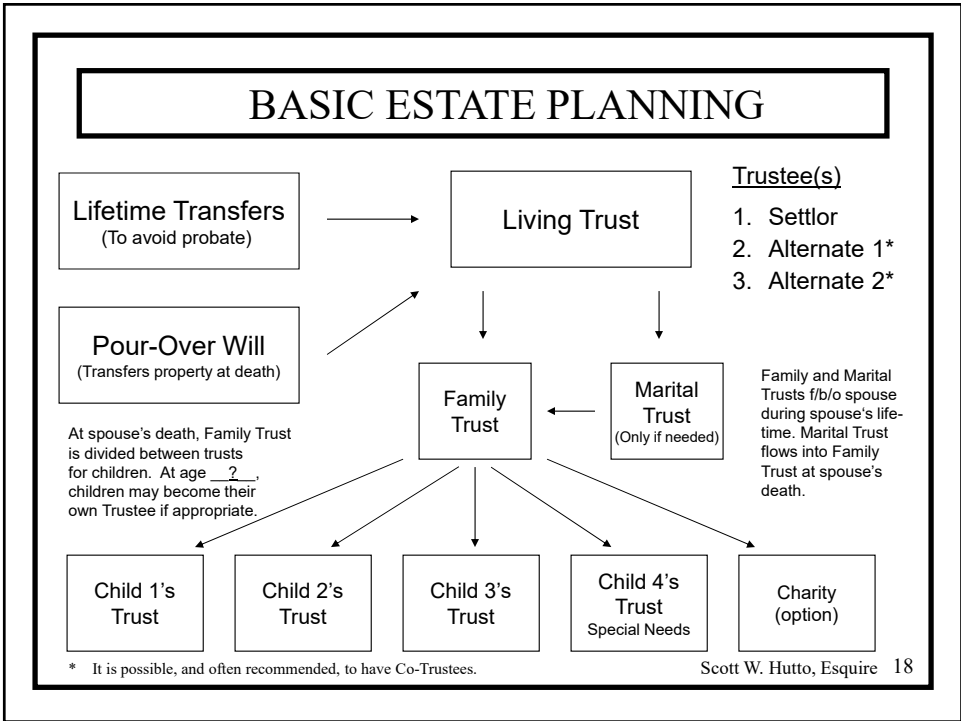
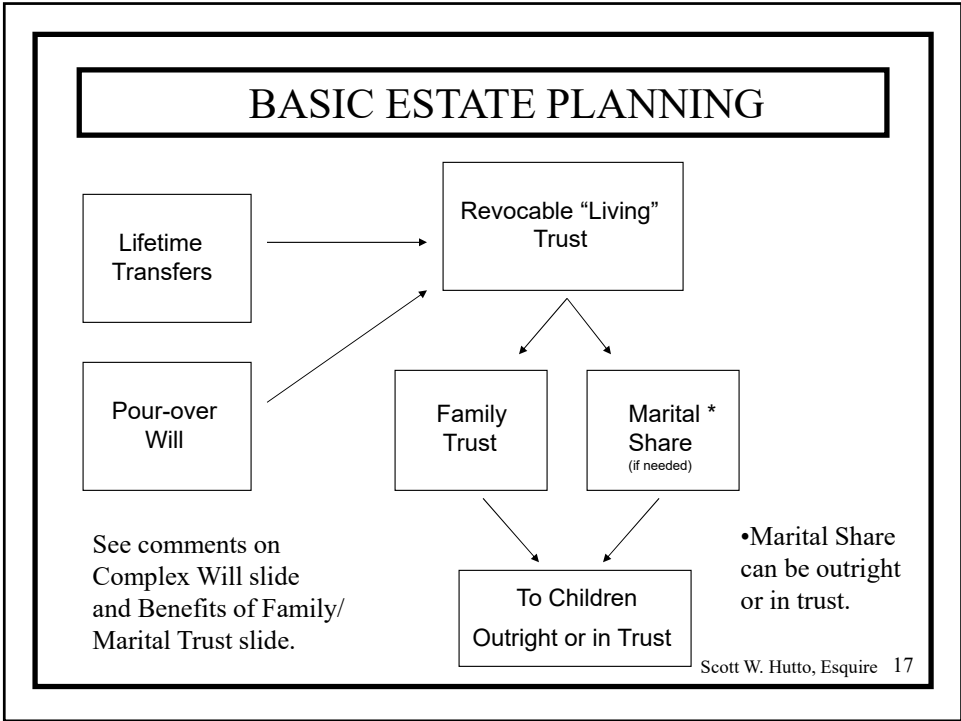
Scott W. Hutto, Esquire 15

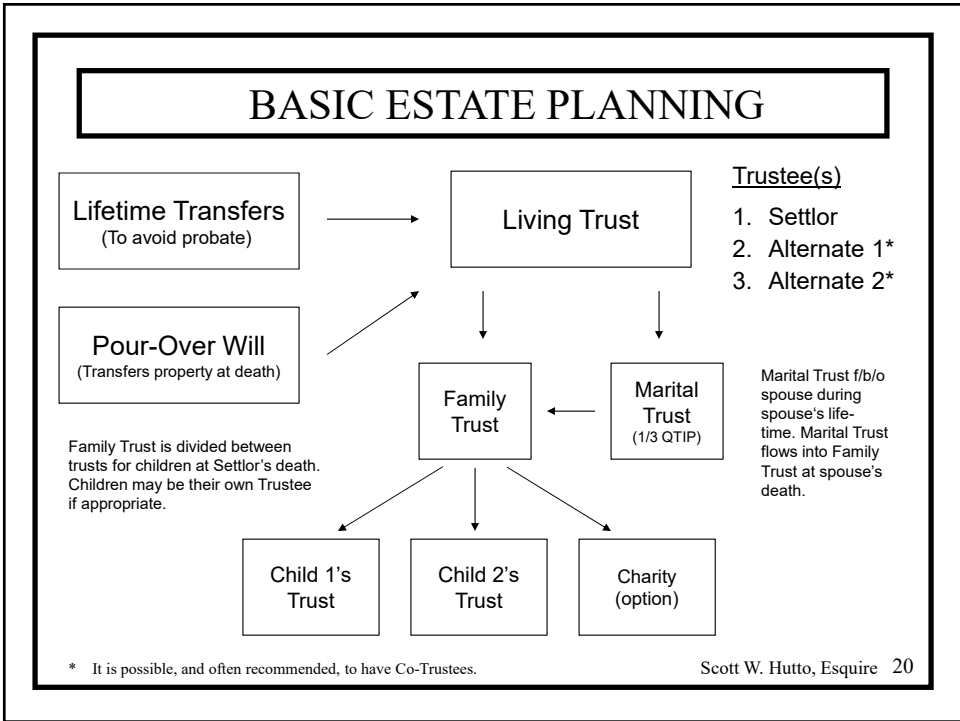
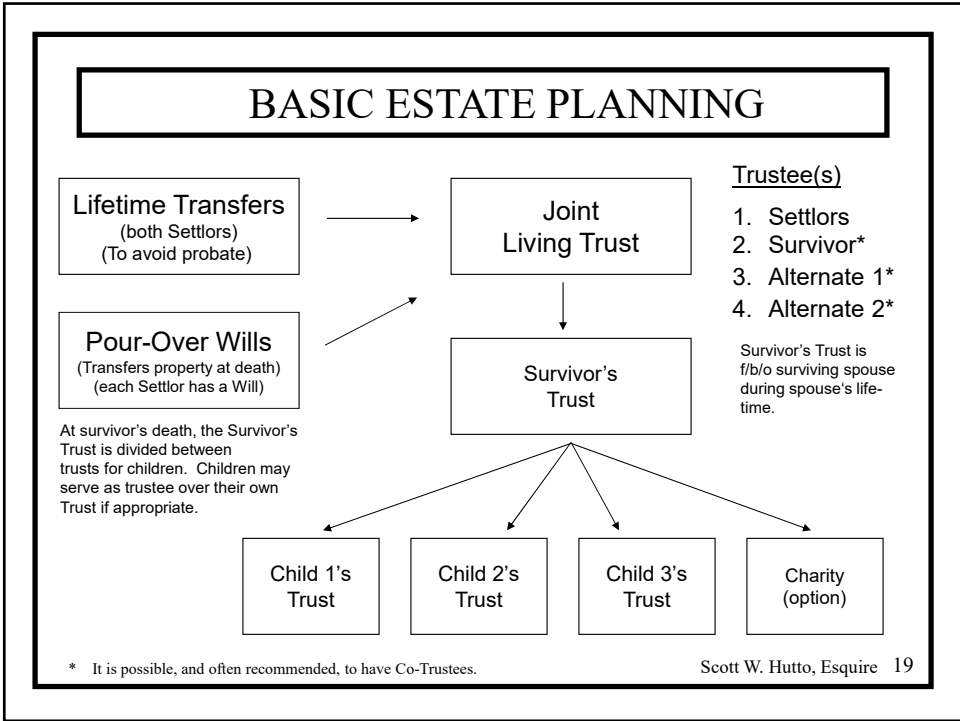
BASIC ESTATE PLANNING

REVOCABLE OR "LIVING" TRUSTS

- (1) Assets in trust are not subject to probate fees.
 - (2) Helps to avoid probate in multiple states.
(Ancillary Probate)
 - (3) Provides privacy regarding assets and beneficiaries.
 - (4) Provides for easy management of assets if you become incompetent.
- *** Value of trust is included for purposes of calculating your taxable estate and is subject to settlor's creditors.

Scott W. Hutto, Esquire 16





BASIC ESTATE PLANNING

DURABLE POWERS OF ATTORNEY

- (1) Only effective during lifetime.
- (2) Can address asset management and health care issues.
- (3) Can prevent need for guardianship and/or conservatorship.
- (4) Springing vs. immediate
- (5) South Carolina law requires that certain powers be specifically granted in the document to be available to the agent (i.e. gifting).

Scott W. Hutto, Esquire 21

BASIC ESTATE PLANNING

LIVING WILL

- (1) Directive to physician to remove life-sustaining treatment upon diagnosis of:
 - a. terminal condition
 - b. permanent state of unconsciousness
- (2) Directive to physicians to provide **or** not provide artificial nutrition and hydration.

Scott W. Hutto, Esquire 22

BASIC ESTATE PLANNING

PROBATE ADMINISTRATION

- (1) Usually last about one (1) year for non-taxable estates.
Taxable estates take longer!
- (2) Creditor's Claims: 8 months from notice or one (1) year
from date of death. (Affects probate and non-probate)
- (3) Probate assets are subject to probate fees.
- (4) Unless otherwise addressed in the will or Court, PR fees
may be 5% of Personal Property (Tangible and Intangible).

Scott W. Hutto, Esquire 23

BASIC ESTATE PLANNING

FIVE COMMON ESTATE PLANNING MISTAKES

- (1) Underestimating the size of one's estate.
- (2) Failure to acknowledge family dynamics.
- (3) Confusion about probate and non-probate property
- (4) Failure to thoughtfully select an agent, personal
representative or trustee.
- (5) Failure to thoughtfully plan for distributions to minors
or other individuals with special situations (i.e. child
with disability, addiction, creditor problems or failing
marriage).

Scott W. Hutto, Esquire 24



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Drafting Wills-Scenario 1

Scott W. Hutto

PROBATE AND ESTATE PLANNING PRACTICE ESSENTIALS

May 31, 2019

Scenario 1

Basic Will

Scott W. Hutto

Certified Specialist in Estate Planning and Probate Law
Fellow of the American College of Trust and Estate Counsel

PO Box 556 | Georgetown, SC 29442
521 Highmarket Street | Georgetown, SC 29440
843-545-5250 | Fax 843-545-5251
swh@huttolaw.com

SCENARIO 1

Basic Will

FACT PATTERN

SCENARIO ONE

Lucille D. Ball is 26 years old and single. She is in the early stages of what hopefully will be a successful career in modeling and acting, but not hit the big time. Her father died when she was young, and she wants to make sure her mother, Dede Ball, is OK if something happens to her. She would also like to make sure her brother, Fred, is the beneficiary of her estate if her mother does not survive her. Her mother and brother will be her Personal Representatives, in that order. She wants to keep it simple!

Assets

Tangible Personal Property:	\$ 25,000
Checking/Savings:	\$ 75,000
Apartment:	\$200,000
<u>IRA:</u>	<u>\$ 50,000</u>
Sub-total:	\$350,000

Debt

Mortgage:	\$100,000
-----------	-----------

Net Worth: \$250,000

LAST WILL AND TESTAMENT

OF

LUCILLE D. BALL

I, **Lucille D. Ball**, a resident of and domiciled in the County of Georgetown, State of South Carolina, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils at any time heretofore made by me.

At the time of the execution of this my Will, I am not married, and I do not have any children.

ITEM I
PAYMENT OF DEBTS

Except as hereinafter provided, I direct that all my legally enforceable debts, secured and unsecured, be paid from my residuary estate as soon as practicable after my death. Notwithstanding this direction, my Personal Representative may cause any debt of mine to be carried, renewed or refinanced from time to time upon such terms and with such securities for its repayment as my Personal Representative deems advisable taking into consideration the best interest of the beneficiaries. Furthermore, if at the time of my death any of the real or personal property herein devised is subject to a mortgage or lien, I direct that the devisee taking such property shall take it subject to the mortgage or lien and that the devisee shall not be entitled to have the obligation secured thereby paid out of my general estate.

ITEM II
SOURCE OF TAX PAYMENT

I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate herein disposed of, or any part thereof, or on any bequest or devise contained in this my Last Will (which term wherever used herein shall include any Codicil hereto), or on any insurance upon my life or on any property held jointly by me with another or on any transfer made by me during my lifetime or on any other property or interests in property included in my estate for such tax purposes be apportioned in accordance with §62-3-916 of the South Carolina Code of Laws, or any similar, subsequent provision of the South Carolina law.

To the extent a provision in the law relating to the payment or apportionment of taxes is unclear or no provision addresses a particular issue, the overriding principle to be applied is full apportionment of tax liabilities to those dispositions generating the tax, reflecting the notion of equitable apportionment to the fullest possible extent to minimize taxes by preserving deductions, exclusions, and exemptions.

ITEM III
BEQUEST OF PERSONAL PROPERTY

I give and bequeath all my personal and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, boats, automobiles, and other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, as follows:

(1) I may leave written memoranda disposing of certain items of my tangible personal property. Any such item of tangible personal property shall pass according to the terms of such memoranda in existence at the time of my death. If no such written memoranda is found or identified by my Personal Representative within ninety (90) days after my Personal Representative's qualification, it shall be conclusively presumed that there is no such memoranda and any subsequently discovered memoranda shall be ineffective. Any property given and devised to a beneficiary who is not living at the time of my death and for whom no effective alternate provision has been made shall pass according to the provisions of the following paragraph, and not pursuant to any anti-lapse statute.

(2) In default of such memoranda, or to the extent such memoranda do not completely or effectively dispose of such property, I give and bequeath the rest of my personal and household effects of every kind to my mother, **Dede Ball**, if she shall survive me. If my said mother shall not survive me, I give and bequeath all of said property to my brother, **Fred Ball**, if he shall survive me. If my said brother shall not survive me, then I give and bequeath all of said property to my brother's issue surviving me, per stirpes. If my beneficiaries do not agree to the division of the property among themselves, my Personal Representative shall make such division among them, the decision of my Personal Representative to be in all respects binding upon my beneficiaries.

(3) If any beneficiary hereunder is a minor, my Personal Representative may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility and the receipt of the person to whom it is distributed shall be a complete discharge of my Personal Representative.

(4) The cost of packing and shipping such property shall be charged against my estate as an expense of administration.

ITEM IV
RESIDUARY DISPOSITION

(1) I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate and whether acquired before or after the execution of this Will, absolutely in fee simple to my mother, **Dede Ball**, if she shall survive me. If my said mother shall not survive me, I give and bequeath all of said property to my brother, **Fred Ball**, if he shall survive me. If my said brother shall not

survive me, then I give and bequeath all of said property to my brother's issue surviving me, per stirpes.

ITEM V
APPOINTMENT OF PERSONAL REPRESENTATIVE

(1) I hereby nominate, constitute, and appoint mother, **Dede Ball**, to be my Personal Representative and direct that she shall serve without bond. If my said mother is for any reason unable or unwilling to serve, then I hereby nominate, constitute and appoint my brother, **Fred Ball**, to serve as my successor Personal Representative and direct that he shall also serve without bond.

(2) Any individual who serves as my Personal Representative shall be entitled to reasonable compensation for services rendered as determined under the laws of South Carolina and shall also be reimbursed for all reasonable expenses incurred in the administration of my estate.

(3) If it becomes necessary for a representative of my estate to qualify in any jurisdiction other than the State of my domicile at the time of my death, then to the extent that I may legally do so, I hereby nominate, constitute and appoint my Personal Representative named in this Will as my representative in such jurisdiction and direct that such Personal Representative shall serve without bond. If for any reason my Personal Representative is unable or unwilling to serve as such representative or cannot qualify as such representative, then I hereby appoint my Personal Representative named herein to designate (to the extent that my Personal Representative may legally do so) a person or a corporation to serve as my representative and request that such person or corporation shall serve without bond.

(4) Whenever the word "Personal Representative" or any modifying or substituted pronoun therefor is used in this my Will, such words and respective pronouns shall include both the singular and the plural, the masculine, feminine and neuter gender thereof, and shall apply equally to the Personal Representative named herein and to any successor or substitute Personal Representative acting hereunder, and such successor or substitute Personal Representative shall possess all the rights, powers and duties, authority and responsibility conferred upon the Personal Representative originally named herein.

ITEM VI
POWERS OF PERSONAL REPRESENTATIVE

(1) By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to personal representatives generally, my Personal Representative is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will; to allot, allocate between principal and income, assign, borrow, buy, care for, collect, compromise claims, contract with respect to, continue any business of mine, convey, convert, deal with, disclaim, dispose of, enter into, exchange, hold, improve, incorporate any business of mine, invest, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell, sue for, to make distributions in cash or in kind or partly in each without regard to the income tax basis of such asset, to distribute, in

substitution for fractional interests in property, the entire interests in any property having a value equal to such fractional interests (and to distribute cash, in addition to such entire interests in property, if necessary, in order that the sum of such entire interests and cash shall be equal in value to such fractional interests), and in general, to exercise all of the powers in the management of my Estate which any individual could exercise in the management of similar property owned in its own right, upon such terms and conditions as to my Personal Representative may seem best, and to execute and deliver any and all instruments and to do all acts which my Personal Representative may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

(2) By way of illustration and not of limitation, I specifically authorize and empower my said Personal Representative to sell any of my property, real or personal, at public or private sale, in my Personal Representative's sole discretion, on such terms and conditions as my Personal Representative may deem advisable. My Personal Representative is authorized to execute and deliver any and all bills of sale, deeds or other instruments of transfer or conveyance necessary to accomplish such sales, and payment of the consideration to my Personal Representative shall constitute full compliance with the terms of this Will by the purchaser at such sale. The purchaser shall not be responsible to see to the proper application of the proceeds therefrom. My Personal Representative is authorized to perform such acts as are necessary to carry out the purposes of this Will, without being limited in any way by the specific grants of power made herein and without the necessity of a court order. [*Optional: Provided, however, my Personal Representative may not sell any property which is specifically devised herein, or in any Memoranda referred to herein, unless necessary to pay my debts or expenses of administration.*]

ITEM VII MINOR AND INCAPACITATED BENEFICIARIES

(1) If any share or property hereunder becomes distributable to a beneficiary who has not attained the age of Twenty-one (21) years or to a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability, is, in the opinion of my Personal Representative unable properly to administer such amounts, then such share or property shall immediately vest in the beneficiary, but notwithstanding the provisions herein, my Personal Representative shall retain possession of the share or property in trust for the beneficiary until the beneficiary attains the age of Twenty-one (21) or until such legal, mental or physical disability no longer exists, using so much of the net income and principal of the share or property as my Personal Representative deems necessary to provide for the health, education, maintenance and support of the beneficiary, taking into consideration to the extent my Personal Representative deems advisable any other income or resources of the beneficiary or his or her parents known to my Personal Representative. Any income not so paid or applied shall be accumulated and added to principal. The beneficiary's share or property shall be paid over, distributed and conveyed to the beneficiary upon attaining age Twenty-one (21) or at such time such legal, mental or physical disability no longer exists, or if he or she shall sooner die, to his or her personal representatives.

(2) Whenever my Personal Representative determines it appropriate to pay any money for the benefit of a beneficiary for whom a trust is created hereunder, then the amounts shall be paid out by my Personal Representative in such of the following ways as my Personal

Representative deems best: (1) directly to the beneficiary; (2) to the legally appointed guardian of the beneficiary; (3) to some relative or friend for the care, support, and education of the beneficiary; (4) by my Personal Representative using such amounts directly for the beneficiary's care, support, and education; (5) to a custodian for the beneficiary under the Uniform Gifts or Transfers to Minors Act. My Personal Representative as trustee shall have with respect to each share or property so retained all the powers and discretions conferred upon it as Personal Representative.

(3) If my Personal Representative reasonably believes that a beneficiary is receiving (or may receive) governmental benefits under the Supplemental Security Income Act ("SSI"), 42 U.S.C. §§1381 et seq., Medicaid, 42 U.S.C. §§1396 et seq., or other federal or state means-tested government benefit programs, then my Personal Representative may, in my Personal Representative's sole discretion, withhold any distribution due under this Will to or for such beneficiary and retain such distribution amount as a discretionary, non-support, spendthrift trust share for the benefit of such beneficiary. In the alternative, my Personal Representative may establish a separate third-party supplemental needs trust for such beneficiary with such terms as my Personal Representative shall deem appropriate. It is my intent that any supplemental needs retained trust share or separate trust provide the maximum benefit to the beneficiary without the principal and/or income of the trust share being available to the beneficiary for the determination of the beneficiary's continued eligibility to receive such governmental assistance programs. If any such trust share or separate trust is created for the life of a beneficiary, then upon the death of such beneficiary, the trust share or separate trust shall be distributed to the beneficiary's issue, if any, per stirpes, or if there are no such issue, to my issue, per stirpes. If either such continuing share or a separate trust for the beneficiary cannot be established, then my Personal Representative may create a first-party supplemental needs trust for the beneficiary pursuant 42 U.S.C. §1396p(d)(4).

ITEM VIII TAX MATTERS

(1) My Personal Representative as the fiduciary of my Estate shall have the discretion, but shall not be required when allocating receipts of my estate between income and principal, to make adjustments in the rights of any beneficiaries, or among the principal and income accounts to compensate for the consequences of any tax decision or election, or of any investment or administrative decision, that my Personal Representative believes has had the effect, directly or indirectly, of preferring one beneficiary or group of beneficiaries over others.

(2) In determining the state or federal estate and income tax liabilities of my estate, my Personal Representative shall have discretion to select the valuation date and to determine whether any or all of the allowable administration expenses in my estate shall be used as state or federal estate tax deductions or as state or federal income tax deductions.

ITEM IX DEFINITIONS

(1) For purposes of this my Will, "children" means the lawful blood descendants in the first degree of the parent designated; and "issue" and "descendants" mean the lawful blood

descendants in any degree of the ancestor designated; provided, however, that if a person has been adopted prior to his or her Eighteenth (18th) birthday, that person shall be considered a child of such adopting parent and such adopted child and his issue shall be considered as issue of the adopting parent or parents and of anyone who is by blood or adoption an ancestor of the adopting parent or either of the adopting parents. The terms "child," "children," "issue," "descendant" and "descendants" or those terms preceded by the terms "living" or "then living" shall include the lawful blood descendant in the first degree of the parent designated even though such descendant is born after the death of such parent.

(2) For purposes of this Will, if a child is conceived after the date of death of the person, who might otherwise be deemed as a parent, that child shall not be considered a child of such person and such child and his or her issue shall not be considered as issue of such person and of anyone who is by blood or adoption an ancestor of the person.

(3) The provisions of the South Carolina anti-lapse statutes shall not be applicable to those bequests, devises or distributions made herein in which I have either (i) designated alternate beneficiary(s) take if the primary beneficiary shall not have survived me or (ii) have conditioned such distributions upon survivorship.

(4) The term "per stirpes" as applied to the issue of a person entitled to receive a testamentary gift herein shall mean that the testamentary gift shall be divided into as many equal shares as on the date of my death there are surviving issue of such person in the nearest degree of kinship to such person plus deceased issue of such person in the same degree of kinship who have issue living at my death. Each living issue in such nearest degree of kinship shall be entitled to receive one equal share and the living lineal descendants of each such deceased issue in the same degree of kinship shall take the share that their deceased ancestor would have taken had such deceased ancestor survived such person. This definition of "per stirpes" is intended to describe "taking by representation" as defined in the South Carolina Probate Code.

OR

The term "per stirpes" as applied to the issue of a person entitled to receive a gift herein shall mean that the gift shall be divided into as many equal shares as there are children who (a) survive the applicable event that permits them to take such gift, or (b) are deceased but leave lineal descendants who survive such applicable event. Each living child shall be entitled to receive one equal share and the living lineal descendants of deceased children shall take the share that their deceased ancestor would have taken had such deceased ancestor survived the applicable event.

ITEM X
SURVIVAL

For purposes of this Will, where a provision herein relates to an individual surviving an event, including the death of another individual, an individual who does not survive the event by at least one hundred twenty (120) hours shall be deemed to have predeceased the event.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this ____ day
of _____, 2019.

Lucille D. Ball

The foregoing Will consisting of nine (9) typewritten pages, including this page and the attached Proof of Will, was this ____ day of _____, 2019, signed, sealed, published and declared by the said Testatrix as and for her Last Will and Testament in our presence and we at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses on the above date.

_____ of _____

_____ of _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PROOF OF WILL

We, **Lucille D. Ball** and _____, being first duly sworn, do hereby declare to the undersigned authority that we are the Testatrix and one of the subscribing witnesses respectively, to the attached written instrument dated the ____ day of _____, 2019, which purports to be the Last Will and Testament of **Lucille D. Ball**, that the Testatrix signed and executed the instrument as her Last Will and Testament and that she signed willingly, and that she executed it as her free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the Testatrix, signed the Will as witness and to the best of his/her knowledge the Testatrix was at that time eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Dated this ____ day of _____, 2019.

Lucille D. Ball

Witness

Subscribed, sworn to and acknowledged before me by **Lucille D. Ball**, the Testatrix, and subscribed and sworn to before me by _____, witness, this ____ day of _____, 2019.

Signature of Notary Public

Printed Name of Notary Public
Notary Public for: South Carolina
My commission expires: _____



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Non-Probate Transfers

Catherine H. Kennedy

Non-Probate Transfers

Catherine H. Kennedy
May 31, 2019

© 2018 All Rights Reserved
These materials may not be reproduced in whole or in part
without the express written permission of the author

NON-PROBATE TRANSFERS

The Will is just one part of a client's whole estate plan. The attorney should inquire into and coordinate not only those assets passing under the Will, but also any assets passing outside of the terms of the Will, whether by contract or by state law. Property that changes ownership because of the decedent's death and which is not controlled by the Will is sometimes referred to as "property passing outside probate" or "non-probate property".

Examples of non-probate property are:

- Life insurance policy death benefits payable to designated beneficiaries;
- Accounts designated as "pay on death (POD) accounts";
- Bank accounts or brokerage accounts owned with survivorship;
- U. S Savings bonds owned with another person;
- U.S. Savings bonds with a POD beneficiary;
- Bank accounts designated as "trust accounts";
- Security accounts designated as "transfer on death (TOD) accounts";
- Qualified or non-qualified retirement plans payable to beneficiaries;
- Annuities payable to designated beneficiaries;
- Real property owned with another with right of survivorship;
- Marital tangible personal property;
- Vehicles registered to the decedent "or" another;
- Assets held in revocable or irrevocable trusts.

A. LIFE INSURANCE

1. Terminology

a. Applicant: This is the person who signs the application for the insurance. Most often, but not always, the applicant is also the Insured. The applicant could also be another person, (e.g., spouse, child, grandchild or “business partner”) as well as a corporation, partnership, or a trust. It is important to note that the applicant must be an individual or an entity having a definable insurable interest in the life of the Insured.

b. Beneficiary: This term refers to the entity or individual(s) designated by the owner of the policy to receive the Death Benefit Proceeds. All policies allow the Owner to designate a Primary Beneficiary(ies) as well as a Contingent Beneficiary (in the event, the Primary Beneficiary is deceased or is unable to receive the Death Benefit).

c. Death Benefit: Also known as the face value of the policy. The amount, which is contracted to be paid upon the death of the Insured, plus any additional coverage purchased on the policy and less any outstanding loans and accumulated interest against the policy.

d. Insured: Under the terms of the contract with the Insurance Company, it is the individual whose subsequent death will trigger the payment of the Death Benefit to the beneficiary.

e. Owner: Under the terms of the contract with the Insurance Company, it is the individual or entity that possesses the economic rights associated with the insurance policy. These economic rights are defined in the Internal Revenue Code as “Incidents of Ownership.” There are estate tax consequences of having possession of an “Incident of Ownership” in an Insurance Policy. (For detailed analysis see IRC § 2042). In the event the client’s estate, including the face value of the insurance, is under the current applicable exclusion amount, then the estate tax considerations of the ownership of the policy need not to be taken into consideration.

Some of the rights that an individual or entity may have over an insurance policy, which would give rise to “Incidents of Ownership” over the policy, are:

- i Power to designate the beneficiary or change or prevent the change of a beneficiary designation.
- ii Power to surrender or cancel the policy.
- iii Power to assign the policy or revoke or veto an assignment.
- iv Power to pledge the policy for a loan.
- v Power to obtain a loan against the cash surrender value of the policy.

2. **Uses of Life Insurance**

For myriad reasons, the creation of a ready fund of cash is always beneficial in a decedent’s estate.

a. **Income Replacement.** Frequently, the decedent is the wage earner in the family. While the income stream from the wage earner ceases with death, the expenses associated with the decedent’s family unit do not. The proceeds from life insurance can be used to continue or provide for college education for children or simply to address the everyday needs of those left behind. The amount of insurance necessary for income replacement is determined by calculating the current and future needs of those individuals for whom the owner expects to provide financial support. The assessment of the standard of living that the surviving dependants will be able to achieve through such insurance is a main consideration. The client’s current standard of living and ability to pay should also be factored into the affordability of premiums for such insurance.

b. **Liquidity For Equalization.** Life insurance becomes a very flexible tool when the decedent’s estate consists of large amounts of non-liquid assets that are left to specific beneficiaries. An example of this would be a farm or real property or the controlling interest in a business operation that is left to a child to the exclusion of other children in the family. Yet, the decedent wants to treat everyone equally. Life insurance can fund the shares of the other beneficiaries.

c. **Liquidity for Payment of Debts, Taxes And Expenses.** Another common use of life insurance is to provide an individual’s estate (or beneficiaries) with

sufficient liquidity to pay the decedent's debts, expenses of the estate and taxes or to replace the wealth currently in the estate that will be used to pay these expenses.

Often clients have accumulated assets with value in excess of the applicable exclusion amount and therefore expect to have significant estate tax consequences upon their death. In reviewing a client's assets the illiquid nature of their assets may become apparent, and therefore would warrant the discussion of the purchase of a policy. When clients are "asset rich" in land or other non-liquid assets, the nine (9) month period to pay the estate taxes may prevent the estate from having sufficient cash to pay the estate taxes in a timely fashion. In addition, clients often do not wish to force their heirs to sell the family properties in order to pay the expenses and taxes of their estates.

d. Business Succession Planning. Often individuals during their lifetime are involved in businesses or business ventures with third parties. Frequently, buy-sell agreements are in place allowing/requiring the deceased individual's Personal Representative or Trustee to sell the decedent's interest in the business or allowing/requiring the business to purchase the deceased party's interest to protect the continuity of the business. Additionally, it is not unusual in a decedent's estate planning directives that a particular devisee or beneficiary may be given the option of acquiring certain properties from a decedent's estate or trust. Obvious unexpected needs arise and frequently, there is insufficient liquidity. Life insurance can be used as a tool by the remaining business or business partner or by the individual to whom the option has been granted to assist in financing the decedent's interest in the business or to acquire the property through the option provided at death. Life insurance enables the remaining business or business partners or the optionee, to be able to acquire the interest or exercise the option without disrupting the financial affairs of the business or the financial affairs of the individual exercising the option.

3. Beneficiary Designation

The proceeds of a life insurance policy (death benefit) are paid to the beneficiary designated by the owner of the policy, or, if none, according to the

provisions of the insurance policy itself. The policy will often provide that if no beneficiary is designated or the designated beneficiaries are deceased, then the death benefit is payable to the estate of the insured. A Will does not supersede nor can it create a beneficiary designation. The practitioner should be diligent in inquiring into the client's beneficiary designations especially if the client is divorced. While South Carolina law does revoke life insurance beneficiary designations for former spouses (S.C. Code Ann. §62-2-507), often the proceeds have already been paid out to the former spouse as beneficiary and a lawsuit may be necessary to recover the funds. .

The structure of beneficiary designation must be carefully considered based upon the client's intentions as to the use of the death benefit of the policy. It is important to discuss with clients their intentions as to the support of the spouse or the education of children or the disposition of non-liquid assets before executing beneficiary designations. If there is any doubt that a beneficiary designee may not use the proceeds for those purposes, then it would be important to consider other choices in the use of beneficiary designations. A trust may be the most likely vehicle to insure the client's goals will be attained.

4. Types of Life Insurance

a. Term Insurance: Term insurance provides pure insurance protection for a stated term with no cash value. Premiums paid provide insurance coverage for the premium period only. Consequently, premiums increase annually as the insured ages, unless the insured selects a level premium for a stated period. In that case, initial premiums will be larger than the standard term policy but lower in later years. Term insurance is typically renewable regardless of insurability for some guaranteed period of time, either a term of years or until a certain age. Term insurance may have a convertibility clause, guaranteeing the right to convert to permanent insurance, generally without proof of insurability at such time. Generally, individual term insurance is an excellent vehicle to provide protection against premature death for a temporary or intermediate period of time. It is particularly popular with younger individuals who often have the greatest need for life insurance protection to provide

for surviving family members but who often cannot afford the higher cost of cash value policies providing the same face amount of protection.

An individual term policy is one owned by the insured or by another owner on the life of the insured individual. Group term insurance is often provided to a group of employees under an employer's plan through a master group policy with a life insurance company. The employees have individual coverages for which they can designate beneficiaries and that are generally assignable, as well. The master group policy usually provides renewable term coverage that will terminate for an individual when he or she ceases to be a member of the group, or perhaps upon attaining a specified age. The premium for each insured under a group term policy is generally less than the premiums for individual term insurance for the same individuals and is often available without the requirement of a physical examination.

b. Whole Life: Whole life insurance (sometimes called "ordinary life" or "straight life") provides a guaranteed death benefit with premiums at a set rate for life, typically up to age 100 or older. At that time the policy matures or endows; that is, its cash value equals the face amount of the policy. Whole life typically offers a fixed, progressive increase of cash value against which the owner may borrow, often at favorable rates, or which the owner may realize upon surrender of the policy or which the owner may use to purchase additional paid-up insurance. Dividends on the cash reserve may be used to help pay future premiums.

c. Universal Life: Universal life is basically a combination of a renewable term policy and a cash accumulation account. The premium is first applied to the cost of term insurance to provide the death benefit, with the balance credited to the "side fund" where it earns interest. As long as there is sufficient cash value in the side fund to cover the term cost of the death protection, additional premiums are not needed. The policy is said to be "universal" because it is flexible--the insured can vary the amount of the premiums and the death benefit according to his or her needs. Cash values increase based on scheduled or flexible premium payments together with performance on the insurance company's general asset account portfolio (predominantly invested in bonds).

d. Variable Life: Variable policies allow the client to allocate cash values among a number of investment choices, such as stocks, bonds, money market funds, real estate, or a combination thereof. Variable life usually requires the payment of fixed premiums with a death benefit at least equal to the policy's face amount. Variable universal life policies are essentially universal life policies with the variable investment option with the side fund. The variable life and variable universal life policies must meet certain diversification requirements under the Internal Revenue Code to receive tax-favored income tax treatment for life insurance under Code Section 17(h). Variable policies are often thought to provide a better hedge against inflation and high interest rates, but they require the client to have a tolerance for investment risk, and they generally are somewhat more expensive.

e. Joint Life: Joint life, also called "survivorship" or "second to die," insures the lives of two persons. Typically, the joint life policy is payable on the death of the second insured. Survivorship riders can be placed on individual policies to reach essentially the same result. With the advent of the unlimited marital deduction, the second to die policy is a way of providing death tax liquidity when the deferred estate tax on marital deduction assets is payable. Generally, joint life premiums are less than the combined premiums necessary to insure the individuals separately. Disadvantages are that no proceeds are available at the death of the first insured, and disposition of the policy, in the event of divorce, may be unclear (some policies allow conversion to separate life policies).

A first to die policy insures the lives of two persons, but proceeds are payable upon the death of the first to die. It is generally more expensive than insuring the life of only one of the persons and more expensive than a survivorship policy.

f. Split Dollar Arrangements: This is not a type of insurance, but purely a method of funding the purchase and maintenance of a Life Insurance policy.

There are many different types of insurance and depending on a client's cost and risk tolerances, the different types of insurance may fulfill different financial needs and purposes of each client. A trusted life insurance broker may play an

important role on the estate planning team of professionals in assessing the appropriate type of policy given the client's needs.

B. PAY ON DEATH (POD) ARRANGEMENTS

1. POD Bank Accounts

Under the South Carolina Probate Code, bank accounts can be titled so that, at the death of all of the owners of the account (called "parties" under Article 6 of the Probate Code), the account is automatically payable to a specified beneficiary or beneficiaries. This form of account is known as a payable on death (POD) account. It avoids the property's inclusion in the decedent's probate estate, reducing both the probate fee and any commission charged by the personal representative.

According to S.C. Code Ann. §62-6-101(10), a "P.O.D. designation" means the designation of a beneficiary or beneficiaries in an account payable on the death of all the parties to the account. It also includes an account in the name of someone as trustee for one or more beneficiaries if the relationship is established by the terms of the account and the trust only holds the sums on deposit in the account. The trust bank account generally occurs when the depositor calls himself a trustee and names particular beneficiaries. See also S.C. Code Ann. §34-11-130.

The designation of a POD beneficiary does not affect what happens to the account during the parties' lifetimes. The POD beneficiary is specifically not a party to the account, see S.C. Code Ann. §62-6-101(7), and has no right to the funds on deposit during the lifetime of a party. S.C. Code Ann. §62-6-201(B).

At the death of all the parties to the account, the sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more POD beneficiaries survive, any sums remaining belong to them in equal shares. There is no right of survivorship in the event of the later death of a POD beneficiary. S.C. Code Ann. 62-6-202(b)(2). However, the terms of the account or deposit agreement may expressly override the default rules. S.C. Code Ann. 62-6-203(a). With proof to the financial institution that all the parties to the account are deceased, the financial institution may pay sums on deposit to the POD beneficiaries. S.C. Code Ann. §62-6-303.

Creditors of the parties have the same attachment rights over a POD account as over a non-POD account, in accordance with their respective interests. POD beneficiaries are liable to the personal representative of a deceased party to the extent necessary to pay debts, taxes, and the expenses of administration against the decedent's estate after the probate estate has been exhausted. There is a one-year limitations period to assert this liability. S. C. Code Ann. §62-6-205.

2. **Registration in Beneficiary Form**

US Savings Bonds may be registered in POD form. The following was taken from the Treasury Direct website <https://www.savingsbonds.gov> :

Owner and beneficiary During the owner's lifetime, only the owner may make transactions (such as redeeming the bond). When the owner dies, if the beneficiary is alive, the beneficiary becomes the sole owner of the bond. The beneficiary cannot be an organization. On a paper bond with an owner and a beneficiary, the registration says P.O.D., which means "payable on death."

Two owners When a bond has two owners and one dies, the other becomes the sole owner of the bond. Note: The co-owner cannot be an organization. "Two owners" are set up differently for electronic and paper bonds:

- **Electronic bonds – primary owner with secondary owner.** Only the first named owner (the primary owner) may make transactions (such as redeeming the bond). The primary owner can authorize the secondary owner to conduct transactions.

The registration reads: First Owner WITH Second Owner. For example, Mary Smith SSN 987-654-321 WITH John Smith SSN 123-456-789.

- **Paper bonds – co-owners.** Either owner may make transactions (such as redeeming the bond) without the knowledge or approval of the other owner

For federal transfer tax purposes, the creation of a POD account or a bank trust account is not a completed gift, and the value of the property in such an account will be includible in the owner's gross estate.

C. **TRANSFER ON DEATH (TOD) ARRANGEMENTS**

South Carolina has enacted the Uniform Transfers on Death Security Registration Act, S.C. Code Ann. §§35-6-10 to 35-6-100. This Act authorizes the creation of transfer on death (TOD) accounts for the ownership of securities and securities accounts. Assets titled in TOD form are handled similarly to POD accounts and bank trust accounts: The owner of the account has all the privileges of

ownership during life, including the right to change the beneficiary. The designated beneficiary acquires no ownership rights in the property until the death of the owner of the account, and the securities pass outside probate and are not included in the decedent's probate estate.

S.C. Code Ann. §35-1-102(29) defines a "security" to include a note, stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, preorganization certificate or subscription, transferable share, investment contract, certificate of deposit for a security,; fractional undivided interest in oil, gas, or other mineral rights, put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities. Section 35-6-10(B)(9) defines a "security account" to include a reinvestment account, a securities account with a broker, the cash balance in a brokerage account, cash or other property held for or due to the owner of a security as a replacement or product of the security, whether or not credited to the account before the owner's death.

The TOD security belongs to the owner until the owner's death, and the owner can cancel or change the TOD beneficiary at any time without the beneficiary's consent. S.C. Code Ann. §35-6-60. Multiple owners cannot create a TOD security or security account, unless they hold the asset with right of survivorship. If multiple owners create the TOD registration, they then own the security as joint tenants with right of survivorship. S.C. Code Ann. §35-6-20.

On death of the sole owner or the last to die of the multiple owners, TOD securities pass to the designated surviving beneficiary(ies). On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Multiple beneficiaries hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners. S.C. Code Ann. §35-6-70.

A registering entity is not required to offer or to accept requests for security registration in beneficiary form. If a registration in beneficiary form is offered by a

registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity. Further, the protection provided by the Act to the registering entity does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds. S.C Code Ann. §35-6-80.

Securities registered in beneficiary form are shown by the words "transfer on death" or "pay on death" or the abbreviations "TOD" or "POD" following the registered owner's name and before the beneficiary's name. S.C Code Ann. §35-6-50. The owner may designate contingent, substitute beneficiaries, if the primary beneficiary does not survive. To provide for a contingent designation to a beneficiary's lineal descendants, per stirpes, the owner can simply add "LDPS" after the primary beneficiary's name. This designation incorporates the law of the beneficiary's domicile governing intestate succession. S.C. Code §35-6-100.

The following are illustrations of registrations in beneficiary form that a registering entity may authorize:

- (1) Sole owner-sole beneficiary: John Brown; TOD (or POD) John Brown, Jr.
- (2) Multiple owners-sole beneficiary: John Brown, Mary Brown, JT TEN; TOD John Brown, Jr.
- (3) Multiple owners-primary and secondary (substituted) beneficiaries: John Brown, Mary Brown, JT TEN; TOD John Brown, Jr., SUB BENE Peter Brown
- (4) Multiple owners-primary and secondary (substituted) beneficiaries: John Brown, Mary B. Brown, JT TEN; TOD John Brown, Jr., LDPS.

Since the ownership does not pass to a beneficiary until the death of the owner, the owner's creditors have full rights against the security or account, and where there are multiple owners, creditors have the same rights as they would have against co-owners of a joint account. Furthermore, during the lifetime of the initial owner, the beneficiary cannot sell his or her interest or leave such interest to his or

her own beneficiaries at death. Creditors of the beneficiary have no claim against the asset that is held under a POD or TOD form of ownership during the lifetime of the initial owner, but will have the rights against the account upon the death of the owner (or the last of multiple owners).

For federal transfer tax purposes, the creation of a POD or TOD account or a bank trust account is not a completed gift, and the value of the property in such an account will be includible in the owner's federal gross estate.

D. RETIREMENT PLANS

Because of the federal government's fairly recent focus on encouraging individuals to save money for retirement and the resulting favorable income tax treatment of assets contributed to retirement plans, planners are seeing a bigger proportion of their client's assets in retirement plans, which are non-probate assets. It is very important that the planner pay close attention to how those plans will distribute at their client's death. Qualified pension and retirement plans are governed by federal law through the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461), which preempts state law when one of its provisions comes in conflict with a state law. 29 USC §1144(a). Retirement assets have unique limitations on the payout to beneficiaries under federal law, so the estate planner not only needs to coordinate the beneficiary with the Will but also to assure that the payout to the beneficiary under federal law is in accordance with the client's wishes.

1. Definitions

a. Defined Benefit Plan: Defined benefit plans, usually referred to as pension plans, provide "definitely determinable benefits" that the employee participant will receive upon retirement. The benefit, determined by a formula based on length of service and compensation, is funded by the employer. The amounts contributed to the plan are based on actuarial assumptions to provide the desired retirement benefit at the employee's projected retirement date. The defined benefit plan (and the money

purchase pension plan) is required to offer annuity payments for the employee at retirement or, if the employee dies before retirement, for the surviving spouse. Such a plan may or may not offer a lump sum option. No plan participant has an individual account balance set aside for him or her. Because the contributions are based upon actuarial assumptions, the annual dollar limit for benefits is reduced if benefits begin before age 65 and the limit is increased if the benefits begin after age 65.

b. Defined Contribution Plan: Defined contribution plans, sometimes called “individual account plans,” provide an individual account for each employee participant. Benefits are based solely on the employee’s account balance at the date benefits are payable. The account balance includes employer contributions, employee contributions, forfeitures from other employee’s accounts, and increases in plan assets. Thus, a defined contribution plan provides benefits based on actual contributions plus any earnings or growth. The most common defined contribution plan is a profit-sharing plan, in which the employer makes contributions based on profits (or without regard to profit) either annually or otherwise, which are allocated among the participants’ accounts. Other types of defined contribution plans include stock bonus plans, money purchase pension plans, 401(k) plans, savings incentive match (SIMPLE) plans, and employee stock ownership plans (ESOP).

c. IRA’s: An individual retirement account (IRA) is an account created by an individual with a bank, brokerage firm or other qualified entity as either the trustee or the custodian. The individual makes contributions to the account which meeting the requirements of I.R.C. §408, which imposes various limitations on the amount and deductibility of contributions.

d. Roth IRA: The Roth IRA is treated like a traditional IRA, except as specifically provided in I.R.C. §408A. The distinctive feature of the Roth IRA is that contributions to it are nondeductible, but distributions from it, including all build-up in the account, are tax-free when made in accordance with the rules.

e. SEP: A simplified employee pension plan (SEP) under I.R.C. §408(k) allows an employer to make contributions for its employees’ retirement, using IRAs as funding vehicles. These plans are attractive because the plan does not have to

meet the more complex requirements of the defined benefit and defined contribution plans. The employer may also establish a group IRA for employees, where the assets are held in a common fund, but separate accounts are maintained for each employee as his or her own IRA. Because SEP contributions are allocated among IRAs, the SEP is generally subject to the same tax rules as IRAs. Generally, employer contributions to a SEP are subject to the same contribution and deduction limits that apply to contributions to qualified profit-sharing plans

f. Qualified Plans: include 401(k)s, employee stock options, defined contribution, profit sharing, and defined benefit plans. These require spousal consent for a non-spouse beneficiary designation. I.R.C. § 417(a)(2)(A)(i); Treas. Reg. § 1.401(a)-20.

g. Non-qualified Plans: include IRA's, SEP and certain 403(b) plans. These are not subject to spousal consent rules.

2. Distributions During the Participant's Life

During the participant's lifetime, distributions without penalty may generally begin after age 59 ½. (There are some exceptions, which are beyond the scope of these materials.) The first required distribution year is the year in which the participant reaches age 70 ½. A required minimum distribution must be made from January 1 of that year to April 1 of the following year. Thus the year following the year in which the participant reaches age 70 ½ is called the "required beginning date."

In the usual case, distributions to the participant are calculated using the Uniform Table. The beneficiary is irrelevant, except in one situation: if the sole named beneficiary is the participant's spouse who is more than 10 years younger. In that instance, the joint life expectancy of the participant and the spouse is used to calculate the minimum distribution on an annual basis. This formulation causes annual recalculation and produces a smaller required distribution than if the distribution is calculated using the Uniform Table. Marital status is determined each January 1 for that year's required annual distribution. Age is determined at the end of the year.

After the participant's death, the "required beginning date" and the "designated beneficiary" become important not only in determining who receives the proceeds but in determining when and how they receive the proceeds.

3. Distributions After Death

Complex federal regulations contained in Reg. 1.401(a)(9) govern the distribution of qualified retirement assets to designated beneficiaries. There are four basic methods to pay out retirement plans after a participant's death:

1. Life expectancy of the surviving spouse;
2. Life expectancy of a nonspouse beneficiary;
3. Life expectancy of the participant; and
4. The 5-year rule.

The complexity arises in determining which payout method applies in particular situations. For instance, naming the client's estate or a trust as the beneficiary of a qualified retirement asset, if the trust is not considered a "qualified trust", could trigger distribution of the entire asset value in five years with income taxes due on distribution. In contrast, if an individual beneficiary is listed on a beneficiary designation, distribution can occur over that beneficiary's life expectancy. Keep in mind that the payouts allowed by these rules only apply if the plan so provides. The default rules are examined below in more detail.

a. Participant Died before Required Beginning Date (RBD). If a participant died before April 1 of the year following the year in which he attained age 70 1/2, then the participant died before his/her RBD. Since a Roth IRA has no RBD, the participant always died before the RBD. Since the participant was not required to take distributions, there will be no required distribution for the year of his/her death.

As to distributions after the year of death, if there is no designated beneficiary, the 5-year rule applies—All benefits must be paid out by 12/31 of the year that contains the 5th anniversary of the participant's death. With the 5-year rule, annual distributions are not required; all benefits may be paid out in the 5th year. If there is a designated beneficiary, distributions will depend upon the identity of the designated beneficiary, but generally distributions will begin in the year following the year of death.

b. Participant Died On or After Required Beginning Date. If the participant died on or after his/her required beginning date and did not take his/her required minimum distribution for the year of death, then that distribution must be paid out by 12/31 of the year of death *to the named beneficiary*. The participant's estate is never entitled to this distribution unless, of course, the estate was the named beneficiary.

As to distributions in the year after death, the 5-year rule never applies if the participant died after his/her RBD. If there is no designated beneficiary, the required minimum distributions continue to be calculated based upon the participant's life expectancy. If there is a designated beneficiary, then the rules related to those beneficiaries vary and are discussed below.

5. Beneficiaries

The person or persons who receive retirement benefits payable after a plan participant's death are determined by beneficiary designation and by the terms of the retirement plan. Retirement plans and other employee death benefits property are typically paid to a named beneficiary, but a "named beneficiary" is not the same as a "designated beneficiary."

The "designated beneficiary" rules can be confusing. Part of the problem is that the "designated beneficiary" under the regulations may mean someone other than the person or entity identified on the beneficiary designation form. A "designated beneficiary" is an individual who is designated as a beneficiary under the plan, whether by the employee or by the terms of the plan itself. The individual does not have to be designated by name but may be part of a class so long as it is possible to identify the individual with the shortest life expectancy. An estate does not have a life expectancy and cannot be a "designated beneficiary" even though it may be the *named beneficiary*. Like estates, charities and corporations cannot be designated beneficiaries.

The designated beneficiary is determined based on those beneficiaries named as of the date of death who remain beneficiaries as of September 30 of the year following the year of the participant's death. Reg. §1.401(a)(9)-4, Q&A-4.

a. Spouse as Beneficiary. If the participant's spouse is the sole designated beneficiary, then the spouse can roll over the plan assets into a traditional IRA or qualified plan established for the spouse. Or the spouse can choose to treat the inherited IRA as the spouse's own by:

- i. designating herself as the account owner rather than the beneficiary, or
- ii. making contributions (including rollover contributions) to the inherited IRA, or
- iii. not taking the decedent's required distributions from the account.

b. Other Individual as Beneficiary. The rollover described above is only available to the surviving spouse. If an individual inherits an IRA from someone other than a deceased spouse, the beneficiary cannot treat the inherited IRA as his or her own. This means that no additional contributions can be made to the IRA and no amounts can be rolled into the inherited IRA. The beneficiary may, however, authorize a trustee-to-trustee transfer of the account to an account at another institution, but the new account must also be in the decedent's name

The designated individual beneficiary may withdraw the assets over his or her life expectancy or the life expectancy of the participant, whichever is longer. The life expectancy for a non-spouse beneficiary is determined by using the beneficiary's age on 12/31 of the year after the year of the participant's death and determining the distribution period for that age. In each subsequent year, the distribution period is reduced by one. If the designated beneficiary is older than the participant, the participant's life expectancy may be used instead of the beneficiary's.

c. Multiple Individual Beneficiaries. If there are multiple designated beneficiaries, whether because multiple beneficiaries are *named* beneficiaries or because the *named* beneficiary is a trust considered a "qualified trust" with multiple beneficiaries, minimum distributions are based on the age of the *oldest* designated beneficiary who has an interest that is not contingent on the death of another beneficiary. Distribution will occur over the shortest life expectancy of the beneficiaries unless separate accounts are created before the deadline after the

grantor's death. Reg. 1.401(a)(9)-5Q-A-7. If a group of beneficiaries is designated and separate accounts are created before the deadline (December 31 of the year following the year of the participant's death), then the qualified retirement asset will be divided into one share for each beneficiary and such share will be distributed over the life expectancy of such beneficiary. This allows the beneficiary to spread the payments from the qualified retirement asset over his or her lifetime resulting in lower income tax payments

d. Trust. While a trust cannot be a designated beneficiary, if a "qualified trust" is the named beneficiary, the trust beneficiaries will be treated as "designated beneficiaries." (Reg §1.401(a)(9)-4, Q&A 5). The requirements are:

- i. the trust is a valid trust under state law, or would be but for the fact that it has no corpus;
- ii. the trust is irrevocable or will become irrevocable when the employee dies;
- iii. the trust beneficiaries can be identified from the trust instrument; and
- iv. a copy of the trust is provided to the plan administrator.
- v. the beneficiaries of the trust and all individuals such that it is possible to determine the beneficiary with the shortest life expectancy.

e. No Designated Beneficiary. If the beneficiary is a charity or corporation or the estate of the participant (either because the participant did not designate any beneficiary or designated his or her own estate), then the account has no designated beneficiary. The payout depends upon whether the participant died before or after his required beginning date. If before, the total account balance must be distributed by 12/31 of the year which is 5 years from the participant's death. If after, the balance may continue to be paid out over the participant's life expectancy.

5. Estate Tax Implications

Death benefits payable to a designated beneficiary under public or private contractual arrangements are usually includable in the gross estate for federal estate tax purposes. See IRC §§2036, 2038-2039. Annuities and other death benefits

payable under qualified retirement plans are also subject to federal estate tax. IRC §2039(c). To the extent the decedent's interest in the benefits passes outright or in other qualified form to a surviving spouse, tax on the benefits will be deferred as a result of the marital deduction.

6. Income Tax Consequences

Section 691(a)(1) of the Code provides rules regarding items of gross income in respect of a decedent that are not properly includible in respect of the taxable period in which the decedent's death occurs or a prior period. Under that section, all such items are included in the gross income, for the taxable year received, of the person who by reason of the death of the decedent acquires the right to receive the amount.

The distribution to the beneficiary of a decedent's IRA that equals the amount of the balance in the IRA at the owner's death, including unrealized appreciation and income accrued to that date, minus the aggregate amount of the owner's nondeductible contributions to the IRA, is income under section 408(d)(1) of the Code and is income in respect of a decedent under section 691(a)(1) that is includible in the gross income of the beneficiary for the taxable year the distribution is received. (If the designated beneficiary had been the owner's surviving spouse, the surviving spouse would have been permitted, under section 408(d)(3)(C), to roll the distribution over into another IRA and avoid current inclusion.)

In accordance with section 691(c) of the Code, in computing income tax for the taxable year the income in respect of a decedent is included in income, the beneficiary may claim a deduction for the portion of the federal estate tax on the decedent's estate that was attributable to that income in respect of a decedent.

7. Planning Considerations

In light of the requirements regarding designated beneficiaries and the income tax treatment of the distributions, it is extremely important for planners to review the regulations and the plan itself before assisting the client in making any beneficiary designation. Clients will generally want to maximize the distribution period of a qualified retirement asset for all beneficiaries and will usually choose to avoid

naming the client's estate or a trust as the beneficiary unless the will or trust has provisions that in the client's estimation outweigh the benefit of maximizing the distribution period and deferring income tax inclusion.

In trying to determine whether to name the estate or a trust as a beneficiary of a qualified retirement asset, the attorney should carefully review the federal regulations and determine the different consequences of naming the client's spouse, individual beneficiaries, the estate or the trust as the beneficiary before deciding which distribution to recommend to the client. If the client wishes to name the estate as the beneficiary, the attorney may want to put all the considerations in writing to the client to be sure that the client understands the disadvantageous tax treatment of such designation.

E. ANNUITIES

An annuity is an investment vehicle sold primarily by insurance companies. Every annuity has two basic properties: whether the payout is immediate or deferred, and whether the investment type is fixed or variable. An annuity with immediate payout begins payments to the investor immediately, whereas the deferred payout means that the investor will receive payments at a later date. An annuity with a fixed investment type offers a guaranteed return on investment by investing in government bonds and other low-risk securities, whereas a variable investment type means that the return on the annuity investment will depend on performance of the funds (called sub-accounts) where the money is invested. Based on these properties, there are four possible combinations, but the ones commonly seen in practice are an annuity with immediate payout and fixed investments (often known as a fixed annuity), and an annuity with deferred payout and variable investments (usually called a variable annuity).

The decedent may have purchased an annuity and designated a beneficiary who becomes entitled to the benefits on the decedent's death. As with other assets, if there is an effective beneficiary designation, the asset is non-probate property. A Will cannot constitute or substitute for a beneficiary designation.

Usually, the beneficiary may begin receiving benefits by submitting to the annuity company a certified copy of the death certificate and a duly executed claim form supplied by the company.

F. JOINT AND SURVIVOR PROPERTY

1. Bank Accounts

A Multiple-Party Account is an account payable on request to two or more parties, whether or not mention is made of any right of survivorship, including joint accounts. S.C. Code Ann. § 62-6-101(5). During the lifetime of the parties, an account belong to the parties in proportion to their net contribution to the account absent any clear and convincing evidence of a contrary intent. S.C. Code Ann. §62-6-201. Sums remaining on deposit at the death of a party belong to the surviving party or parties and not to the estate of the deceased party unless either of two exceptions applies. If there are two or more surviving parties one of whom is surviving spouse of the deceased party, the then surviving spouse succeeds to the decedent's interest. If there are two or more surviving parties none of whom is the surviving spouse of the deceased party, their respective ownerships during lifetime are in proportion to their previous ownership interests augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death. The right of survivorship continues between the surviving parties. S.C. Code Ann. §62-6-202(a). A presumption of survivorship occurs if the multiple-party account is between husband and wife. S.C. Code Ann. §62-6-203(c).

There are two exceptions to the general rule of survivorship:

- a) A writing executed by a party and received by the financial institution during a party's lifetime, whether the account agreement or a subsequent notice, may change survivorship; or
- b) Clear and convincing evidence, including but not limited to express provisions in a Will, of the decedent's intent that his/her interest in the account not pass to the survivor(s).

2. **Personal Property**

Tangible personal property in the joint possession or control of the decedent and the surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the spouse as joint tenants with right of survivorship. S.C. Code Ann. §62-2-805(A).

There are a number of exceptions to the general rule of survivorship:

- a) A certificate of title or bill of sale or other writing establishing that the property was owned solely by the decedent;
- b) The property was acquired before the marriage;
- c) The property was acquired by gift or inheritance;
- d) The property was used by the decedent in a trade or business in which the surviving spouse had no interest;
- e) The property is held for another;
- f) The property is specifically devised in a Will or in a tangible personal property memorandum pursuant to S. C. Code Ann. §62-2-512;
- b) The presumption is overcome by a preponderance of the evidence.

3. **Real Estate**

There are various forms of property ownership where more than one individual has an ownership interest in the same property. In tenancy in common, two or more individuals own undivided interests in property. When a tenant in common dies, the share of the property that the deceased tenant owned passes pursuant to intestacy or pursuant to the tenant's Will. This interest is thus probate property.

A probate avoidance technique is ownership of property as joint tenants with right of survivorship. At the death of a tenant, the property passes automatically to the surviving tenant, or in the case of a joint tenancy with more than two tenants, to the surviving tenants.

The courts in South Carolina have traditionally favored tenancy in common, and have found that the right of survivorship exists only if clearly provided in the Will or instrument of conveyance. S.C. Code Ann. §27-7-40, enacted in 2000,

contains “Safe Harbor” language for the creation of a joint tenancy with right of survivorship—“as joint tenants with rights of survivorship, and not as tenants in common”—and also clarifies the incidents of this form of ownership. Upon the death of a joint tenant who owns property subject to a right of survivorship, the decedent’s interest passes automatically to the surviving joint tenant(s) in equal shares. Further, a joint tenant has the right, during life, under both the statute and common law, to sell or otherwise convey his or her interest in the property, thereby severing the rights of survivorship. However, the statute prohibits one joint tenant from unilaterally encumbering his or her interest.

Another related statute, S.C. Code Ann. §62-2-804, allows for the creation of a joint tenancy with rights of survivorship by deed or will. This statute was also amended in 2000 to provide the same “safe harbor” language as is set forth in Section 27-7-40.

In 2005 the South Carolina Supreme Court has articulated the requirements to create a "tenancy in common with right of survivorship." *Smith v. Cutler*, 366 S.C. 546, 623 S.E.2d 644 (2005). During the joint lifetimes of the cotenants, this type of tenancy cannot be defeated by the unilateral act of one cotenant unlike joint tenancies with right of survivorship. The property still passes to the survivor on the death of the other cotenant. This type of a tenancy is created by using the words to x and y "for and during their joint lives and upon the death of either of them, then to the survivor of them."

South Carolina has abolished the common law estate of tenancy by the entirety, whereby a husband and wife could own property subject to characteristics similar but not identical to those of a joint tenancy with right of survivorship.

For federal estate tax purposes, except in cases where the only surviving joint tenant is the spouse who is a United States citizen, when a joint tenant dies, the value of the property held in joint tenancy with right of survivorship will be included in his or her federal gross estate except to the extent that the decedent’s personal representative can prove that the surviving tenant(s) furnished consideration for the property. In the case of joint tenancy where the only other tenant is the spouse, if the

surviving spouse is a citizen of the United States, only half of the value of the property will be included in the deceased spouse's federal gross estate.

G. VEHICLES

No South Carolina statutes or regulations speak to joint ownership of vehicles. Practically speaking, the Division of Motor Vehicles adheres to the generally understood effect of joint registration. Vehicles that are registered in the names of two persons joined by "or" are deemed to be held in joint tenancy with right of survivorship. In order to remove the decedent's name from the title, the death certificate must be presented to the Division of Motor Vehicles. Vehicles registered in the names of two persons joined by "and" are deemed to be held by the co-owners as tenants in common. Thus the signature of each co-owner or the representative of his or her estate is needed in order to transfer the title to the vehicle.

H. REVOCABLE OR IRREVOCABLE TRUSTS

Sometimes a client will have created a revocable or an irrevocable trust which may pass assets to the desired beneficiaries. The assets held in these trusts are distributed according to the terms of the trusts and therefore are non-probate property. S.C. Code Section 62-7-607 provides that divorce or annulment revokes provisions in a revocable trust for the former spouse unless the trust specifically provides otherwise.

I. COORDINATION OF PROBATE AND NON-PROBATE ASSETS

After the attorney understands the client's priorities and desired distribution plan, the attorney should review the present distribution plan for non-probate assets and determine whether to change the distribution plan for those assets to complement the client's estate plan. The attorney should fully explain to the client the consequences of joint ownership and beneficiary designations. The attorney should

also explain to the client the consequences of naming the personal representative or the client's estate as the beneficiary. This type of designation will convert the non-probate asset to a probate asset on the death of the client, subjecting the asset to probate fees, personal representative commissions and the claims of creditors. Sometimes it is worth the extra expense, if the will has a special distribution plan under which the client wants the asset to be distributed.

Once the appropriate decisions have been made, the attorney may offer assistance in drafting beneficiary designations and in transferring assets at the client's request.

Designating property to pass outside probate requires careful planning. Examples of some of the problems and complications that can arise by inadvertently causing property to pass outside probate include:

- the lack of sufficient or appropriate assets to fund a trust created by a Will,
- the lack of coordination between the Will and non-probate beneficiaries,
- permitting beneficiaries to enjoy unrestricted ownership of property at a young age,
- overfunding or underfunding the credit shelter trust,
- placing control of minor's property with a court-appointed conservator rather than with a trustee,
- giving disproportionate shares of property,
- causing liquidity problems in the probate estate, creating insufficient assets to pay bills, expenses or estate taxes;
- estate tax apportionment issues by placing more of the burden of paying estate taxes and the expenses of administering the estate upon the beneficiaries under the Will rather than the recipients of property passing outside probate,
- elective share issues

Non-Probate Transfers

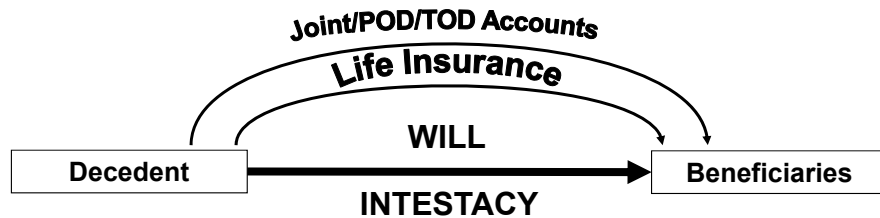
Presented by

Catherine H. Kennedy, Esq.

Certified Specialist in Estate Planning and Probate Law

TURNER PADGET GRAHAM & LANEY, PA

Non-Probate Transfers



Joint Bank Accounts

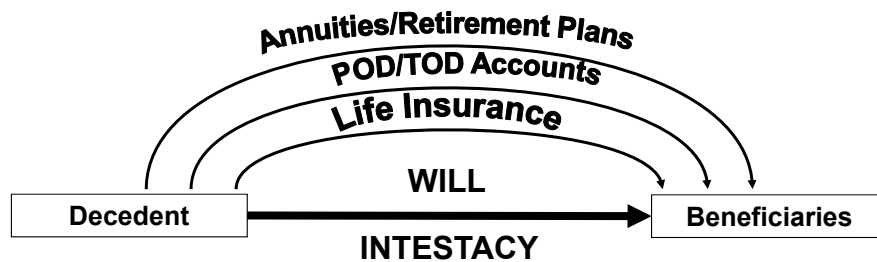
Automatic survivorship per §62-6-202 unless

1. Writing filed with financial institution

(See 62-6-104 for a statutory form to override)

2. Clear and convincing evidence (including Will) to override

Non-Probate Transfers



Retirement Plans (Default Rules)	
Participant dies before RBD	Participant dies after RBD
<ul style="list-style-type: none"> ➤ No distributions required, therefore Participant's life expectancy is irrelevant 	<ul style="list-style-type: none"> ➤ Since distributions required, Participant's life expectancy can be used

Retirement Plans	
Beneficiary	Result
Spouse	<ul style="list-style-type: none"> ➤ Can roll over to own account or treat it as spouse's own account ➤ Can withdraw over spouse's life expectancy (recalculating) ➤ Can name new beneficiary who withdraws over beneficiary's life expectancy ➤ Same options as with non-spouse individuals

Retirement Plans	
Beneficiary	Result
Spouse	<ul style="list-style-type: none"> ➤ Can roll over to own account ➤ Can withdraw over spouse's life expectancy (recal) ➤ Can name new beneficiary
Non-Spouse Individual	<ul style="list-style-type: none"> ➤ Account remains in participant's name but can move decedent's account to another institution by trustee-to-trustee transfer ➤ Withdraw over individual's life expectancy (not recalculating) or participant's if longer ➤ Can name own beneficiary who continues to withdraw over individual's life expectancy

Retirement Plans	
Beneficiary	Result
Non-Spouse Individuals	<ul style="list-style-type: none"> ➤ Can divide into separate shares if done by 12/31 of year after participant's death ➤ Each share has same characteristics as above ➤ If no separate shares, withdraw over shortest life expectancy of all beneficiaries
Qualified Trust	<ul style="list-style-type: none"> ➤ Look through trust to trust beneficiaries ➤ Withdraw over shortest life expectancy of all trust beneficiaries ➤ Ignore many contingent beneficiaries

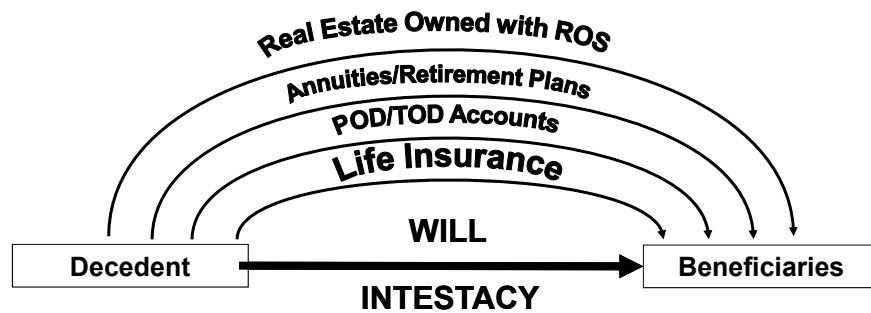
Retirement Plans

Beneficiary	Result
Qualified Trust	<ul style="list-style-type: none"> ➤ Look through trust to trust beneficiaries ➤ Withdraw over shortest life expectancy of all trust beneficiaries ➤ Ignore mere potential contingent beneficiaries
Conduit Trust	<ul style="list-style-type: none"> ➤ Trustee must pay benefits to beneficiary ➤ Withdraw over life expectancy of beneficiary (Remainder beneficiaries disregarded) ➤ Control contingent beneficiary

Retirement Plans

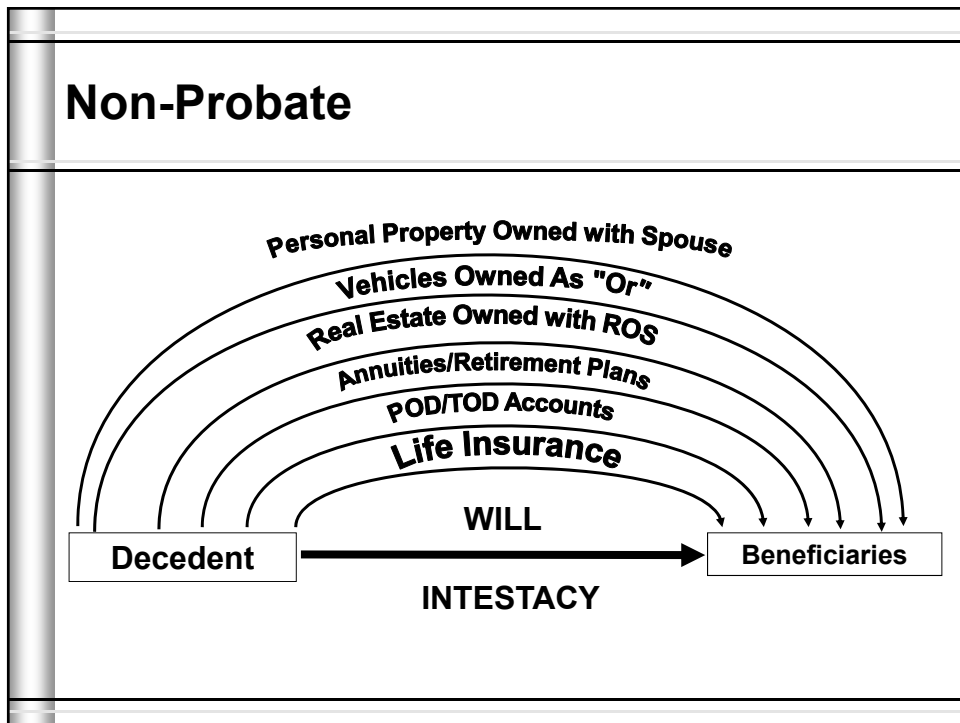
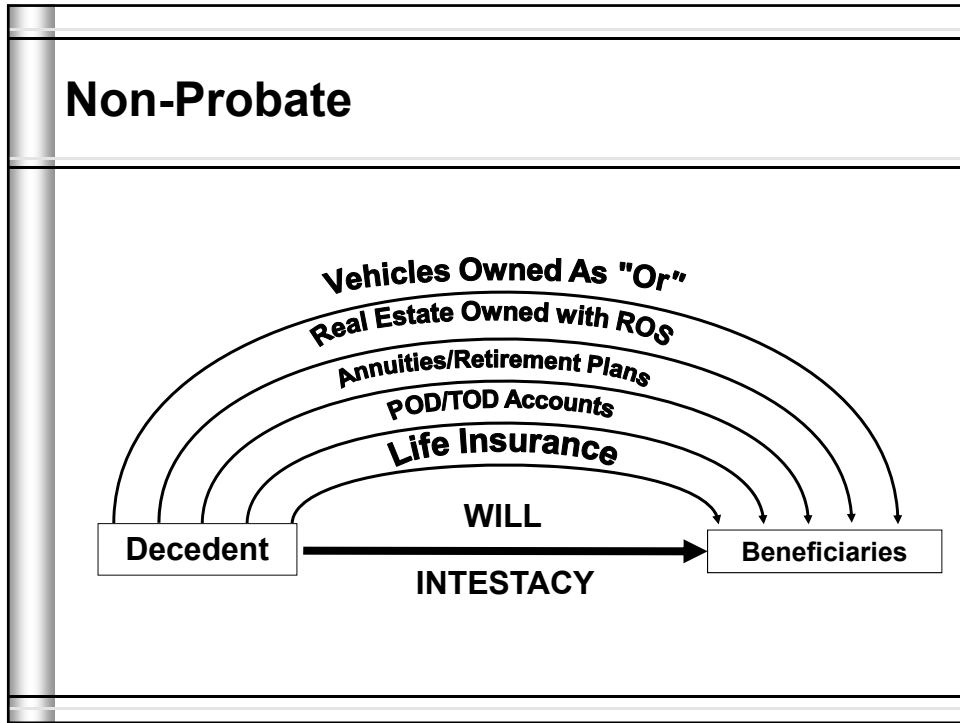
Beneficiary	Result
Non-Qualified Trust	<ul style="list-style-type: none"> ➤ No designated beneficiary ➤ Before RBD – 5 year payout ➤ After RBD – participant's life expectancy
Charity	<ul style="list-style-type: none"> ➤ No designated beneficiary ➤ Before RBD – 5 year payout ➤ After RBD – participant's life expectancy
Estate	<ul style="list-style-type: none"> ➤ No designated beneficiary ➤ Before RBD – 5 year payout ➤ After RBD – participant's life expectancy

Non-Probate Transfers



Real Estate

- Tenants in common ⇒ Probate
- Joint tenancy with Right of Survivorship ⇒ Non-Probate
- Tenancy in common with Right of Survivorship ⇒ Non-Probate



Tangible Personal Property in Joint Possession or Control with Spouse (§62-2-805)

- **Acquired Prior to Marriage**
- **Acquired by Gift or Inheritance**
- **Used in Trade or Business in which Spouse has no interest**
- **Held for Another**
- **Devised in Will or Memorandum**
- **Preponderance of Evidence to overcome**

Non-Probate Transfers Questions?

Catherine H. Kennedy
Certified Specialist in Estate Planning and Probate Law
Certified Mediator; Certified Arbitrator
PO Box 1473 | Columbia, SC 29202
1901 Main Street, Suite 1700 | Columbia, SC 29201
803-227-4367 | Fax 803-400-1567
ckennedy@turnerpadget.com



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Drafting Wills-Scenario 2

Matthew Myers

ESTATE PLANNING ESSENTIALS – MAY 31, 2019

Drafting Wills, Scenario Two – Complex Will

Lucille is 42 and has been married to Desi Arnaz for about 10 years. They have one child, Lucie Arnaz (2), but want more. She is still working in the entertainment business and having moderate success. She and Desi have had some difficulties, but she is confident those are in the past, and she wants to take care of Desi and their children. If she is not survived by Desi or any children, she wants to leave everything 50/50 between her mother, Dede, and brother, Fred. She wants Desi as her primary Personal Representative/Trustee, and her mother and brother listed as alternate Personal Representatives/ Trustees/Guardians, in that order.

Assets:

\$50,000 - tangible personal property
\$50,000 - checking/savings
\$200,000 - non-retirement investment account
\$450,000 - residence (with \$150,000 mortgage)
\$250,000 - IRA
\$500,000 – term life insurance
\$1,500,000 potential total as of today

What drafting options to consider?

What non-probate options to consider?

- POD / TOD / IRA and insurance beneficiaries

Basic Goals of Estate Planning:

- 1) Leaving your assets to the people you want to have them
- 2) Protecting those assets into the future*
- 3) Avoiding estate taxes
- 4) Reducing income taxes
- 5) Avoiding probate
- 6) Coordinating non-probate transfers
- 7) Designating various fiduciaries and their succession

*Current asset protection sometimes also considered, especially rental/business property.

Asset placement and protection considerations (goals 1 & 2)

Who do you want to leave your assets to? “Wants to take care of Desi and children” leaves many possible variations to explore with client.

1. Does client want to set aside anything for children even if spouse survives?

If so, what value, percentage, and/or specific assets?

2. Does client want spouse’s assets to be outright or in trust for protection?

Protection could be to protect spouse from creditors/paramours and/or children from spendthrift spouse.

If so, you’ll include a marital trust. Note if marital deduction is desired, then trust must satisfy QTIP requirements (qualified terminable interest property). IRC § 2056(b)(7).

Be sure to warn about administrative and tax filing burden. Especially if separate trustee.

QTIP can be used to satisfy elective share. S.C. Code Ann. § 62-2-207(c)(1).

If elective share is an issue, consider elective share waiver. S.C. Code Ann. § 62-2-204.

3. For children’s assets how long, if at all, should they be kept in trust?

Will be available at 18 by default, so most opt for deferred period, such as ½ at 25 and remainder at 30.

Consider whether to divide immediately, or have “pot” until all reach certain age.

Consider whether to have disclaimer into indefinite trusts.

May want to mandate indefinite trust if there are known substance abuse, creditor. or special needs concerns. Good idea to have discretionary SNT backup regardless.

If children predecease trust termination, where do assets go next? E.g., their issue, heirs under intestacy, or by power of appointment

4. If all potential additional beneficiaries are exhausted, then 50/50 mother and brother.

Understand § 62-2-603 (issue great-grandparent or lineal descendant thereof).
If using testamentary trusts, may need additional final backup such as charity.

Tax considerations (goals 3 & 4)

These can complicate things quickly, so you need know when to call in back up.

If gross estate value is safely under lifetime exemption (even after year 2025), then federal taxes should be a moot issue for the foreseeable future.

Since 2011, exemption is \$5M indexed for inflation (doubled for 2018-2015) and portable to the surviving spouse if estate tax return is filed for first decedent.

However, even with portability, it's a good idea to give surviving spouse power to disclaim into credit shelter trust. (or for QTIP trust, give election to non-marital).

Credit shelter trust can allow spouse access to income, discretionary principal subject to ascertainable standard (health, education, support and maintenance) and "5 and 5" annual withdrawal right (greater of 5% or \$5k of trust value) without inclusion in spouse's estate

Also, there are many situations that can undermine the generous lifetime exemption:

Are both spouses US Citizens/residents? Special limitations apply if not.

Any assets subject to other state's estate/inheritance taxes? Many states have lower thresholds. May want to mandate credit shelter for such instances (or transfer assets).

Any prior large taxable gifts that have reduced lifetime exemption?

Any potential windfalls like inheritance, rapid business/investment growth, general powers of appointment over another's property?

Are there any income tax considerations?

Does client have any community property? Such property receives a full basis adjustment at the first spouse's death. States include Louisiana, Texas, New Mexico, Arizona, California, Nevada, Idaho, Washington, and Wisconsin.

Does client plan to give away or sell appreciated property? If so, consider alternatives.

Make sure tax-deferred retirement accounts don't go to estate and consider "stretch" trust to spread over the beneficiary lifetime (usually for descendants because longer life expectancy and spousal rollover provides better deferral). Special trust rules apply.

Limiting use of testamentary trusts and/or requiring all income to be paid annually (maybe with "spray" power for credit shelter trusts to reduce beneficiaries' overall taxes).

Avoiding probate and coordinating non-probate transfers (goals 5 & 6)

Assets:

\$50,000 - tangible personal property
\$50,000 - checking/savings
\$200,000 - non-retirement investment account
\$450,000 - residence (with \$150,000 mortgage)
\$250,000 - IRA
\$500,000 – term life insurance

Non-probate options:

S.C. Code Ann. § 62-2-805
JROS or POD/beneficiary
JROS or beneficiary/POD
JROS & similar
beneficiary
beneficiary

Can the assets be passed outside of probate?

Yes. Ultimately, anything can be put in a trust to avoid probate, but that generally costs to prepare and fund more and may offer less creditor protection than other means.

In this case, it appears all assets can pass outside of probate, with the possible exception of some of the tangible personal property. For example, any property with titles (cars and boats), if acquired before marriage or by inheritance, or used in separate business.

If there is a vehicle (some clients wont list so be sure to ask) then they can be most easily transferred outside of probate if retitled as Owner 1 “or” Owner 2.

Should check real estate deed because they often are not sure. Titling possibilities also include tenants in common with indestructible right of survivorship, see Smith v. Cutler, 623 644 S.E.2d (SC 2005), or tenants by the entirety if property in another state.

Even if there are some modest residual probate assets (net value no more than \$25,000 and no real estate), they can pass pursuant to a collection by affidavit pursuant to S.C. Code Ann. § 62-3-1201. Assets will go first to funeral and other administrative expenses, then up to \$25,000 to spouse and dependent children before general creditors.

Are non-probate transfers coordinated with estate plan?

If client isn't paying you to confirm beneficiary designations, account survivorship, and the like, then need to indicate this to client and good idea to include in writing.

For example, if desiring to allocate 25% to trust for children but Desi is automatic survivor of 100%, then the 25% may not be funded. Disclaimer might not fix.

Alternately, if the children are 25% beneficiaries but it is paid to them outright, then it will “miss” the trust and the trust's benefits. Disclaimers might not fix.

One simplifying option is to name testamentary trust as either the primary beneficiary (if all beneficiaries are part of trust) as contingent beneficiary (if primary beneficiary will receive outright). However, must be careful about deferred-tax retirement accounts because you can defeat stretch option if not (e.g., charities or mixing old and young).

Designating fiduciaries (7)

Relatively straightforward. You are mainly walking folks talk through various options, whether co-representation is a good idea, and considering use of professional fiduciaries as primary or successor.

Personal representative (note that providing power to sell and waiving bond important)

Digital access agent?

Guardians for minors?

Trustees?

Trust protectors?

Agents for health care/assets (next topic)

LAST WILL AND TESTAMENT

OF

LUCILLE BALL

I, LUCILLE BALL, a resident of and domiciled in the County of Richland, State of South Carolina, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils at any time heretofore made by me.

ITEM I

APPOINTMENT OF PERSONAL REPRESENTATIVE AND TRUSTEE

I hereby nominate and appoint my husband, DESI ARNAZ, to be my Personal Representative and Trustee and direct that he shall serve without bond. If he is, for any reason, unable or unwilling to serve or continue to serve then I hereby nominate and appoint my mother, DEDE BALL, to be my Personal Representative and Trustee and direct that she shall also serve without bond. If she is, for any reason, unable or unwilling to serve or continue to serve then I hereby nominate and appoint my brother, FRED BALL, to be my Personal Representative and Trustee and direct that he shall also serve without bond.

ITEM II

POWERS OF PERSONAL REPRESENTATIVE AND TRUSTEE

By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers, granted to personal representatives or trustees generally, my Personal Representative and Trustee is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will: to allot, allocate between principal and income, assign, borrow, buy, care for, collect, compromise claims, contract with respect to, continue any business of mine, convey, convert, deal with, disclaim, dispose of, enter into, exchange, hold, improve, incorporate any business of mine, invest, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell, sue for, to make distributions in cash or in kind or partly in each without regard to the income tax basis of such asset, to distribute, in substitution for fractional interests in property, the entire interests in any property having a value equal to such fractional interests (and to distribute cash, in addition to such entire interests in property, if necessary, in order that the sum of such entire interests and cash shall be equal in value to such fractional interests), to access the decedent's files and accounts in electronic format, including the power to obtain the decedent's user names and passwords, and in general, to exercise all of the powers in the management of my Estate or the Trust Estate which any individual could exercise in the management of similar property owned in its own right, upon such terms and conditions as to my Personal Representative and Trustee may seem best, and to execute and deliver any and all instruments and to do all acts which my Personal Representative and Trustee may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

ITEM III

DIGITAL ASSET AND ACCOUNTS ACCESS AND MANAGEMENT

I specifically authorize my Personal Representative to access, manage, and handle all digital assets, including any digital accounts, of which I am an owner, licensee, or subscriber and any electronic communication and the contents thereof and any catalogue of electronic communications in any digital asset, as fully and completely as though I were acting. The terms "digital asset", "digital account", "electronic communication" and "catalogue of electronic communications" shall have the meaning given them in the South Carolina Uniform Fiduciary Access to Digital Assets Act, or, if broader, in any governing Terms of Service or similar agreement for the particular digital asset or in any similar law enacted in this state or in any state whose governing law is prescribed for the particular digital asset. Additionally, the authority of my Personal Representative to engage in transactions regarding the underlying property (whether real or personal, tangible or intangible) represented in any such digital asset or digital account as an owner shall be as complete as is necessary for a Personal Representative to administer and distribute my estate. My Personal Representative shall have the authority to use any username and password in connection with any of my digital assets in order to effectuate the authority granted.

ITEM IV SIMULTANEOUS DEATH

If any beneficiary and I should die under such circumstances as would render it doubtful whether the beneficiary or I died first, then it shall be conclusively presumed for the purposes of this my Will that said beneficiary predeceased me; provided, however, that if my husband shall die with me as aforesaid, I direct that my husband shall be conclusively presumed to have survived me.

ITEM V BEQUEST OF PERSONAL PROPERTY

(1) I direct that my Personal Representative and my beneficiaries abide by any memorandum signed by me directing the disposition of certain items of personal property. If no such written memorandum is found by my Personal Representative within 90 days after my Personal Representative's qualification, it shall be conclusively presumed that there is no such memorandum and any subsequently discovered memorandum shall be ineffective.

(2) I give and bequeath all the remainder of my household furniture and furnishings, clothing, jewelry, personal effects, automobiles and all other tangible personal property of every kind to my husband, DESI ARNAZ, if he shall survive me. If my said husband shall not survive me, I give and bequeath all of said property to my children surviving me, in approximately equal shares, provided, however, the issue of a deceased child surviving me shall take per stirpes the share their parent would have taken had he or she survived me. If my beneficiaries do not agree to the division of the said property among themselves, my Personal Representative shall make such division among them, the decision of my Personal Representative to be in all respects binding upon my beneficiaries. If any beneficiary hereunder is a minor, my Personal Representative may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility thereof.

ITEM VI

RESIDUARY DISPOSITION

I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate and whether acquired before or after the execution of this Will, absolutely in fee simple to my husband, DESI ARNAZ, if he shall survive me. If my said husband shall not survive me, then I give, devise and bequeath all of said property to my Trustee, hereinafter named. This trust shall be known as the ARNAZ FAMILY TRUST and shall be held, administered and distributed as follows:

(1) Commencing with the date of my death, the Trustee shall pay to or apply for the benefit of my surviving husband during his lifetime all the net income from the Trust in convenient installments, but no less frequently than quarter-annually, as well as such sums from the principal of the Trust as in the Trustee's sole discretion shall be necessary or advisable from time to time for the medical care and for the support in the accustomed manner of living of my surviving husband, taking into consideration to the extent the Trustee deems advisable, any other income or resources of my surviving husband known to the Trustee.

(2) In addition, there shall be paid to my surviving husband during his lifetime from the principal of this Trust upon his written request during the last month of each fiscal year of the Trust an amount not to exceed during such fiscal year the amount of Five Thousand (\$5,000.00) Dollars or Five (5%) percent of the aggregate value of the principal of this Trust on the last day of such fiscal year without reduction for the principal payment for such fiscal year, whichever is greater. This right of withdrawal is noncumulative, so that if my Surviving husband does not withdraw, during such fiscal year, the full amount to which he is entitled under this Paragraph, the right to withdraw the amount not withdrawn shall lapse at the end of that fiscal year.

(3) Upon the death of both my husband and me, and until division into shares pursuant to Paragraph (4), my Trustee shall pay to or apply for the benefit of any one or more of my children all of the net income from the Trust in convenient installments, as well as such sums from the principal of the Trust as in the Trustee's sole discretion shall be necessary or advisable from time for the medical care, comfortable maintenance, welfare and education of my said children, with all such payments in such shares and proportions as my Trustee in its sole discretion shall determine after taking into consideration to the extent my Trustee deems advisable any other income or resources of my said children known to my Trustee. Any payment or application of benefits for a child of mine pursuant to this Paragraph shall be charged against this Trust as a whole rather than against the ultimate distributive share of a beneficiary to whom or for whose benefit the payment is made.

(4) Upon or after the death of both my husband and me, when no child of mine is living who is under the age of Twenty-two (22) years, my Trustee shall divide This Trust as then constituted into equal separate shares so as to provide One (1) share for each then living child of mine and One (1) share for each deceased child of mine who shall leave issue then living. Each share provided for a living child of mine shall be held, administered and distributed for the benefit of such child as set forth in Paragraph (5) below. Each share provided for a deceased child of mine who shall leave issue then living, shall be distributed per stirpes to such issue.

(5) After division into shares pursuant to Paragraph (4), all the net income from each share so provided for a living child of mine shall be paid in convenient installments to or applied for the benefit of such child until complete distribution of such share as herein provided. In addition to income, my Trustee may pay to or apply for the benefit of such child such sums from the principal of his or her share as in its sole discretion shall be necessary or desirable from time to time for his or her medical care, education, support and maintenance in reasonable comfort, taking into consideration to the extent my trustee deems advisable, any other income or resources of such child known to my Trustee.

(6) After division into shares pursuant to Paragraph (4), when a child of mine attains the age of Twenty-five (25) years, my Trustee shall distribute to such child one-half (1/2) of the principal of his or her share as then constituted; and when a child of mine attains the age of Thirty (30) years, my Trustee shall distribute to such child undistributed balance of his or her share. If a child of mine has already attained the age of Twenty-five (25) or Thirty (30) at the time this Trust is divided into shares pursuant to Paragraph (4), my Trustee shall, upon making the division, distribute to such child one-half (1/2) or all of his or her share, respectively. The foregoing notwithstanding, to the extent that a child of mine validly disclaims any interest pursuant to this paragraph, then such interest shall instead be transferred to a trust for the child's benefit that is identical to this Trust except that it shall not include paragraphs (1), (2), (3), (4), and (6) thereof.

(7) After division into shares pursuant to Paragraph (4), upon the death of a child of mine prior to complete distribution of his or her share, the undistributed balance of such child's shares shall be distributed per stirpes to his or her then living issue, or in default of such issues, per stirpes to my then living issue; provided, however, that if any portion of such share would otherwise be distributed to a person for whose benefit a trust is then being administered under this Trust, that part shall instead be added to that trust and shall thereafter be administered and distributed according to its terms.

If at the time prior to final distribution hereunder, my spouse and all my issue are deceased and no other disposition of the property is directed by this Trust, then the remaining property of this Trust shall be paid over and distributed free of trust as follows: one-half (1/2) to my mother, DEDE BALL, and one-half (1/2) to my brother, FRED BALL.

ITEM VII MINOR BENEFICIARIES

If any share hereunder becomes distributable to a beneficiary who has not attained the age of Twenty-five (25) years, then such share shall immediately vest in such beneficiary, but notwithstanding the provisions herein, my Trustee shall retain possession of such share in trust for such beneficiary until such beneficiary attains the age of Twenty-five (25) years, using so much of the net income and principal of such share as my Trustee deems necessary to provide for the proper support, medical care, and education of such beneficiary, taking into consideration to the extent my Trustee deems advisable any other income or resources of such beneficiary or his or her parents known to my Trustee. Any income not so paid or applied shall be accumulated and added to principal. Such beneficiary's share shall be paid over and distributed to such beneficiary upon attaining age Twenty-five (25), or if he or she shall sooner die, to his or her personal representatives or administrators. My Trustee shall have with respect to each share so retained all the powers and discretions had with respect to the trusts created herein generally.

ITEM VIII
SUPPLEMENTAL NEEDS TRUST

If my Trustee reasonably believes that a beneficiary is receiving (or may receive) governmental benefits under the Supplemental Security Income Act ("SST"), 42 U.S.C. §§1381 et seq., Medicaid, 42 U.S.C. §§1396 et seq., or other federal or state means-tested government benefit programs, then the Trustee may, in the Trustee's sole discretion, withhold any distribution due under ARNAZ FAMILY TRUST to or for such beneficiary and retain such distribution amount as a discretionary, non-support, spendthrift trust share for the benefit of such beneficiary. In the alternative, the Trustee may establish a separate third-party supplemental needs trust for such beneficiary with such terms as the Trustee shall deem appropriate. It is my intent that any supplemental needs retained trust share or separate trust provide the maximum benefit to the beneficiary without the principal and/or income of the trust share or separate trust being available to the beneficiary for the determination of the beneficiary's continued eligibility to receive such governmental assistance programs. If any such trust share or separate trust is created for the life of a beneficiary, then upon the death of such beneficiary, the trust share or separate trust shall be distributed to the beneficiary's issue, if any, per stirpes, or if there are no such issue, to my issue, per stirpes. If either such continuing share or a separate trust for the beneficiary cannot be established, then the Trustee may create a first-party supplemental needs trust for the beneficiary pursuant 42 U. S .C. §1396p(d)(4) or any similar enabling law.

ITEM IX
SOURCE OF TAX PAYMENT

I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate herein disposed of, or any part thereof, or on any bequest or devise contained in this my Last Will (which term wherever used herein shall include any Codicil hereto), or on any insurance upon my life or on any property held jointly by me with another or on any transfer made by me during my lifetime or on any other property or interests in property included in my estate for such tax purposes be paid out of my residuary estate and shall not be charged to or against any recipient, beneficiary, transferee or owner of any such property or interests in property included in my estate for such tax purposes.

ITEM X
APPOINTMENT OF GUARDIAN

If my husband shall predecease me, or if he dies after my death without having appointed a testamentary guardian for any minor child or children of ours, then I hereby nominate, constitute and appoint my mother, DEDE BALL, as testamentary guardian of the person and the property of such minor child or children and to the extent allowed by law direct that such guardian shall serve without bond. If she dies, resigns or refuses or is otherwise unable to act, then I appoint my brother, FRED BALL, as testamentary guardian of the person and property of such minor child or children and direct that he shall also serve without bond.

ITEM XI
DEFINITION OF CHILDREN

For the purposes of this my Will, "children" means the lawful blood descendants in the first degree of the parent designated; and "issue" and "descendants" mean the lawful blood descendants in any degree of the ancestor designated; provided, however, that if a person has been adopted, that person shall be considered a child of such adopting parent and such adopted child and his issue shall be considered as issue of the adopting parent or parents and of anyone who is by blood or adoption an ancestor of the adopting parent or either of the adopting parents. The terms "child," "children," "issue," "descendant" and "descendants" or those terms preceded by the terms "living" or "then living" shall include the lawful blood descendant in the first degree of the parent designated even though such descendant is born after the death of such parent.

ITEM XII
DEFINITION OF PER STIRPES

The term "per stirpes" as applied to the issue of a person entitled to receive a gift herein shall mean that the gift shall be divided into as many equal shares as there are children who (a) survive the applicable event that permits them to take such gift, or (b) are deceased but leave lineal descendants who survive such applicable event. Each living child shall be entitled to receive one equal share and the living lineal descendants of deceased children shall take the share that their deceased ancestor would have taken had such deceased ancestor survived the applicable event.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this ____ day of _____, 2019.

_____(SEAL)
LUCILLE BALL

The foregoing Will consisting of seven (7) typewritten pages, Proof of Will included, was this ____ day of _____, 2019, signed, sealed, published and declared by the said Testatrix as and for her Last Will and Testament in our presence and we at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses on the above date.

of _____

of _____

PROOF OF WILL

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

We, LUCILLE BALL and _____, being first duly sworn, do hereby declare to the undersigned authority that we are the Testatrix and one of the subscribing witnesses respectively, to the attached written instrument dated the ____ day of _____, 2019, which purports to be the Last Will and Testament of LUCILLE BALL; that the Testatrix signed and executed the instrument as her Last Will and Testament and that she signed willingly, and that she executed it as her free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the Testatrix, signed the Will as witness and to the best of his knowledge the Testatrix was at that time eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Dated this ____ day of _____, 2019.

LUCILLE BALL

Subscribed, sworn to and acknowledged before me by LUCILLE BALL, the Testatrix, and subscribed and sworn to before me by _____, witness, this ____ day of _____, 2019.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: _____



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

**Drafting Financial Powers of Attorney, Health
Care Powers of Attorney and Living Wills**

Matthew Myers

Health Care POAs & Living Wills

I. Default law

A. Life sustain procedures. South Carolina's Death With Dignity Act (S.C. Code Ann. § 44-77-10 et seq.) provides that life-sustaining procedures may be withheld only if patient has adopted a declaration to withhold such treatment. S.C. Code Ann. § 44-77-30.

B. General health care decisions. South Carolina's Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 et seq.) provides the priority of persons who may make health care decisions for patient who is unable to consent pursuant to S.C. Code Ann. § 44-66-30:

- (1) guardian appointed pursuant to SC Probate Code, within scope of such guardianship
- (2) agent appointed pursuant to 62-5-501, which the scope of such durable power of attorney
- (3) person given health care authority by another statutory provision
- (4) spouse unless legally separated
- (5) majority of adult children reasonably available for consultation
- (6) a parent
- (7) majority of the adult siblings reasonably available for consultation
- (8) a majority of grandparents reasonably available for consultation
- (9) a majority of other adult relatives by blood or marriage reasonably believed by health care professional to have close personal relationship with patient who are reasonably available for consultation

"Unable to consent" means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner. This term does not apply to minors, and this chapter does not affect the delivery of health care to minors unless they are married or have been determined judicially to be emancipated. A patient's inability to consent must be certified by two licensed physicians, each of whom has examined the patient. However, in an emergency the patient's inability to consent may be certified by a health care professional responsible for the care of the patient if the health care professional states in writing in the patient's record that the delay occasioned by obtaining certification from two licensed physicians would be detrimental to the patient's health. A certifying physician or other health care professional shall give an opinion regarding the cause and nature of the inability to consent, its extent, and its probable duration. If a patient unable to consent is being admitted to hospice care pursuant to a physician certification of a terminal illness required by Medicare, that certification meets the certification requirements of this item. S.C. Code Ann. § 44-66-20(8).

Decisions are to be made based on the patient's wishes, if known, or the patient's best interest. S.C. Code Ann. § 44-66-30(G).

In case of disagreement by people of equal priority, probate court may be petitioned for order determining care or appointment of guardian. S.C. Code Ann. § 44-66-30(C).

Priority can be negated by health care provider responsible for patient if they determine the decision maker is not reasonably available or is not willing or able to make health care decisions, or as to persons (5) through (9) only, they have actual knowledge the patient did not want that person involved in such decision, or if they deem patient's inability to consent to be temporary that delaying until patient regains such ability will not result in significant harm patient's health. S.C. Code Ann. § 44-66-30(D), (E), & (F).

Health care may be provided without consent in cases of emergency if no one is reasonably available to consent. S.C. Code Ann. § 44-66-50.

Health care decisions for minors (whether incapacitated are not), unless married or judicially emancipated, are determined in the following priority (1) legal guardian; (2) parent; (3) grandparent or adult sibling; (4) other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the client; (5) other person who reasonably is believed by the health care professional to have a close personal relationship with the client; (6) authorized designee of the South Carolina Department of Disabilities and Special Needs. S.C. Code Ann. § 44-26-60(A).

II. Statutory forms

A. Purpose: override default law and/or provide greater certainty as to health care decisions.

B. Declaration of a desire for natural death/living will/advance directives. Allows you to provide for withdrawal of life-sustaining medical procedures, and whether or not nutrition and hydration will also be withdrawn, in the event you are certified by two examining physicians to have a terminal condition (that could result in death within a reasonably short time?) or in a state of permanent unconsciousness (but for at least 90 consecutive days or after massive destruction of the cerebral cortex as determined within a high degree of medical certainty). S.C. Code Ann. § 44-77-30.

Physicians and health care facilities may refuse to withhold life-sustaining procedures, but must make reasonable efforts to locate a physician or facility that will do so, and transfer the patient. S.C. Code Ann. § 44-77-100.

Must be substantially in the form of S.C. Code Ann. § 44-77-50 or in compliance with law of the state of declarant's domicile at the time the declaration is adopted, if such declaration has a similar intent as under South Carolina law. S.C. Code Ann. § 44-77-30. May also be included as part of a health care POA by implication of the inclusion of one in the statutory health care POA. See S.C. Code Ann. § 62-5-504. If directives are in both, then the separate declaration will trump. S.C. Code Ann. § 62-5-509.

Statutory form provides limitations on qualified witnesses, S.C. Code Ann. § 44-77-40(2) & (3), mandatory notarization (unlike healthcare POA), S.C. Code Ann. § 44-77-40(4), procedures for revocation, S.C. Code Ann. § 44-77-80, optional agent to effectuate declaration for natural death, S.C. Code Ann. § 44-77-85. Must be signed by declarant. S.C. Code Ann. § 44-77-40(2).

In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this Declaration be honored by my family and physicians and any health facility in which I may be a patient as the final expression of my legal right to refuse medical or surgical treatment, and I accept the consequences from the refusal.

I am aware that this Declaration authorizes a physician to withhold or withdraw life-sustaining procedures. I am emotionally and mentally competent to make this Declaration.

APPOINTMENT OF AN AGENT (OPTIONAL)

1. You may give another person authority to revoke this declaration on your behalf. If you wish to do so, please enter that person's name in the space below.

Name of Agent with Power to Revoke: _____

Address: _____

Telephone Number: _____

2. You may give another person authority to enforce this declaration on your behalf. If you wish to do so, please enter that person's name in the space below.

Name of Agent with Power to Enforce: _____

Address: _____

Telephone Number: _____

REVOCATION PROCEDURES

THIS DECLARATION MAY BE REVOKED BY ANY ONE OF THE FOLLOWING METHODS. HOWEVER, A REVOCATION IS NOT EFFECTIVE UNTIL IT IS COMMUNICATED TO THE ATTENDING PHYSICIAN.

1. BY BEING DEFACED, TORN, OBLITERATED, OR OTHERWISE DESTROYED, IN EXPRESSION OF YOUR INTENT TO REVOKE, BY YOU OR BY SOME PERSON IN YOUR PRESENCE OF AND BY YOUR DIRECTION. REVOCATION BY DESTRUCTION OF ONE OR MORE OF MULTIPLE ORIGINAL DECLARATIONS REVOKES ALL OF THE ORIGINAL DECLARATIONS;

2. BY A WRITTEN REVOCATION SIGNED AND DATED BY YOU EXPRESSING YOUR INTENT TO REVOKE;

3. BY YOUR ORAL EXPRESSION OF YOUR INTENT TO REVOKE THE DECLARATION. AN ORAL REVOCATION COMMUNICATED TO THE ATTENDING PHYSICIAN BY A PERSON OTHER THAN YOU IS EFFECTIVE ONLY IF:

- (a) THE PERSON WAS PRESENT WHEN THE ORAL REVOCATION WAS MADE;

- (b) THE REVOCATION WAS COMMUNICATED TO THE PHYSICIAN WITHIN A REASONABLE TIME;
- (c) YOUR PHYSICAL OR MENTAL CONDITION MAKES IT IMPOSSIBLE FOR THE PHYSICIAN TO CONFIRM THROUGH SUBSEQUENT CONVERSATION WITH YOU THAT THE REVOCATION HAS OCCURRED.

TO BE EFFECTIVE AS A REVOCATION, THE ORAL EXPRESSION CLEARLY MUST INDICATE YOUR DESIRE THAT THE DECLARATION NOT BE GIVEN EFFECT OR THAT LIFE-SUSTAINING PROCEDURES BE ADMINISTERED;

4. IF YOU, IN THE SPACE ABOVE, HAVE AUTHORIZED AN AGENT TO REVOKE THE DECLARATION, THE AGENT MAY REVOKE ORALLY OR BY A WRITTEN, SIGNED, AND DATED INSTRUMENT. AN AGENT MAY REVOKE ONLY IF YOU ARE INCOMPETENT TO DO SO. AN AGENT MAY REVOKE THE DECLARATION PERMANENTLY OR TEMPORARILY; AND

5. BY YOUR EXECUTING ANOTHER DECLARATION AT A LATER TIME.

JANE DOE, Declarant

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

We, _____ and _____, the undersigned witnesses to the foregoing Declaration, dated the _____ day of _____, 2019, at least one of us being first duly sworn, declare to the undersigned authority, on the basis of our best information and belief, that the Declaration was on that date signed by the declarant as and for his or her DECLARATION OF A DESIRE FOR A NATURAL DEATH in our presence and we, at his or her request and in his or her presence, and in the presence of each other, subscribe our names as witnesses on that date. The declarant is personally known to us, and we believe him or her to be of sound mind. Each of us affirms that he is qualified as a witness to this Declaration under the provisions of the South Carolina Death With Dignity Act in that he is not related to the declarant by blood, marriage, or adoption, either as a spouse, lineal ancestor, descendant of the parents of the declarant, or spouse of any of them; nor directly financially responsible for the declarant's medical care; nor entitled to any portion of the declarant's estate upon her decease, whether under any will or as an heir by intestate succession; nor the beneficiary of a life insurance policy of the declarant; nor the declarant's attending physician; nor an employee of the attending physician; nor a person who has a claim against the declarant's decedent's estate as of this time. No more than one of us is an employee of a health facility in which the declarant is a patient. If the declarant is a resident in a hospital or nursing care facility at the date of execution of this Declaration at least one of us is an ombudsman designated by the State Ombudsman, Office of the Governor.

Witness

Witness

Subscribed before me by JANE DOE, the declarant, and subscribed and sworn to before me by _____, the witness, this _____ day of _____, 2019.

_____(SEAL)
Notary Public for South Carolina
My Commission Expires:_____

C. Health Care Power of Attorney. Health care agent given power to make medical care decisions as specifically provided in the POA if principal is incapacitated (except end-of-life decisions unless specifically stated). In addition the specific powers in the health care POA, the agent has the following general statutory powers under S.C. Code Ann. § 62-5-505:

- Access to principal's medical records and information to the same extent that the principal would have access, including the right to disclose the contents to others;
- Contract on the principal's behalf for placement in a health care or nursing care facility;
- Hire and fire medical, social service, and other support personnel responsible for the principal's care;
- Have same visitation rights of the principal as immediate family members have.

Agent also entitled to reimbursement of expenses but not compensation; consent to health care does not make one liable for principal's expenses. S.C. Code Ann. § 62-5-506.

Mental incompetence determined under standard in S.C. Code Ann. § 44-66-20(8), except that certification of incompetence may be substituted for that of a second physician. S.C. Code Ann. § 62-5-502(d).

Health care providers with knowledge of health care POA have duty to follow agent's directives that are consistent with the POA, S.C. Code Ann. § 65-5-508; provided, however, that they may refuse to withhold life-sustaining treatment in similar manner as for a stand-alone declaration for desire for natural death, S.C. Code Ann. § 65-5-616(b).

Waivers of liability for good faith decisions by agent and good faith reliance on agent's authority. S.C. Code Ann. § 62-5-510.

Valid if substantially in the form provided in S.C. Code Ann. § 62-5-504. S.C. Code Ann. § 62-5-503(a)(1). Statutory form provides limitations on qualified witnesses, S.C. Code Ann. § 62-5-503(3), limitations on qualified agents, S.C. Code Ann. § 62-5-503(4). May be signed by principal or person in principal's presence and by principal's direction. S.C. Code Ann. § 62-5-503(2).

An alternate set of general requirements is provided by S.C. Code Ann. § 62-5-517(a), which is actually more restrictive than statutory form regarding principal signature and notarization. It is unclear if these additional restrictions are required for that additional "add-ons" of S.C. Code Ann. § 62-5-517(b):

- (1) organ donations;
- (2) life-sustaining treatment;
- (3) tube feeding;
- (4) other kinds of medical treatment that the principal wishes to have or not to have;
- (5) comfort and treatment issues;
- (6) provisions for interment or disposal of the body after death; and
- (7) any written statements that the principal may wish to have communicated on his behalf.

May be possible for courts to give effect to health care POAs made other law or law of another state. S.C. Code Ann. § 62-5-502(b). However, it is unclear because statute refers to that specific statute rather than Part 5 of Title 62 generally.

May be revoked in writing, orally, or other act by the principal to the agent or health care provider intending to be a revocation, or by executing a subsequent health care POA or regular durable power of attorney if it states that the health care POA is revoked or is inconsistent with the health care POA. S.C. Code Ann. § 62-5-512(a). Health care provider must immediately record a revocation in principal's medical record and notify agent, attending physician, and all other health care/nursing care providers responsible for principal's care. S.C. Code Ann. § 62-5-512(b).

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

A. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.

B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.

C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.

E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.

F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.

G. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.

8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

HEALTH CARE POWER OF ATTORNEY
(S. C. STATUTORY FORM)

1. DESIGNATION OF HEALTH CARE AGENT

I, JANE DOE, Principal, hereby appoint:

JOHN DOE, SR.

(Agent's Name)

(Agent's Address)

(Home Phone)

(Work Phone)

(Mobile Phone)

as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named:

A. First Alternate Agent: JOHN DOE, JR.

(Agent's Address)

(Home phone)

(Work phone)

(Mobile phone)

B. Second Alternate Agent: _____

(Agent's Address)

(Home phone)

(Work phone)

(Mobile phone)

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

- A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation.
- B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death.
- C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service.
- D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

E. The powers granted above do not include the following powers or are subject to the following rules or limitations:

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may ___; may not ___ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

7. STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT

With respect to any Life-Sustaining Treatment, I direct the following:
(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

(1) ___ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) ___ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

- a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or
- b. if I am in a state of permanent unconsciousness.

OR

(3) ___ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) ___ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

(b) ___ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

(c) ___ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN ITEM 8, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

- A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.
- B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on this ___ day of _____, 2019.

My current home address is: 123 Main Street, Columbia, SC 29201

JANE DOE
WITNESS STATEMENT

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: _____ Date: _____
Print Name: _____ Telephone: _____
Residence Address: _____

Witness No. 2

Signature: _____ Date: _____
Print Name: _____ Telephone: _____
Residence Address: _____

(optional)
STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The foregoing instrument was acknowledge before me by Principal on _____, 2019.

Notary Public for South Carolina
My Commission Expires: _____

General Powers of Attorney

A. Overview.

Allows a principal to name one or more agents and successor agents to act on principal's behalf as provided in the power of attorney and general law, which is the new South Carolina Uniform Financial Power of Attorney Act, S.C. Code Ann. § 62-8-101 et seq. (effective January 1, 2017).

Primary potential benefit is to assist the principal without the time and cost of having to appoint a conservator/guardian. Primary potential drawback is abuse by the agent.

Can merge health care and financial powers of attorney. However, most practitioners separate, I think, because (1) some principals will want different agents for financial versus health care powers, and (2) even if not, to make it easier for the recipients (i.e., health care facilities and financial institutions) to focus on the relevant powers at issue, especially health care facilities which are used to dealing the statutory health care POA.

Act does not apply to certain limited purpose POAs such as those provided for use by the government (e.g., form 2848), financial institutions, creditors, and entity voting. S.C. Code Ann. § 62-8-103.

B. Incapacity and contingent POAs:

POAs under Act are effective beyond principal's incapacity (i.e., "durable") by default. S.C. Code Ann. § 62-8-104. But can be made to terminate upon principal's incapacity if specifically provided in document. Was the reverse prior to 2017.

Effective upon execution unless specifically made contingent (i.e., "springing") on a future occurrence such as the principal's incapacity. S.C. Code Ann. § 62-8-109.

Principal may appoint one or more people to determine if the contingency is met. In default of appointment or an ability or willingness of the appointee to make the determination, an incapacity contingency may be determined by a physician or licensed psychologist, a court, an appropriate government official, or a lawyer. S.C. Code Ann. § 62-8-109.

"Incapacity" means inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return. S.C. Code Ann. § 62-8-102(5).

After incapacity, regardless of whether POA is springing or not, agent cannot act unless POA is recorded in county of principal's then residence or, if a non-resident, in any county where the principal's property is then located. S.C. Code Ann. § 62-8-109.

C. Agents' general rights and duties.

Agent accepting appointment (by exercising authority under POA or other conduct indicating acceptance) has many both unwaivable affirmative duties (duty to act in principal's best interest, good faith, and within the scope of authority in POA) and waivable affirmative duties (act with due care ordinarily exercised by agents in similar circumstances, including any special skills of agent if chosen for that reason; duty of loyalty and not to create a conflict of interest that impairs agent's impartiality; duty to keep all records of transactions for principal; to cooperate with a known health care agent; to attempt to preserve principal's estate plan actually known to agent based on several factors). S.C. Code Ann. §§ 62-8-113 & -114.

Co-agents may exercise authority independently unless specifically stated in POA. S.C. Code Ann. § 62-8-111. An agent (co- or successor) with actual knowledge of another agent's breach or imminent breach of duty must notify principal or, if incapacitated, take any action reasonably appropriate to safeguard principal's best interest. Id.

Agent entitled to reimbursement of reasonable expenses payment of reasonable compensation unless POA otherwise provides. S.C. Code Ann. § 62-8-112.

Duty to account for agent's actions is limited though an additional range of persons can seek judicial review of agent's actions. S.C. Code Ann. §§ 62-8-114(h) & -116.

Agent violating POA Act is liable for restoring value of principal's property and attorney fees and costs paid on the agent's behalf, S.C. Code Ann. § 62-8-117, in addition to any other relief allowable under law, S.C. Code Ann. §§ 62-8-121 & -123.

POA may exonerate agent for conduct other than dishonesty, bad faith, fraud, and willful, reckless, or grossly negligent conduct. S.C. Code Ann. § 62-8-115. Exoneration invalid if it was the result of abuse of confidential or fiduciary relationship. Id.

D. Specific powers.

Traditionally, POAs in South Carolina contained long lists of specifically enumerated powers, along with catch-all provisions to do anything that the principal might be able to do him or herself, though the catch-all provisions were generally given limited scope.

South Carolina's POA Act now allows for incorporation by reference of powers over the following subjects:

1. real property. S.C. Code Ann. § 62-8-204.
2. tangible personal property. S.C. Code Ann. § 62-8-205.
3. stocks and bonds. S.C. Code Ann. § 62-8-206.
4. commodities and options. S.C. Code Ann. § 62-8-207.
5. banks and other financial institutions. S.C. Code Ann. § 62-8-208.
6. entities and businesses. S.C. Code Ann. § 62-8-209.
7. insurance and annuities. S.C. Code Ann. § 62-8-210.

8. estates, trusts, and other beneficial interests. S.C. Code Ann. § 62-8-211.
9. claims and litigation. S.C. Code Ann. § 62-8-212.
10. personal and family maintenance. S.C. Code Ann. § 62-8-213.
11. governmental, civil, and military benefits. S.C. Code Ann. § 62-8-214.
12. retirement plans. S.C. Code Ann. § 62-8-215.
13. taxes. S.C. Code Ann. § 62-8-216.

Alternately, giving agent power to do all things principal could do expressly incorporates all the powers enumerated in S.C. Code Ann. § 62-8-204 through -216 (presumably unless otherwise negated by POA). S.C. Code Ann. § 62-8-201(c).

Any incorporation of S.C. Code Ann. § 62-8-204 through -217 also carries with it the general powers of S.C. Code Ann. § 62-8-203 with regard to each such statute incorporated, unless otherwise provided in POA. S.C. Code Ann. § 62-8-203.

E. Powers that must be specifically provided for.

Pursuant to S.C. Code Ann. § 62-8-201(a), agent cannot do the following unless the POA specifically provides for and such power is not otherwise prohibited:

- (1) create, amend, revoke, or terminate a trust, pursuant to Section 62-7-602A;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;
- (5) delegate authority granted under the power of attorney;
- (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- (7) exercise fiduciary powers that the principal has authority to delegate;
- (8) disclaim property, including a power of appointment;
- (9) access a safe deposit box or vault leased by the principal;
- (10) exercise a power of appointment in favor of someone other than the principal;
- (11) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest; or
- (12) deal with commodity futures contracts and call or put options on stocks or stock indexes

Any such powers can cannot be used to create interest in principal's property for the agent or person agent owes legal obligation of support, unless POAs specifically provides or the agent is a spouse, ancestor, descendant of principal. S.C. Code Ann. § 62-8-201(b).

Unless POA indicates, the power to make gift is also subject to limitations of S.C. Code Ann. § 62-8-217. S.C. Code Ann. § 62-8-217(d). This includes limit of annual federal gift tax exclusion per donee (with possibility of spousal gift splitting) and that gifts must be consistent with principal's objectives or, if unknown, various general principals. S.C. Code Ann. § 62-8-217.

Principal may nominate person to serve as guardian and/or conservator in the event of future protective proceedings. S.C. Code Ann. § 62-8-108. Note that appointment of a guardian or conservator negates any part of the POA within the scope of such fiduciary. Id.

Under the Uniform Fiduciary Access to Digital Assets Act, S.C. Code Ann. § 62-2-1010 et seq., the principal may also designate the agent as a person entitled to access the principal's digital assets, including electronic communications, pursuant to S.C. Code Ann. § 62-2-1020, which overrides a general terms-of-service agreements preventing disclosure but not any online tools that allow user to specifically designate such person(s). Although S.C. Code Ann. § 62-8-203(9) specifically allows agents to access electronic communications and files, it is only relevant to specifically incorporated statutory powers, and even then may not be sufficient.

F. How to create.

Signed by principal or in principal's presence by another individual directed by principal; attested with same witness requirements as South Carolina wills, and acknowledged or proved pursuant to S.C. Code Ann. § 30-5-30. S.C. Code Ann. § 62-8-105. Also valid if in accordance with law of South Carolina at the time it was executed or the law of the law of another state that applied to the POA at the time of execution, or to military POAs under 10 U.S.C. § 1044b. S.C. Code Ann. § 62-8-106.

G. How to revoke.

POA terminates when principal dies or revokes POA, the occurrence of an event provided in POA, the purpose of the power is accomplished (e.g., limited power of attorney), or there are no more able and willing agents provided in the POA. S.C. Code Ann. § 62-8-110.

Specific agent's authority terminates at termination of POA, when principal revokes authority, agent dies, becomes incapacitated, or resigns, or severance of marital rights under S.C. Code Ann. § 62-2-507. Id. Terminated agent may possibly still bind person acting in good faith on the POA. Id.

A new POA does not automatically revoke a prior POA unless expressly provided in the new POA. Id.

"Unless otherwise provided in the power of attorney, a revocation of a power of attorney must be executed in accordance with Sections 62-8-105 and 62-8-106 and, if the power of attorney has been recorded, then the revocation also must be recorded in the same county as the recorded power of attorney." Id. I believe this means that a stand-alone revocation must meet the same formalities as POAs and be recorded where the revoked POA is recorded.

Agent may as provided in POA or, if silent, by written notice to people in S.C. Code Ann. § 62-8-118. Resignation of must be recorded in county where POA recorded (whether or not POA provides an alternate resignation?). Id.

H. POA use/enforcement.

Third-parties may rely in good faith on POAs executed in accordance with statute when there is no actual knowledge that the authority of the POA or agent is otherwise limited. S.C. Code Ann. § 62-8-119(b). Third-party may refuse to honor POA under very limited circumstances in S.C. Code Ann. § 62-8-120(b). Otherwise, an agent may seek court order mandating acceptance of POA and reasonable fees and costs to secure the same. S.C. Code Ann. § 62-8-120(c).

Except as provided by statute, photo or digital copy of POA has same effect as original. S.C. Code Ann. § 62-8-106(d)

Probate court and circuit court have concurrent jurisdiction over POAs. S.C. Code Ann. § 62-8-401.

Governing law is determined by jurisdiction indicated in POA or, if none, the law of the jurisdiction in which the POA was executed. S.C. Code Ann. § 62-8-107.

Substantive law does not change for POAs created under prior law, but procedural matters do for actions after January 1, 2017. S.C. Code Ann. § 62-8-403.

- e. banks and other financial institutions pursuant to S.C. Code Ann. § 62-8-208;
 - f. entities and businesses pursuant to S.C. Code Ann. § 62-8-209;
 - g. insurance and annuities pursuant to S.C. Code Ann. § 62-8-210;
 - h. estates, trusts, and beneficial interests pursuant to S.C. Code Ann. § 62-8-211;
 - i. claims and litigation pursuant to S.C. Code Ann. § 62-8-212;
 - j. personal and family maintenance pursuant to S.C. Code Ann. § 62-8-213;
 - k. governmental, civil, and military benefits pursuant to S.C. Code Ann. § 62-8-214;
 - l. retirement plans pursuant to S.C. Code Ann. § 62-8-215; and
 - m. taxes pursuant to S.C. Code Ann. § 62-8-216.
2. To create, amend, revoke, or terminate a trust, pursuant to S.C. Code Ann. § 62-7-602A.
 3. To make a gift pursuant to S.C. Code Ann. § 62-8-217 or that otherwise qualify for the federal gift tax marital deduction or federal gift tax charitable deduction.
 4. To create or change rights of survivorship.
 5. To create or change a beneficiary designation.
 6. To delegate authority granted under the power of attorney.
 7. To waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
 8. To exercise fiduciary powers that the principal has authority to delegate.
 9. To disclaim property, including a power of appointment.
 10. To access a safe deposit box or vault leased by the principal.
 11. To exercise a power of appointment in favor of someone other than the principal.
 12. To reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest.
 13. To deal with commodity futures contracts and call or put options on stocks or stock indexes.

14. To obtain access to the principal's health care information and communicate with the principal's health care provider pursuant to the Health Insurance Portability and Accountability Act, including but not limited to 42 U.S.C. Section 1320d.

15. To obtain access to the principal's digital assets, including the content of electronic communications, pursuant to the Uniform Fiduciary Access to Digital Assets Act, including but not limited to S.C. Code Ann. § 62-2-1020.

C. Restrictions on Powers

1. Notwithstanding any provision herein to the contrary, Agent shall be prohibited from transferring, appointing, assigning, or designating any of Principal's property rights or interests for less than approximately equal return consideration unless such transaction is in accord with the Principal's then existing estate plan actually known by Agent and the standards enumerated in S.C. Code Ann. § 62-8-217(b)(3).

2. Notwithstanding any provision herein to the contrary, Agent may not exercise any power in favor of Agent, Agent's estate, and Agent's creditors or the creditors of Agent's estate, nor may Agent satisfy any legal obligation, including any obligation of support to others, out of any property subject to this power of attorney if such exercise shall cause the inclusion of property subject to this power to be includable in the gross estate of Agent under the Internal Revenue Code of 1986, as amended, or any other applicable federal or state law.

3. Notwithstanding any provision hereto to the contrary, Agent shall have no power or authority whatever with respect to (a) any policy of insurance owned by Principal on the life of Agent, and (b) any trust created by Agent as to which Principal is trustee.

ARTICLE II
Incidental Powers and Binding Effect

In connection with the exercise of the powers herein described, Agent is fully authorized and empowered to perform any other acts or things necessary, appropriate, or incidental thereto, with the same validity and effect as if I were personally present, competent, and personally exercised the powers myself. All acts lawfully done by Agent hereunder during any period of my disability or mental incompetence shall have the same effect and inure to the benefit of and bind me and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled. The powers herein conferred may be exercised by Agent alone and the signature or act of Agent on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representations of Agent for the scope of authority granted to Agent shall incur any liability to me or to my estate as a result of permitting Agent to exercise this authority, nor shall any person dealing with Agent be responsible to determine or insure the proper application of funds or property.

ARTICLE III
Miscellaneous

A. Effective Date and Exclusivity

This power of attorney is effective immediately and is intended to revoke, and hereby revokes, all powers of attorney executed by me prior to this date that purports to appoint a general agent or attorney-in-fact for the Principal, other than any health care power of attorney, or is otherwise limited to a specific purpose, including but not limited to the purposes provided in S.C. Code Ann. § 62-8-103.

B. Agent Succession

The limitations upon the authority to act of my successor Agent shall not apply if such Agent has executed and delivered an affidavit setting forth that the limitations described above upon such Agent authority to act do not then apply. Upon the execution and delivery of such an affidavit by my successor Agent, such Agent shall be authorized to act as Agent and no person acting in reliance upon such affidavit shall incur liability to me or to my estate.

C. Power not Affected by Principal's Incapacity

This power of attorney shall not be affected by physical disability or mental incompetence of the Principal which renders the Principal incapable of managing her own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.

D. Termination and Amendment

This power of attorney shall remain in full force and effect until the earlier of the following events: (i) Agent has resigned as provided herein; (ii) I have revoked this power of attorney by written instrument recorded in the public records of the county aforesaid, or (iii) a guardian or conservator shall have been appointed for me by a court of competent jurisdiction. This power of attorney may be amended by me at any time and from time to time but such amendment shall not be effective as to third persons dealing with Agent without notice of such amendment unless such amendment shall have been recorded in the public records of the county aforesaid.

E. Resignation and Removal

In the event that Agent shall become unable or unwilling to serve or continue to serve, then Agent may resign by delivering to me in writing a copy of his resignation and recording the original in the public records of the county aforesaid. Any person named herein as Agent may also be removed by written instrument executed by me and recorded in the public records of the county aforesaid. Upon such resignation or removal and recording, Agent shall thereupon be divested of all authority under this power of attorney.

D. Exculpation

To the extent allowed by law, Agent, Agent's heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of any failure to act of Agent pursuant to this power of attorney, failure to meet a standard of care that is higher than an ordinary standard of care, or on account of mere negligence.

E. Definitions

Whenever the word "Agent" or "Principal" or any modifying or substituted pronoun therefor is used in this power of attorney, such words and respective pronouns shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

F. Severability

If any part of any provision of this power of attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this power of attorney.

G. Compensation

Agent shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by Agent on my behalf pursuant to any provision of this power of attorney, but Agent shall not be entitled to compensation for services rendered hereunder.

IN WITNESS WHEREOF, as Principal, I have executed this power of attorney as of this _____ day of May, 2019, and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

JANE DOE

The foregoing power of attorney was this ____ day of May, 2019, signed, sealed, published and declared by the Principal as the Principal's appointment and empowerment of an Agent, in the



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Drafting Revocable Trusts-Scenario 3

Patricia Scarborough

DRAFTING REVOCABLE TRUSTS

F. Patricia Scarborough
Evans, Carter, Kunes & Bennett, P.A.
115 Church Street
Charleston, SC 29401
(843) 577-2300
scarborough@eckb.com

I. Introduction

This outline provides an introduction to using and drafting revocable trusts in South Carolina. This outline is intended to cover the drafting of revocable trusts for clients that have estates that will not be subject to federal or state estate tax.

(a) Why use a Revocable Trust?

- Manage the client's assets in the event of an incapacity: While this may generally be accomplished through the use of a durable power of attorney, a Revocable Trust may create some administrative convenience. Banking institutions may be more flexible with Revocable Trusts than powers of attorney.
- Avoid probate (and the probate fee): SC Probate Code §62-1-201(35) defines "probate estate" as "the decedent's property passing under the decedent's Will plus the decedent's property passing by intestacy." Assets transferred to the decedent's Revocable Trust prior to death are not part of the probate estate. Probate fees are assessed only against the probate estate. See Exhibit A for the Charleston County Probate Court fee schedule.
 - Clients with real property in states other than South Carolina may avoid ancillary probate in those states by titling those properties into the Revocable Trust during lifetime.
 - Revocable Trusts may be funded by declaration. Trust Code §62-7-401(a)(ii) provides that a Revocable Trust may be created by "written declaration signed by the owner of property that the owner holds identifiable property as trustee." See Exhibit B for a sample written declaration.
 - Practical Point: Various Probate Courts differ on what types of assets may be transferred by written declaration. For example, currently, Charleston County will allow real property to be treated as funded by declaration for purposes of the inventory and appraisal (and the probate fee), whereas Berkeley County requires real property to actually be deeded to the Revocable Trust.
 - Practical Point: When utilizing a declaration, a personal representative will still need to be appointed to transfer legal title after the client's death. So, while the client may get some of the benefits of funding the Revocable Trust by using the written declaration, they will not get all of them.
- Privacy: A decedent's Will becomes public record after it is admitted for probate, but the Revocable Trust is not required to be filed with the Probate Court (barring some type of

litigation). Assets owned by the Revocable Trust are not required to be listed on the inventory and appraisal filed by the personal representative (as required by Probate Code §62-3-706)

- Why is this important?
 - Protection of beneficiaries (creditors, spouses, "bad influences" cannot ascertain what a beneficiary will be receiving from the Revocable Trust).
 - Privacy for valuation of business interests or other assets that the Trustee may intend to sell.
- Practical Point:
 - Trust Code §62-7-1013(a) allows for a Certification of Trust to be provided to third parties and/or included on public record (this RMC office) in lieu of a copy of the instrument.
 - Trust Code § 62-7-813(b)(1) requires a Trustee to provide notice to qualified beneficiaries, within 90 days of appointment, to provide "qualified beneficiaries" of their right to demand a copy of the Trust Agreement. Trust Code §62-7-813(b)(3) requires a Trustee to provide to a beneficiary who is not a qualified beneficiary "a copy of the trust instrument redacted to include only those provisions of the trust that are relevant to the beneficiary's interest in the trust, as the trustee determines" upon that beneficiary's "reasonable written request."
 - BUT, Trust Code §62-7-813(b) is prefaced by "[u]nless the terms of the trust expressly provide otherwise." A decedent may alter these default rules in a Revocable Trust – they may not do so in a Will. Why might a decedent do so? An example might be a Revocable Trust that contains specific bequests to charities. The decedent may object to representatives of those charities receiving information relating to other bequests.

Sample language:

ARTICLE 27
Confidentiality

The provisions of this instrument are to be totally confidential. Except as determined necessary or appropriate by the Trustee, no person (other than a beneficiary who is a descendant of the Settlor) shall have the right or access to a copy of this instrument which has not been redacted as provided for in this Article 27. Each beneficiary hereunder (other than a beneficiary who is a descendant of the Settlor) shall be entitled only to a copy of this Trust instrument from which all information other than which pertains to the applicable beneficiary's interest in the Trust, as determined in the sole and absolute discretion of the Trustee, has been redacted.

No part of this Article 27 shall apply to a descendant of the Settlor. A descendant of the Settlor shall be entitled to any information (including a full, unredacted copy of this instrument) as provided for by law. Nevertheless, the Settlor's descendants are requested to keep both the trust instrument and any financial information regarding the assets of the trust confidential.

- BUT DON'T FORGET: Even with a Revocable Trust, the client may still need a Will:

- Appointment of Guardian – Probate Code §62-5-301 – "(A) The parent of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual....(B) The spouse of an alleged incapacitated individual may by will nominate a guardian for an alleged incapacitated individual."
- Appointment of Personal Representative – Unless there is a person nominated by "a probated will", the personal representative will be determined under the default rules of Probate Code §62-3-203.
 - If the Revocable Trust is fully funded, why would you need a Personal Representative?
 - Wrongful death or other litigation;
 - Tax issues;
 - Unclaimed Property (<https://southcarolina.findyourunclaimedproperty.com/>);
 - Decedent was entitled to inheritance; and
 - *Property the client forgot about*
- Tangible Personal Property Memorandum – Probate Code §62-2-512 states that "[a] will may refer to a written statement or list to dispose of items of tangible personal property..."
 - Many drafters reference a memorandum or list for personal property in a Revocable Trust which is precatory, which may be perfectly sufficient for a client. If there is likely to be discord or disagreement amongst the beneficiaries, may be preferable to follow the Probate Code and reference by Will.
- Power of Appointment – If the client wants to exercise a power of appointment over an existing trust, review the language of that trust to determine how that power may be exercised – some trusts require exercise in a probated Will.
- Statute of Limitations for Creditors – Probate Code §62-3-801 provides the means for a personal representative to provide notice to creditors, including notice to known creditors which can start a 60 day period for the presentment of a creditor's claim under subsection (b). In certain cases, it may be advantageous to be able to address potential creditors earlier in the administration process, rather than waiting until 1 year after the decedent's death (the default limitations period under Probate Code §62-3-803 if there is no notice, either by publication or actual notice).

(b) Misconceptions Clients have about Revocable Trusts:

- Revocable Trusts do not save estate taxes.
- Revocable Trusts do not protect assets from the client's creditors.
 - Trust Code §62-7-505:
 - Assets of revocable trust are subject to settlor's creditors during settlor's lifetime.
 - After Settlor's death, except as otherwise provided by law, property held in a revocable trust at the time of the Settlor's death is subject to the claims of settlor's creditors and expenses of administration of settlor's estate.
- SECTION 38-63-40 – Life insurance proceeds and cash surrender value **payable to someone other than the insured's estate** which are for the primary benefit of

the insured's spouse, children, or dependents are generally (check to see if an exception applies) exempt from claims of insured's creditors.

- SECTION 38-65-90 – Exemption for proceeds of group life insurance.
 - Retirement accounts granted protection under federal law.
 - Practical point: Where you have an asset that would otherwise have protection from creditors at client's death (such as life insurance), **be careful** that the Revocable Trust is drafted in such a way as to preserve that protection. See Article 4 of sample Revocable Trust at Exhibit C.
- Revocable Trusts typically do not protect assets from an elective share claim filed by a surviving spouse.
 - Revocable Trusts that are "illusory" are included for purposes of calculating the spouse's elective share amount: Probate Code §62-2-202(b); Trust Code §62-7-401(c); Seifert v. Southern Nat'l Bank of South Carolina, 305 S.C. 353 (1991).
 - SC Reporter's Comments to §62-2-401 – "The [2013] amendment means to leave intact Section 62-7-401(c), including the possibility that assets owned by a revocable inter vivos trust found not to be illusory are not subject to the election share".

II. DRAFTING THE REVOCABLE TRUST:

- (a) **Facts:** Lucille is 49 and recently divorced from Desi. They had two children: Lucie Arnaz (9) and Desi Arnaz, Jr. (7). Lucille wants to protect her children if something happens to her, but she does not want them to have control over their shares until age 30. She has had success in the entertainment industry and has her own production company. Her mother and brother are still living, and should be listed as her contingent beneficiaries. Her brother will be her primary Personal Representative/Trustee/Guardian, and her friend, Carol Burnett, will be the successor Personal Representative/Trustee/Guardian.

Assets:

\$75,000 – tangible personal property
\$125,000 – checking/savings
\$400,000 – non-retirement investment account
\$500,000 – residence
\$900,000 – business interest
\$450,000 – IRA accounts
\$500,000 – term life insurance

(b) **Before you get started:**

- Know the capacity required for Lucille to execute a Revocable Trust.
 - Trust Code §62-7-601: "The capacity to create, amend, revoke or add property to a revocable trust...is the same as that required to make a will."
 - Testamentary capacity: Whether the person has the capacity to know (i) his estate, (2) the objects of his affections, and (3) to whom he wishes to give his property. Hairston v. McMillan, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010); Weeks v. Drawdy (In

re Estate of Weeks), 329 S.C. at 263, 495 S.E.2d at 461; Hembree v. Estate of Hembree, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993).

- Review Lucille's divorce decree.
 - It is not uncommon for divorce decrees to contain provisions that affect estate planning (for example, conditions surrounding inheritance of children of the marriage). Make sure the client's documents are in compliance.
 - If there is a problem with the divorce decree language, better to deal with it now than after the client is deceased.
 - Example from an actual divorce decree: "Husband warrants, covenants and agrees to bequest [sic] not less than one-third (1/3) of the net worth of his estate to Daughter, if she survives him."

(c) Look at Lucille's Assets:

- IRA Accounts: Lucille wants her assets (including the IRA) to benefit her minor children. Generally this would call for a Trust, so that someone can be named to manage those assets for the benefit of the minor children without the need for a conservator. HOWEVER, the rules for naming a trust as a beneficiary of an IRA are extremely complex. I commend to you *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners* by Natalie B. Choate (<https://www.ataxplan.com/>) as an excellent resources on estate planning for IRAs.
- Insurance: The beneficiary designation will need to be updated once the Revocable Trust is signed. It is unfortunately too common that client creates an estate plan but fails to update the beneficiary designation, resulting in insurance being paid outright to minor children or to the estate, unnecessarily subjecting the proceeds to the client's creditors.
- Bank and brokerage accounts: Consider making accounts "POD" to the Revocable Trust, particularly accounts that the client does not want to retitle during lifetime (think those with automatic drafts set up), POD may accomplish the same thing.

Be careful: Estate plans frequently go awry because of joint accounts and POD designations. Clients frequently get advised by non-lawyer professionals to make accounts joint with a relative for convenience (i.e. family member can have access to the account to pay bills for the client). Clients do not always realize that this will result in that family member receiving the balance of that account at the client's death. Clients may receive advice to make accounts POD to avoid probate, not understand that this may result in the account proceeds not passing pursuant to their estate plan.

- Business interest:
 - What type of entity is the business interest (i.e. sole proprietorship, LLC, partnership, subchapter S corporation, C corporation)?
 - Remember that only certain types of Trusts qualify as shareholders of a subchapter S corporation.

- Almost all revocable trusts qualify as S corporation shareholders. Internal Revenue Code §1361(c)(2)(A)(i) (so long as the Revocable Trust qualifies as a "grantor trust", it will be a permitted shareholder).
 - After the Settlor's death, a previously grantor trust will remain a qualified shareholder for two years. Internal Revenue Code §1361(c)(2)(A)(ii).
 - HOWEVER, you will need to ensure that the Trusts for Lucie and Desi will also qualify as shareholders after Lucille's death, either as a qualified subchapter S trust ("QSST") or electing small business trust ("ESBT"). Treas. Reg. § 1.1361-1(h)(3)(ii)(A).
- Are there governing documents for the business (shareholder agreement, partnership agreement, operating agreement)? Review to determine if there are transfer restrictions, buy-sell provisions, etc. that need to be addressed in the Revocable Trust.
 - Is there a succession plan in place? Who will run the production company after Lucille's death? Does Lucille intend that the production company be sold in the event of her death?
 - Particularly if it is a unusual or niche business, the client may be the best person to advise on who can help the Trustee sell the business.
 - Is the best person to make decisions regarding the Production Company the same as the person being appointed as Trustee?
 - If not, consider:
 - Appointing an investment advisor to direct the Trustee on investment decisions (see Article 13 of the Sample Revocable Trust at Exhibit C); or
 - Providing direction to the Trustee on who should be retained to manage the production company (see Article 15 of the Sample Revocable Trust at Exhibit C).
 - If it is, does Lucille intend that the Trustee receive compensation both as Trustee and as manager of the production company?
 - Remember that Trust Code §62-7-802 classifies a "sale, encumbrance, or other transaction involving the investment or management of trust property" between the trust and the trustee personally as a voidable transaction, unless there is beneficiary or court approval, or the transaction was authorized by the terms of the trust.
- Residence
 - Practical point: If Lucille deeds her residence to her Revocable Trust, she may be required to reapply for the 4% legal residence assessment for property tax. This seems to differ county by county. The property will still be eligible, but make sure client is not surprised if a reapplication is required.
 - Practical Point: Make sure the client updates their insurance to reflect the correct ownership.
 - Practical Point: If Lucille has title insurance covering the residence, it may need to be updated. Some title insurance companies take the position that a transfer to a revocable trust is a transfer that requires the trustee to apply for an updated policy.

(d) Drafting Revocable Trust – Fiduciary Appointments

- Even though Lucille is naming Fred, then Carol, as successor Trustees, address appointment of subsequent successor trustees. See Sections 9.2 and 9.3 of the Sample Revocable Trust at Exhibit C. If you do not, you are left with the default rule under Trust Code § 62-7-704 that the Trustee will be appointed by the unanimous agreement of the qualified beneficiaries, or by the court.
- In a divorce situation, if the client wants to name ex-spouse (or soon to be ex-spouse) as a fiduciary, remember Trust Code §62-7-607 (if divorce occurs after execution of revocable trust, all interests of spouse, including appointment as Trustee, are terminated unless the trust expressly provides otherwise). If Lucille desired to appoint Desi as Trustee prior to the finalization of the divorce, she would need to expressly state that the appointment should survive the later divorce:

Example:

At the time of the execution of this Trust agreement, I am separated from my husband, Desi Arnaz. I have named Desi as Trustee of the Trust(s) created hereunder for the benefit of my children, Lucie and Desi. I intend that this appointment as Trustee to survive a divorce finalized after my execution of this agreement. I expressly intend to override the provisions of South Carolina Trust Code §62-7-607 to the extent that such section would terminate his appointment as Trustee.

- Consider a "trustee of last resort". Some clients, particularly if there was a contentious divorce, may want to ensure that an ex-spouse may never serve as Trustee for children. Including a corporate trustee as the last successor trustee (or a requirement that a corporate trustee be appointed) can help insure ex-spouse will not serve as Trustee. Remember that if there is a vacancy in the Trustee position and no named successors in the trust agreement, Trust Code §62-7-704 allows the qualified beneficiaries by unanimous agreement to appoint a Trustee.

(e) During Lucille's Lifetime (Article 1 of Sample Revocable Trust at Exhibit C):

- If Lucille becomes incapacitated, should someone be able to make modifications to the Trust?
 - An ability to make modifications may be particularly important when you have very young beneficiaries.
 - What are Lucille's options?
 - Agent under power of attorney - Trust Code §62-7-602A – An agent may (i) revoke, (ii) amend, (iii) add to, (iv) direct the trustee of, and (v) create a revocable trust only if authorized by the terms of the trust or the power of attorney. Any exercise of these powers may not alter the amount of property beneficiaries are to receive on the settlor's death. See Section 1.4 of the Sample Revocable Trust at Exhibit C.
 - Trust Protector - Trust Code §62-7-818 – The Trust protector has the powers and discretions granted by the trust instrument, which may include (but are not limited to): (i) modifying or amending the trust to achieve favorable tax status, (ii) increasing or decreasing the interest of any beneficiaries, (iii) modifying any power of appointment, (iv) removing and appointing a fiduciary, (v) terminating the trust, (vi) directing trust distributions, (vii) changing trust situs, (viii) appointing a successor trust protector, (ix)

interpreting terms of the trust, (x) advising the trustee on matters concerning a beneficiary, and (xi) amending or modifying the trust to take advantage of laws governing restraint on alienation, distribution of trust property, or the administration of the trust. See Article 14 of the Sample Revocable Trust at Exhibit C.

NOTE: The ability of the trust protector to modify is not subject to the same limitations as the agent under power of attorney. Under Trust Code §62-7-105, the limitations on an agent's ability to revoke or amend a revocable trust may not be modified, but a trust protector may be given the power to alter beneficial interests under Trust Code §62-7-818.

(f) Revocable Trust – After Lucille's Death:

- Trusts for Lucie and Desi:
 - Distributions for Lucie and Desi prior to their reaching age 30.
 - Should distributions be subject to an ascertainable standard (health, education, support and maintenance) or be made in the discretion of the Trustee?
 - If the divorce was contentious, client may want to control ex-spouse's ability to compel distributions for children's benefit.

Example:

The Trustee shall pay to or apply for the Primary Beneficiary's benefit so much or all or none of the income and/or principal of this Trust as it shall determine in the exercise of its sole and absolute discretion. The Trustee is requested, though not directed, to make such distributions as are needed for the Primary Beneficiary's maintenance in health and reasonable comfort, support in his or her accustomed manner of living, and education, including college and professional education; provided, however, that this request is merely precatory, the sole and absolute discretion as to distributions being vested in the Trustee.

In making its determinations with respect to distributions, payments or applications of Trust assets, the Trustee shall take into consideration the Primary Beneficiary's other income, funds or assets or the obligation of another person (including a parent) to provide for the Primary Beneficiary's support. The Trustee's determination as to the amount of any such payment or application, if any, and as to the advisability thereof, shall be final and conclusive upon all persons interested or who may become interested in the Trust.

During such times as the Primary Beneficiary is a disabled person [see Section 8.1 of the Sample Revocable Trust at Exhibit C for definition], the Trustee is encouraged (though not directed) to pay expenses directly for the Primary Beneficiary's benefit, rather than making distributions to the Primary Beneficiary's parent or guardian for the payment of such expenses. Any exercise of the Trustee's discretion to make distributions for the Primary Beneficiary's benefit or to the Primary Beneficiary's parent or guardian shall be final and conclusive upon all persons interested or who may become interested in the Trust.

- Should Lucie and Desi have a power of appointment over their shares of the Trust? If so, (i) who may they appoint to, and (ii) at what age should they be granted the power?
- What happens at age 30?
 - Discuss with Lucille allowing Lucie and Desi to withdraw their Trust assets at age 30 vs. allowing them to serve as trustee at age 30.
 - Allowing a child to become Trustee rather than withdraw the assets preserves creditor protection.
 - SC Trust Code §62-7-501 – a Court may not authorize a creditor or assignee of a beneficiary to reach a beneficiary's interest in a trust if protected by a spendthrift clause. See Article 16 of the Sample Revocable Trust at Exhibit C.
 - Exception is Trust Code §62-7-503 – Child support
 - SC Trust Code §62-7-504(f) – "A creditor of a beneficiary who is also a trustee or cotrustee may not reach the trustee's beneficial interest or otherwise compel a distribution if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.
 - If Lucille chooses to allow Lucie and Desi to serve as their own trustees at age 30, their ability to distribute to themselves must be limited by an ascertainable standard. If the power of the Trustee to make distributions was at the Trustee's discretion, the Trust will need to impose a standard once Lucie and Desi become Trustees.

Example:

Distribution Provisions - Self-Trusteed Trust. Upon attaining the age of thirty (30) (or at the time of the Trust's establishment if the Primary Beneficiary has already attained such age), the Primary Beneficiary shall become the sole Trustee and any then acting Trustee(s) other than the Primary Beneficiary shall automatically cease to serve as Trustee(s), unless the Primary Beneficiary elects not to serve, in which case any then serving Trustees shall continue as Trustees. After the Primary Beneficiary has attained the age of thirty (30) and if the Primary Beneficiary has elected not to serve as Trustee, the Primary Beneficiary shall have the power to appoint a substitute Trustee or Trustees and also shall have the power to remove and replace any then acting Trustee, either with the Primary Beneficiary or with another Trustee.

After the Primary Beneficiary attains the right to serve as the sole Trustee, distributions shall be made pursuant to the following provisions of this Section 8.3.

Distribution Provisions. My Trustee shall pay to or apply for the benefit of the Primary Beneficiary such portion of the income and/or principal of this Trust as is appropriate for the Primary Beneficiary's maintenance in health and reasonable comfort, support in the Primary Beneficiary's accustomed manner of living, and education, including college and professional education.

- If they are being granted withdrawal rights, consider mechanism for withholding those withdrawal rights if warranted at the time they would be granted. See Section 6.4.1 of the Sample Revocable Trust at Exhibit C.
- If they are being granted withdrawal rights, consider advising Lucille to allow withdrawals in installments.
 - If a child proves irresponsible after the first withdrawal, they will not have jeopardized their entire inheritance.

Withdrawals of Trust Principal. After the Primary Beneficiary has attained the age of thirty-five (35), the Primary Beneficiary may withdraw all of the Trust assets at any time. Prior to attaining such age, at any time after attaining age thirty (30), the Primary Beneficiary may withdraw one-half (1/2) of the fair market value of the Trust assets (determined as of the date the Primary Beneficiary turned twenty-five (25)).

EXHIBIT A

**CHARLESTON COUNTY
PROBATE COURT FEE SCHEDULE**

SOUTH CAROLINA CODE SECTION 8-21-770(B) STATES FEES FOR ESTATES AND CONSERVATORSHIP PROCEEDINGS ARE DETERMINED ON THE GROSS VALUE OF THE **PROBATE ASSETS** AS FOLLOWS:

- | | | |
|-----|--|----------|
| (1) | PROPERTY VALUATION LESS THAN \$5,000.00 | \$ 25.00 |
| (2) | \$5,000.00 BUT LESS THAN \$20,000.00 | \$ 45.00 |
| (3) | \$20,000.00 BUT LESS THAN \$60,000.00 | \$ 67.50 |
| (4) | \$60,000.00 BUT LESS THAN \$100,000.00 | \$ 95.00 |
| (5) | \$100,000.00 BUT LESS THAN \$600,000.00 | \$ 95.00 |
| | PLUS .15 PERCENT OF THE PROPERTY VALUATION BETWEEN \$100,000.00 AND \$600,000.00. | |
| (6) | PROPERTY VALUATION OF \$600,000.00 OR HIGHER AMOUNT SET FORTH IN (5) ABOVE PLUS 1/4 OF 1% OF THE PROPERTY VALUATION ABOVE \$600,000.00. | |

OTHER FEES

- | | | |
|------|---|----------|
| (1) | FILING WILL FOR RECORD ONLY | \$ 10.00 |
| (2) | RECORDING CERTIFIED ESTATE RECORDS FROM OTHER COUNTIES | \$ 20.00 |
| (3) | RECORDING EXEMPLIFICATIONS FROM OUT-OF-STATE | \$ 20.00 |
| (4) | ISSUING EXEMPLIFIED/AUTHENTICATED COPY | \$ 20.00 |
| (5) | APPOINTMENT OF SUCCESSOR/SUBSEQUENT PERSONAL REPRESENTATIVE, TRUSTEE OR SPECIAL OR TEMPORARY ADMINISTRATOR | \$ 22.50 |
| (6) | APPROVAL OF SETTLEMENT ORDER (MINORS/INCOMPETENTS) | \$150.00 |
| (7) | APPOINTMENT OF GUARDIAN AD LITEM | \$ 3.50 |
| (8) | MARRIAGE LICENSE FEE | \$ 70.00 |
| (9) | CERTIFIED COPY OF MARRIAGE LICENSE | \$ 5.00 |
| (10) | REFORMING OR CORRECTING MARRIAGE RECORD | \$ 6.75 |
| (11) | CERTIFIED COPY OF ESTATE RECORD | \$ 5.00 |
| (12) | FILING CONSERVATORSHIP ACCOUNTINGS | \$ 10.00 |
| (13) | FILING DEMANDS FOR NOTICE | \$ 5.00 |
| (14) | CERTIFYING APPEAL RECORDS | \$ 10.00 |
| (15) | FILING THE INITIAL PETITION IN ANY ACTION OR PROCEEDING OTHER THAN ABOVE, SAME FEE AS CHARGED FOR FILING CIVIL ACTIONS IN CIRCUIT COURT | \$150.00 |
| (16) | COPY MACHINE COPY | \$.50 |
| (17) | MICROFILM COPY | \$.50 |
| (18) | CERTIFICATES OF APPOINTMENT (AFTER INITIAL FOUR) | \$.50 |
| (19) | FILING AFFIDAVIT FOR COLLECTION OF PERSONAL PROPERTY UNDER SECTION 62-3-1201, THE FEE PURSUANT TO ITEM (1) ABOVE BASED UPON PROPERTY VALUATION SHOWN, PROVIDED THAT WHERE THE PROPERTY VALUATION IS LESS THAN \$100.00 THE FEE SHALL BE ONE-HALF THE AMOUNT OTHERWISE PROVIDED. | |
| (20) | THE COSTS OF THE NOTICE TO CREDITORS OR OTHER LEGAL ADVERTISEMENT ARE IN ADDITION TO PRESCRIBED COURT COSTS AND ARE DUE AND PAYABLE PRIOR TO PUBLICATION OF ADVERTISEMENT. | |

EXHIBIT B

Deed of Transfer and Declaration of Trust Ownership The McGillicuddy Trust

The undersigned, in her individual capacity, does hereby transfer the Property (as that term is defined below) to the McGillicuddy Trust dated the 31st day of May, 2019, a revocable inter-vivos trust created by Lucille D. Ball, as Settlor and as Trustee (the "Trust"), as may be subsequently amended and/or restated. Lucille D. Ball, as the sole Trustee of the Trust, for herself and for her successor trustees, does hereby accept the transfer and ownership of the Property and the parties hereto hereby agree that the Property shall henceforth be held, managed and owned solely and exclusively by, on behalf of, and pursuant to the provisions of the Trust. The term "Property" shall mean the below described property, whether owned immediately prior to the execution of this Deed of Transfer and Declaration of Trust Ownership by Lucille D. Ball, or subsequently acquired by her, which shall be held by him in her capacity as Trustee of the Trust:

Any and all intangible personal properties of all kinds, (regardless of the means by which acquired), including, without limitation:

Bank accounts (checking, savings, certificates of deposit, etc.),

Mutual and money market funds of all kinds,

Securities (stocks, bonds, treasury bills, notes receivable, interests in entities such as LLCs and partnerships, etc.), except for any interest in Individual Retirement Accounts and Retirement Plans qualified under Section 401 of the Internal Revenue Code,

All tangible personal property,

All agency and custody accounts (at banks, brokerage firms, etc.), and

All real estate wheresoever located (including land, buildings, improvements, mortgages, land contracts, leaseholds, mineral interests, etc.), which now or at any time after the date of this instrument is registered in the name of Lucille D. Ball (regardless of whatever variation of her name may be employed) including but not limited to any interest in real estate occupied by her as a residence, together with any and all tangible personal property located therein.

The undersigned hereby further affirms and declares that, from and after the date hereof:

1. The Property described above will be held by the undersigned solely and exclusively for and in behalf of the Trust as true owner subject to any and all instructions from the then trustee(s) of the Trust;

2. Except to the extent of beneficial interests provided to the undersigned under the terms and provisions of the trust agreement governing the Trust (as now written and as the same may in the future be amended), the undersigned has and shall have no personal interest in any of the Property (including any proceeds from any the Property, including any refunds, dividends, etc.); and
3. All liabilities which relate in any way to the acquisition of or which are a lien upon any of the Property shall be borne by the Trust which, pursuant to this Deed of Transfer and Declaration of Trust Ownership , owns such Property.

This Deed of Transfer and Declaration of Trust Ownership is intended to be and shall be binding upon the undersigned's heirs, executors, and assigns and shall be revocable only by written instrument executed by one or more of the then trustee(s) of said trust (with or without indicating such fiduciary capacity) with all of the same formalities as accompanied the execution of this instrument.

This declaration is intended to revoke all prior declarations of executed by the undersigned with respect to the Property.

IN WITNESS WHEREOF, I have executed this instrument on the 31st day of May, 2019.

 Lucille D. Ball, individually, and as Settlor and Trustee of the McGillicuddy Trust dated the 31st day of May, 2019

This instrument was executed in our presence by Lucille D. Ball and we do now, at her request and in her presence, sign our names as witnesses.

 Witness

 Witness

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON

The foregoing instrument was acknowledged before me this 31st day of May 2019, by Lucille D. Ball.

 Notary Public for South Carolina
 Print Name: _____
 My commission expires: _____

EXHIBIT C

STATE OF SOUTH CAROLINA)	REVOCABLE TRUST AGREEMENT
)	BETWEEN
)	LUCILLE D. BALL, AS SETTLOR
)	AND
COUNTY OF CHARLESTON)	AS TRUSTEE

The McGillicuddy Trust

This Agreement is made this 31st day of May, 2019, and is executed by Lucille D. Ball, as Settlor and as the sole Trustee. If at any time the Settlor fails to qualify or ceases to act as Trustee, the Settlor's brother, Fred Ball, shall serve as Trustee. If at any time Fred Ball fails to qualify or ceases to act as Trustee, the Settlor's friend, Carol Burnett, shall serve as Trustee.

This Trust shall be known as the McGillicuddy Trust.

Background

The Settlor is no longer married, but has children whose names are Lucie Arnaz ("Lucie") and Desi Arnaz Jr. ("Desi"). The word "issue" will include the Settlor's children as well as the Settlor's other descendants.

Any determination that the Settlor is a disabled person and is therefore unable to serve or to continue to serve as Trustee shall be made by written opinion of two licensed physicians or psychiatrists, one of whom shall be the Settlor's regular physician (if she then has one) and the other (or both, as the case may be) shall be appointed by the Settlor's brother, Fred Ball, or if he is unwilling or unable to act, the Settlor's friend, Carol Burnett. A judicial determination of the Settlor's incapacity need not be made.

ARTICLE 1

Administration during the Life of the Settlor

The Trustee shall hold, manage, invest and reinvest the Trust Estate (originally listed on Schedule A as may be adjusted from time to time) and shall collect the income, if any, therefrom and shall dispose of the net income and principal during the lifetime of the Settlor as follows:

1.1 Payments of Trust Principal and Income. The Trustee shall pay to or apply for the benefit of the Settlor so much of the net income or principal or both, whether the whole or lesser amount, as the Trustee in his sole discretion determines. In addition, the Trustee shall pay from the principal of the Trust to any person other than the Settlor such amounts as shall be directed by the Settlor pursuant to an

instrument filed with the Trust records.

1.2 Withdrawals of Trust Principal. The Settlor may at any time and from time to time, withdraw all or any part of the principal of this Trust, free of trust. During such time as the Settlor is not serving as Trustee, any such withdrawal shall be made by the Settlor's giving the Trustee written notice, describing the property or portion thereof desired to be withdrawn. Upon receipt of such instrument, the Trustee shall thereupon convey and deliver to the Settlor, free of trust, the property described in such notice.

1.3 Settlor's Incapacity. In the event that the Settlor is adjudicated to be incompetent or in the event that she is not adjudicated incompetent, but by reason of illness or mental or physical disability is, pursuant to the provisions above as to determination of incapacity, unable to properly handle her own affairs, then and in that event, the Trustee shall, in addition to the payments of income and principal for the benefit of the Settlor, pay to or apply for the benefit of any person who the Settlor is legally obligated to support, or who is related to the Settlor by blood, marriage or adoption and who the Settlor was supporting at the time the Settlor became incapacitated, such amounts of income and/or principal as the Trustee shall determine to be necessary or advisable from time to time for the health, comfortable maintenance and welfare of such persons, taking into consideration to the extent the Trustee deems advisable, any other income or resources of such persons known to the Trustee.

1.4 Power of Attorney in Fact. The Settlor's agent under a power of attorney is expressly authorized to make additions to this Trust.

ARTICLE 2

Additions to the Trust

At any time while this Trust is being administered, the Settlor and, at such times as the Settlor is not serving as Trustee, with the consent of the Trustee, any other persons, firms, or corporations, including fiduciaries, may add life insurance policies and/or other property both real and personal, to this Trust by gift, Will, or otherwise. All such additional policies and property shall be held and administered in accordance with the terms and provisions of this Agreement.

ARTICLE 3

Reserved Rights and Powers

The Settlor shall have and possess, and hereby reserves the right to revoke and/or to modify the terms of this Trust and of the gifts hereunder at any time by Will or by supplemental written agreement to this Trust without the consent of the Trustee, or any beneficiary, provided, however, that the duties, powers, and liability of the Trustee hereunder shall not be substantially changed without written consent of the Trustee.

ARTICLE 4

Provision for Bequests and Estate Administration Expenses

At the death of the Settlor, the then serving Trustee shall make available to the Personal Representative of the Settlor's estate such amounts or the whole of the Trust estate as the Personal Representative shall request for the payment of estate administration expenses as well as taxes and such other funds as may be required to satisfy such bequests as may have been made under the Settlor's Last Will and Testament; provided, however, that any tangible personal property making up a part of the Trust estate shall instead be distributed to such person or persons as the Settlor's Last Will and Testament (or a memorandum authorized in Article 3 of the Settlor's Last Will and Testament) directs, such Article or memorandum to be incorporated herein by reference. If any tangible personal property disposed of pursuant to this paragraph is deliverable to a disabled person, the Trustee shall have the discretion (i) to deliver such property to the disabled person, (ii) to sell such property and hold or deliver the proceeds of such sale as directed elsewhere in this Agreement, (iii) to hold such property (without bond) until the property can be delivered to such person (i.e., pending such person's attaining the age of maturity, etc.), or (iv) to deliver such property (without bond) to the person or persons having the care of such disabled person. Notwithstanding the previous sentence, however, the Trustee is requested not to sell antiques, silver, art, jewelry and items of family heritage as it is the Settlor's desire that such items be preserved for her family. Any distribution authorized in this section shall be a full discharge to the Trustee with respect thereto. To the extent that the Settlor's Last Will and Testament (or memorandum) does not direct disposition of all of such tangible personal property, such remaining property shall be disposed of as part of the Trust estate as provided below.

In the event that this Trust (or any Trust created hereunder) is designated as the beneficiary of any life insurance policy or any retirement account (including, but not limited to, an Individual Retirement Account (IRA) or a 401(k) plan), the proceeds of any such policy or account received by the Trust (or any subtrust created hereunder) shall not be made available by the Trustee to the Personal Representative for the payment of any estate administration expenses, including taxes, or debts of the Settlor.

Tax obligations shall be apportioned as directed in the Settlor's Last Will and Testament.

ARTICLE 5.

Distributions of Property

Upon the Settlor's death and after the distributions specified above, the balance of the Trust Estate (the "Trust Residue") shall be held, administered, and distributed pursuant to the provisions of Article 6, below, for the benefit of the Settlor's children, Lucie and Desi, or the issue of a child who fails to survive the Settlor.

ARTICLE 6.

Children's Trust

6.1 Trust for Children. The Trustee shall hold the assets directed to be held pursuant to this Article as a single Trust for the benefit of the Settlor's children (and issue of a deceased child, as the case may be). Until separate trusts are created as provided below, the Trustee shall pay to or apply for the benefit of the Settlor's children (or the issue of a deceased child) who are beneficiaries (excluding those persons for whom a separate Trust may already have been created as provided below) so much or all or none of the income and/or principal of this Trust as is appropriate for their maintenance in health and reasonable comfort, support in their accustomed manner of living, and education, including college and professional education.

6.2 Division into Separate Trusts. At such time as the Settlor's youngest living child attains the age of twenty-two (22)(or upon establishment if such event has occurred at the time of the establishment of this Trust), the Trustee shall divide the then assets of the Trust, per stirpes, for the Settlor's then living issue. The part or share for each child (or the issue of a deceased child) thereby created shall be held as a separate Trust for the benefit of each such person entitled to receive that share ("the Primary Beneficiary").

After the division into separate trusts, the following provisions of this Article shall apply with respect to each separate Trust thereby created.

6.3 Distribution Provisions. The Trustee shall pay to or apply for the Primary Beneficiary's benefit such portion of the income and/or principal of this Trust as is appropriate for the Primary Beneficiary's maintenance in health and reasonable comfort, support in the Primary Beneficiary's accustomed manner of living, and education, including college and professional education.

6.4 Withdrawals of Trust Principal. After the Primary Beneficiary has attained the age of thirty (30), the Primary Beneficiary may withdraw all of the Trust assets at any time.

6.4.1 Suspension of Withdrawal Rights. Notwithstanding the previous provisions of this Section permitting withdrawals, the Trustee shall have the power to deny withdrawal rights to the Primary Beneficiary of this Trust if he should determine that such withdrawal rights would not be in the Primary Beneficiary's best interest for any reason the Trustee may determine. In lieu of permitting withdrawals, the Trustee shall have the power to pay such portion or all of any such amounts directly for the Primary Beneficiary's benefit. The Trustee shall also have the power to reinstate the Primary Beneficiary's withdrawal rights, should the Trustee so determine that denial of the Primary Beneficiary's withdrawal rights is no longer in the Primary Beneficiary's best interest.

By way of illustration, the Settlor anticipates that the Trustee would exercise the power granted to him in this Section 6.4.1 in situations such as: (i) the Primary Beneficiary is incarcerated; (ii) the Primary Beneficiary has been convicted of any crime, other than misdemeanors or minor traffic violations, within five (5) years of the date upon which the Primary Beneficiary attempts to exercise the withdrawal right, (iii) the Primary Beneficiary is on probation in connection with any criminal conviction, other than for misdemeanors or minor traffic violations, (iv) the Trustee determines in his sole discretion that within three (3) years of the date on which the Primary Beneficiary attempts to exercise the withdrawal right, the Primary Beneficiary has used or engaged in the purchase and/or sale of any illegal drugs or other illegal substances or has abused the use of alcohol, or (v) the Primary Beneficiary is experiencing financial difficulties (such as a being the subject of a bankruptcy proceeding).

Absent bad faith or wilful misconduct, the Trustee shall not be liable for a failure to deny withdrawal to the Primary Beneficiary. If the Trustee suspects or becomes aware that the Primary Beneficiary is involved with drug and/or alcohol abuse, the Trustee is authorized, but not required, to employ private investigators and to take such other actions as the Trustee determines appropriate, at the expense of the Trust, in determining whether to exercise the rights granted to the Trustee in this Section 6.4.1.

6.5 Distribution at the Primary Beneficiary's Death. If this Trust is still in existence at the time of the Primary Beneficiary's death, the Trust under this Article shall terminate and the principal and any accumulated income shall be:

6.5.1 For the Primary Beneficiary's Issue. Paid over and distributed per stirpes among the Primary Beneficiary's then living issue, or if none;

6.5.2 For Collateral Issue. Paid over and distributed per stirpes among the issue of the Settlor's most remote descendant who is the Primary Beneficiary's direct lineal ancestor with respect to whom issue is then living, or if none;

6.5.3 Per Stirpes Distribution. Paid over and distributed per stirpes among the Settlor's then living issue;

subject, in each case (except in the case of the exercise of the power given herein to appoint, whether outright or in trust subject to other provisions), to the trust provisions of this Article (i.e. as if each

such person for whom a separate share is created were the Primary Beneficiary). If a distribution is to be made to or for the benefit of any person for whom a Trust with provisions substantially similar to those contained in this Article exists, such share shall be added to such trust.

ARTICLE 7

Contingent Disposition

If, upon the Settlor's death or upon the termination of any Trust created under this instrument, none of the Settlor's issue are living or in being, the Trustee shall distribute the Trust Residue, or the assets of any Trust not otherwise effectively disposed of, as the case may be (the "Contingent Disposition"), in equal shares to the Settlor's mother, Dede Ball ("Dede"), and the Settlor's brother, Fred Ball ("Fred"). If the Settlor's mother, Dede, is not living at the time of a distribution pursuant to this Article 7, the entire Contingent Disposition shall be distributed to the Settlor's brother, Fred. If the Settlor's brother, Fred, is not living at the time of a distribution pursuant to this Article 7, the share otherwise distributable to Fred under this Article shall be distributed to Fred's issue, per stirpes, or if none, to the Settlor's mother, Dede.

ARTICLE 8.

Disabled Persons

8.1 Disabled Person. A "disabled person" is a person under the age of twenty-one (21) or a person (i) who has been determined to be legally incapacitated to act on his or her own behalf by a court of competent jurisdiction, or as to whom any such court has appointed a guardian to act on his or her behalf, (ii) who, in the written opinion of two licensed physicians or psychiatrists appointed by the Trustee, is deemed to be physically or mentally incapable of managing his or her affairs although a judicial declaration of the incapacity may not have been made, or (iii) as to whom the Trustee has credible and current evidence that such individual has disappeared, is unaccountably absent, or is being detained under duress in such a manner as to be unable effectively and prudently to attend to his or her own financial best interests. The incapacity shall be deemed to continue until the court order or circumstances have been revoked or become inapplicable.

8.2 Title To Property Vested. Whenever under this instrument any property is to be distributed to a disabled person, title to that property shall vest in the disabled person, but payment may be deferred and held by the Trustee in accordance with the following provisions of this Article. When the disability ceases, the property and any accumulated income shall be delivered to the formerly disabled person or to his or her legal representatives. Any income accumulated shall be added to and accounted for as part of the principal.

8.3 Distributions for Disabled Person's Benefit. When payment of any amount otherwise payable under this instrument to a disabled person is deferred by the Trustee, pursuant to the above

provisions of this Article, then such amounts shall be paid out by the Trustee in such of the following ways as the Trustee, in his sole and absolute discretion, deems best: (1) directly to the disabled person; (2) to the disabled person's parent, guardian, custodian under the applicable state Uniform Gifts (or Transfers) to Minors Act, committee, conservator, or to an individual with whom the disabled person resides, for the care, support and education of the disabled person; (3) to an appropriate relative or friend for the care, support and education of the disabled person; (4) to a special needs or supplemental needs trust for the benefit of the disabled person; or (5) by the Trustee using such amounts directly for the disabled person's care, support and education. The receipt of the distributee shall constitute a full and sufficient discharge to the Trustee. The powers for the management of assets granted to Fiduciaries in this instrument shall be applicable to any property dealt with in this Article.

ARTICLE 9.

Resignation, Appointment and Succession of Fiduciaries

9.1 Resignation and Appointment Procedure. Any person or organization at any time serving as a fiduciary hereunder, whether as Trustee or in any other capacity (a "Fiduciary") may resign at any time by providing written notice to another then acting Co-Fiduciary (if there is one), or, if none, to the then beneficiary or one of the then beneficiaries of the affected Trust, setting forth the effective time and date of such resignation on or before such effective time. Notwithstanding the previous sentence, the resignation of a Fiduciary acting alone shall only be effective upon the appointment and qualification of a successor Fiduciary.

All Fiduciary resignations, appointments and removals permitted hereunder shall be made by an acknowledged instrument delivered to the Fiduciary(ies) then acting, if any, and, when applicable, to the appointee, and shall become effective on the date or upon the happening of the event specified in the instrument and may be revoked in the same manner at any time before the successor qualifies.

9.2 Appointment of Successor Trustees and Co-Trustees. Any Trustee (including any substitute or successor Trustee) shall have the right at any time after qualifying as Trustee to appoint a successor Trustee to act in the place of the appointing Trustee, either immediately or in the future upon any stated contingency. Any such appointment may be changed from time to time prior to the date it becomes effective. If any initial Trustee or any such successor, for any reason, fails or ceases to act without having appointed a Trustee who succeeds the former Trustee, any remaining Trustee may appoint another Trustee to act in the former Trustee's place.

9.3 Appointment of Additional Trustees. The Trustees of any Trust serving at any time, acting unanimously, may appoint one or more individuals over age twenty-five (25) or a bank or trust company to act as an additional Trustee(s).

9.4 Appointment of Special Trustee. Should there be a power granted to the Trustee hereunder or by state law that the then serving Trustee is prohibited from exercising, or should there be an act authorized to the Trustee hereunder or by state law that the then serving Trustee is prohibited from doing, a Special Trustee shall be appointed to consider exercising such power or doing such act. The then serving Trustee shall have the power to appoint the Special Trustee; provided, however, that the Special Trustee may not be (i) a beneficiary of the Trust, (ii) a potential remainderman of the Trust's assets (assuming the non-exercise of any power of appointment), nor (iii) related or subordinate within the meaning of Section 672(c) of the Internal Revenue Code to the then serving Trustee who is appointing such Special Trustee. Any person who has the power to appoint the Special Trustee shall also have the power to remove the Special Trustee and replace the Special Trustee with another Special Trustee who is not related or subordinate (within the meaning of Section 672(c) of the Internal Revenue Code) to the person who is appointing such Special Trustee.

9.4.1 Duties and Liabilities of Special Trustee. No personal liability shall attach to the Special Trustee except for gross negligence or willful wrongdoing. The Special Trustee shall have no responsibilities as a Trustee with respect to such Trust other than the responsibilities which directly relate to those powers specifically are vested in the Special Trustee as described in Section 9.4, above. The powers, duties, and responsibilities of any Special Trustee are thus limited to those specifically vested in such position (and none, such as responsibility for administration, investments, etc., that result generically to a trustee).

9.5 Disability of a Fiduciary. Except as otherwise set forth herein as to the Settlor, the determination that a Fiduciary is a disabled person shall be made by a court of competent jurisdiction.

9.6 Termination of Fiduciary Powers. An outgoing Fiduciary, upon the effective date of removal, resignation, or incapacity, shall cease to have any powers or discretion hereunder. At the earliest possible date after a Fiduciary ceases for any reason to be a Fiduciary hereunder, there shall be delivered to such Fiduciary's successor or to another then acting Fiduciary hereunder all of the assets (Trust or otherwise) which were in the possession of such Fiduciary and there shall be made available to each successor Fiduciary a complete financial record and inventory of assets affected thereby. With respect to any properties thus transferred by the outgoing Fiduciary or by such Fiduciary's representative, such Fiduciary shall stand and be discharged of all further duties and obligations.

9.7 Successor Fiduciary Powers and Authority. Each successor Fiduciary, upon assumption of such position, shall have the same powers, rights, discretion, duties, and obligations as the predecessor Fiduciary. Title to the entire property (of the Trust or otherwise) shall automatically vest in any successor

Fiduciary without the necessity of any conveyance. The assumption of authority by a successor Fiduciary shall not be complete until such successor executes a written acceptance of such appointment showing the authority for such succession (a copy of which shall promptly be delivered personally or sent by certified mail to the outgoing Fiduciary or to such Fiduciary's legal representative). Any corporation into which any corporate Fiduciary acting hereunder shall be merged or converted, or with which it shall be consolidated, or any corporation resulting from any merger, conversion, reorganization or consolidation to which all or substantially all of its trust business shall be transferred, shall be the successor of such corporate Fiduciary hereunder, without the execution or filing of any instrument or the performance of any further act and shall have the same powers, authorities and discretions as though originally named in this instrument.

9.8 Exoneration from Liability for Acts of Prior Fiduciaries. Each successor Fiduciary shall be exempt from any liability in any way related to the prior actions or omissions of the previous Fiduciaries, and each shall be entitled to accept as conclusive any accountings and statement of assets furnished by any predecessor Fiduciary.

9.9 Trustee Settlements. The "Beneficiary" or the "Primary Beneficiary" of any Trust created hereunder or, if none, any individual who is at the time (a) a beneficiary entitled or permitted, as the case may be, to receive current distributions from any Trust created hereunder, and (b) not then serving as a Trustee, may at any time or from time to time settle any Trustee's or former Trustee's accounts and to the extent permissible by law each settlement shall be binding and conclusive upon all persons who may be interested in the Trust, whether directly or contingent, born or unborn, infant or adult. If the person herein designated with the power to consent to settlements is a disabled person, such power shall only be exercised by his or her guardian or other legal representative.

ARTICLE 10.

Fiduciary Provisions

10.1 Delegation of Ministerial Acts. Each Fiduciary hereunder is authorized, by written instrument filed with such Fiduciary's Co-Fiduciary or Co-Fiduciaries, to delegate to such other Co-Fiduciary or Co-Fiduciaries, or any one of them or to such other agent or agents as all then acting Fiduciaries serving in that role (i.e., Trustee, Investment Advisor, etc.) have agreed to, such Fiduciary's duties with respect to general ministerial acts, specifically including the signing of checks, the execution of tax returns and the execution of instruments of contract, sale or conveyance with respect to a particular Trust's assets, including the opening of checking, brokerage or similar accounts. This authority to delegate ministerial duties does not permit a Fiduciary to delegate fiduciary powers, authorities or discretions conferred upon such Fiduciary under this instrument, the purpose of this delegation authority being intended solely to facilitate the administration of any Trusts created under this instrument through the delegation of non-discretionary duties. Upon written assurance by any Fiduciary or agent that such Fiduciary or agent has been delegated such

ministerial duties, any third parties shall accept the signature of such Fiduciary or agent, as applicable, as binding upon the affected Trust, shall not require further authorization of any other Fiduciary, and shall be indemnified and held harmless to the extent of such Trust's assets on account of any loss, liability or expense arising out of the acceptance of the signature of any such Fiduciary or agent as the basis of any transfer, withdrawal or other transaction.

10.2 Inventory; Appraisals; Bond. Except as otherwise required by law, the Trustee shall not be required to file any inventory or appraisal or any annual or other returns or reports to any court or to give bond in any jurisdiction. The Trustee shall not be required to provide annual accountings to any beneficiary except to the extent that a beneficiary shall so request, in which case the Trustee shall make available a report of the trust property, liabilities, receipts and disbursements, including the sources and amount of the Trustee's compensation, a listing of the trust assets and, if feasible, the respective market values of the assets of any Trust created hereunder at least annually to each such person then eligible to receive distributions from such Trust who requests such information.

10.3 Notice. Any notice or other instrument required or permitted to be given, made, executed, or delivered hereunder shall be in writing duly signed by (or, where permitted hereunder, on behalf of) the party or parties giving, making, or executing the same and shall be physically delivered or sent by certified or express mail (or equivalent postal or private express service) to all parties, if any, entitled thereto (when so sent, such notice or communication shall be plainly addressed to such person at such person's last known address). Any such instrument required to be given or sent to the estate of any deceased or incapacitated person shall be physically delivered or sent, in like manner, to the personal representative (or one of the personal representatives) of such person at such representative's last known address or, if there be no such personal representative known to the sender, to the estate of such person at his or her last known address.

Instruments shall be considered delivered: (i) if sent by mail or express service, on the third day following the date of its receipt by the postal service (or such express service), as evidenced by a dated postal (or express) service receipt showing the addressee's name and proper address (as described above); (ii) if sent by facsimile, upon receipt by the sender of a confirmation of receipt from the addressee's facsimile machine indicating (a) the correct telephone number of the addressee's facsimile machine and (b) receipt of the correct number of pages sent as properly received; or (iii) if sent by e-mail, upon receipt by the sender of a confirmation from the addressee's e-mail address indicating that the addressee has opened the e-mail.

In all other cases, the date of actual physical delivery shall be the effective date of delivery and, except as such instrument may specifically provide for a later effective date, it shall be effective for all purposes from such date.

Copies of all instruments of amendment, revocation, exercise of power, designation, release, disclaimer, etc., as well as of trustee resignation, removal, appointment, and/or acceptance, the original of which shall be kept with the Trust records, shall, upon request, be promptly delivered or sent by mail by the Fiduciary receiving or initiating the same to each other then interested party (i.e., the other then Fiduciary(ies)), if any, of the affected Trust or Trusts, and each then present beneficiary thereof.

10.4 Notice to Disabled Parties. If a person who is a disabled person is a party to any legal proceeding relating in any manner to any Trust created hereunder, service of process upon the disabled person shall not be required if another individual, who is not a disabled person, is a party to the proceeding and has the same interest as the disabled person.

10.5 Fiduciaries Protected. Each Fiduciary shall be fully protected for any action taken in good faith or in accordance with the advice of counsel. No Fiduciary acting hereunder shall be responsible for the act, default or omission of any other Fiduciary, nor for the default or misconduct of any agent or attorney appointed by the Fiduciary, or any of them, except that any corporate Fiduciary shall be liable for the default or misconduct of its own agents, officers, or employees. Each Fiduciary shall be liable only for his, her or its own willful misconduct or gross negligence.

ARTICLE 11.

Fiduciary Powers

In the administration of any Trust created hereunder, the Trustee shall have all of the powers granted by law, including but not limited to the powers granted to Trustees by the South Carolina Trust Code (S.C. Code Section 62-7-101, et. seq.), which powers shall not be revoked or reduced if said statutes should hereafter be repealed or restrictively amended. It is the Settlor's intention to give broad discretion and flexibility to the Trustee.

Without limiting the foregoing, the Trustee shall have the following powers:

11.1 Determinations. To determine what property is covered by general descriptions in this instrument. The Trustee is specifically granted the power to consent, or to refuse to consent, to accept any asset or any portion of any asset which any person seeks to transfer to this Trust. No Trustee or other Fiduciary shall be personally liable to any beneficiary of any Trust created hereunder, or to any other party interested in any Trust created hereunder, for any claim against the Trustee or any Trust for the diminution in value of trust property arising such Trustee's or Fiduciary's determination not to accept any asset for whatever reason he may determine, whether it be for environmental, tax, public policy or other reasons, including such other reasons as he may determine in his sole and absolute discretion, including his determination not to serve in a fiduciary capacity with respect to the asset (or portion thereof) which may be the subject of any such attempted transfer.

- 11.2 Investments and Reinvestments.** To invest or reinvest in and to sell and/or to sell short such securities or other property, real or personal (whether within or without the United States) as he shall determine; to lease all or part of the real or personal property of the estate or Trust (including real property owned by any entity owned by the Trust), even for a term longer than the probable duration of any trust, to grant options for the renewal of leases; and to retain any property received by him for such periods as he determines (including specifically retention of, or investment in, assets which may be for the use of the beneficiary or beneficiaries of any such Trust), even though such asset or assets may not be of a character, or of such a percentage of the total Trust, as would otherwise be deemed proper Trust investments. The Settlor requests that the Trustee honor the wishes of the Trust beneficiaries as to the disposition or retention of any original property of the Trust, or any Trust asset which is of a personal use nature, unless the Trustee determines that such wishes are clearly in contradiction to the purposes and terms of any such Trust.
- 11.3 Conveyance of Assets.** To convey an absolute fee in possession of any land, and full ownership of any personalty comprising a part of any Trust created hereunder and to sell, exchange, mortgage, partition, pledge, improve or otherwise alter any real or personal property comprising a part of any Trust created hereunder, at public or private sale, at such price and upon such terms as the Trustee shall deem proper and to lease the same for a term extending beyond the life of any Trust created hereunder without prior application to any court for permission to do so.
- 11.4 Non-Traditional Investments.** In addition to the powers granted under this Article, the Trustee (other than any beneficiary) is expressly authorized to acquire and retain investments not regarded as traditional for Trusts. The Trustee may invest in any type of property, wherever located, including any security or option, improved or unimproved real property, and tangible or intangible personal property, and in any manner, including direct purchase, joint ventures, partnerships, limited partnerships, limited liability companies, restricted stocks, foreign debt, equity or real estate investments, corporations, mutual funds or other forms of participation or ownership and may sell or write options on assets of the Trust.
- 11.5 Management and Holding of Assets.** To invest and reinvest all or part of the assets of any trust created hereunder in interests formed principally for the commingling of assets for investment, such as partnerships, limited liability companies, and common trust funds, including any common trust fund of any corporate Fiduciary, including registered mutual funds for which any Trustee hereunder, or an affiliate of any Trustee, provides investment advisory, custodial or other services for compensation paid from such funds; to execute trades of securities by, purchase from or sell securities to the dealer portfolio of, and purchase securities from the underwriting position of any affiliate of any Trustee; to employ banks, trust companies, securities brokerage firms and/or independent investment advisors or managers (collectively, "Agents or Advisors"), including affiliates of any Trustee, located anywhere within or without the United States (including themselves), at the discretion of the Trustee, but at the expense of the Trust, as custodian or agent; and to designate and employ such persons to give investment advice and to hold and manage discretionary investment or trading accounts; to have stock and securities registered in the name of such agent or custodian or nominee thereof without designation of fiduciary capacity; and to appoint such

agent, bank, trust company, or securities brokerage firm to perform such other ministerial functions as the Fiduciary(ies) may direct. While such stock or securities are in the custody of any such bank, trust company, or securities brokerage firm, the Fiduciary(ies) shall be under no obligation to inspect or verify such stock or securities nor shall the Fiduciary(ies) be responsible for any loss by such bank, trust company, or securities brokerage firm. The Fiduciary(ies) shall not be responsible for the act, default or omission of any such Agent or Advisor except to the extent that the Fiduciary(ies) have been negligent or exhibited willful misconduct in the selection of such Agent or Advisor. The Fiduciaries shall not be liable for relying absolutely on any apparently valid documents or the opinions of counsel and advisors to the Trust.

- 11.6 Consolidation and Division of Assets.** To hold and administer the assets of the Trusts created hereby in one or more consolidated funds, in whole or in part, in which any separate Trusts shall have undivided interests. Generally, and subject only to the provisions of this instrument, the Fiduciary(ies) shall hold, manage, control, use, invest, reinvest and dispose of trust properties to the same extent as may a fee simple owner of such properties.
- 11.7 Special Powers Relating to Estates.** The Trustee is specifically authorized, in addition to the other powers conferred upon him, to (i) make loans to the Personal Representative of the Settlor's or the Settlor's husband's estate, and (ii) purchase from such estate(s) (and continue to hold) assets which might otherwise be imprudent investments.
- 11.8 Borrowing.** To borrow such sums, on a secured or unsecured basis, from any source (including themselves), for such period and upon such terms as he deems necessary or convenient in the administration of such Trust, and to secure any such loan by mortgage or pledge. To maintain margin account(s) and to make such pledges of and other undertakings with respect to assets as the Trustee deems advisable in connection with the establishment and maintenance of such account or accounts. No lender shall be bound to see to or be liable for the application of the proceeds, and no Trustee shall be personally liable for sums borrowed, and each such loan shall be payable only out of assets of the Trust.
- 11.9 Lending.** To lend all or any portion of the funds of any Trust created hereunder to any beneficiary, with or without security and with or without interest, to make any Trust property available as security for a loan obligation or undertaking made or to be made by any beneficiary, or to guarantee a loan to be made to, or any obligation to be assumed by, any beneficiary (notwithstanding in each case that the beneficiary may also be a Trustee), subject to those terms and conditions as the Trustee may in his discretion impose.
- 11.10 Receipts, Disbursements and Allocations.** To allocate receipts and disbursements between income and principal in such manner as the Trustee (other than any beneficiary) determines, even though a particular allocation may be inconsistent with otherwise applicable state law; provided, however, that this power shall not apply to permit any allocation of administration expenses to income that would require a reduction in the estate tax marital deduction (pursuant to IRC §2056(b)(4) of the Internal Revenue Code (the "Code")) or charitable deduction (pursuant to Treas. Reg. §20.2055-3(b)), as the case may be. Upon the sale or other disposition of property which has been unproductive or underproductive of income, no part of the proceeds received shall be allocated to income,

except (i) in the case of property qualifying for the marital deduction, in which case such allocation shall follow state law, and (ii) in the discretion of the Trustee (other than any beneficiary).

- 11.11 Distributions.** Without the consent of any beneficiary, the Trustee (other than any beneficiary) may make distributions (including the satisfaction of any pecuniary bequest) in cash or in specific property, real or personal, or an undivided interest, or partly in cash and partly in such property, and to do so without regard to the income tax basis of specific property allocated to any beneficiary (including any Trust) and without making pro-rata distributions of specific assets. In addition, the Trustee is authorized to select specific assets in funding fractional share distributions and is not required to select a percentage of each specific asset.
- 11.12 Occupancy and Use.** Except as may be otherwise specified elsewhere in this instrument as to any specific property, the Trustee shall have the power to permit any person having an interest in the income of any Trust created hereunder to occupy real property, or to use personal property, held by any such Trust upon such terms as the Trustee deems proper, whether rent free or for the payment of taxes, insurance, maintenance and ordinary repairs, or other expenses, or upon such terms and conditions as the Trustee determines. The Trustee may pay or employ such domestic employees and pay such expenses incident to the maintenance of households for the benefit of any one or more of the Trust beneficiaries as he shall determine.
- 11.13 Unproductive, Wasting and Personal Use Assets.** In addition to the powers granted under this Article, the Trustee (other than any beneficiary) is expressly authorized to invest and reinvest the Trust funds without regard to the production of current income. The Trustee should invest and reinvest the Trust funds in assets which are expected to produce a reasonable rate of appreciation or are expected to produce substantial personal enjoyment for the Trust's beneficiaries. Such assets may include, but are not limited to, personal use real estate, personal property such as works of art and antiques, undeveloped real estate, discounted debt obligations, and remainder interests, whether such interests will produce current enjoyment and benefits or enjoyment and benefits after any term of years or the deaths of one or more individuals, which terms or deaths may not be expected to occur within the term of this Trust.
- 11.14 Related Party Transactions.** To sell to or purchase from, at fair market value at the time of such purchase, property of any character from any trust the Settlor may have established and to retain such property so long as the Trustee hereunder may deem advisable, whether or not such property is of the class in which trustees are authorized by law or any rule of court to invest; and to make loans to, or borrow from, any such trust or trusts upon such terms and conditions as the Trustee deems advisable.
- 11.15 Management of Closely Held Businesses.** In connection with (a) the continuation or operation of any business or investment interests which become a part of any Trust under this instrument (whether on initial funding, by purchase by the Trustee, by bequest or otherwise), or (b) the establishment of any new business or investment, the Trustee is specifically authorized: (i) to invest sums or additional sums in any such business even to

the extent that the Trust may be invested largely or entirely in that business; (ii) to guarantee any obligation on behalf of such business or investment; (iii) to hold the interest in any form, including, but not limited to, general or limited partnership interests, and interests in limited liability companies; and (iv) to act as or to select other persons to act as directors, officers, agents, or in other capacities with respect to the business, and to be compensated for those services (and for any other services rendered by the Trustee in respect of the operation of the business) without regard to his being a Trustee under this Agreement. Such power shall include the power to organize, either alone or jointly with others, new corporations, partnerships, limited partnerships, limited liability companies or other business entities; and generally to exercise with respect to the continuance, management, sale or liquidation of any business which any Trust may own or in which it may be financially interested, or of any new business or business interest, all the powers which an outright owner of such business could have exercised.

- 11.16 Division or Combination of Trusts.** In the event that the Trustee determines that it is more feasible or advisable to administer the Trust or any shares or interests created hereunder as separate trusts or shares (whether for tax (including a desire to enable any such trust to qualify as an eligible shareholder of an S corporation), administrative, liability, environmental, or other reasons), the Trustee shall have the power to divide any such Trust into further trusts or shares. The Trustee shall also have the power to combine any such Trust created hereunder with any other Trust, whether created by the Settlor or another person, if the terms of the trusts are substantially the same and the Trustees are the same.
- 11.17 Stock and Other Options.** To exercise any and all stock and other forms of options, whether held by the Settlor at her death or otherwise acquired and to make any and all necessary payments required thereby.
- 11.18 Qualified Conservation Easements.** To create one or more qualified conservation easements in real property (including any property which, or an interest in which, is specifically disposed of), and/or to distribute to beneficiaries such easements so as to permit tax deductible gifts of such easements so as to permit the Settlor's estate or any Trust created hereunder to make use of the exclusion pursuant to §2031(c) of the Code and to make the election under said provision in the absence of the consent of all beneficiaries of the property as to which the election is made.
- 11.19 Life Insurance.** To purchase, hold or own life insurance policies (including insurance policies which may be purchased, held or owned in part by the Trustee on a split-ownership basis) even though any such policy or policies may be the only asset(s) of the Trust, and to pay all premiums, exercise all options, rights and elections (including settlement options and conversion privileges) exercisable under any life insurance policies (or portions thereof) owned by the Trust (the "Policy"); designate and change beneficiaries under the Policy; demand and collect all Policy proceeds unless by assignment or designation of beneficiary the Trustee shall have otherwise provided; cancel any certificate issued in connection with the Policy and any interest in the Policy and cancel, substitute, convert, modify, or surrender any Policy or converted Policy; borrow upon the Policy and assign any and all rights thereunder; convert any group insurance policy or policies to an individual life insurance policy on the life of the insured; and surrender the Policy for cash

value, provided, however, that under no circumstances shall any person who is the insured under any policy of insurance owned by any Trust who may also be a Trustee or any other Fiduciary participate in any determination concerning the Policy or its proceeds or in any manner or fashion exercise any incident of ownership (as that term is defined in Treasury Regulation §20.2042-1(c)(2)) over such Policy. It is specifically contemplated that the Trustee (other than any beneficiary) shall have the power to create from any Trust created hereunder one or more separate Trusts which may hold insurance on a beneficiary hereunder. If such action is desired, the Trustee (other than any beneficiary) shall have the power to exclude such insured party from certain or all beneficial interests in such Trust in order to prevent such insured party from having any incidents of ownership of any such policy. In addition, the Trustee (other than any beneficiary) may create lifetime or testamentary powers of appointment (general or limited) to facilitate the creation and funding of any such Trust or Trusts.

11.20 Voting Trusts and Self Interested Voting of Securities. To enter into a voting trust agreement; to transfer any stock or securities to the Trustee under a voting trust agreement; and, generally, to vote and to exercise all the rights and powers as are or may be lawfully exercised by persons owning securities or other property. To vote for themselves, or for any officer or employee of a corporate Trustee, to be a director or officer of any corporation in which any Trust may be interested, or to be a member of any committee related in any way to such corporation, and any officers or employees of any corporate Trustee may serve as such directors, officers or committee members, and receive proper remuneration for such services, and may exercise free and untrammelled discretion with respect to all matters concerning the affairs of such corporation (or any other entity or property).

11.21 Power to Deal With Environmental Hazards. To use and expend any Trust income and principal: (i) to conduct environmental assessments, audits, and site monitoring; (ii) to take all appropriate remedial action to contain, cleanup or remove any environmental hazard; (iii) to institute legal proceedings concerning environmental hazards or contest or settle legal proceedings; (iv) to comply with any local, state or federal agency order or court order directing an assessment, abatement or cleanup of any environmental hazards; and (v) to employ agents, consultants and legal counsel to assist or perform the above undertakings or actions. The Fiduciaries shall also have the power: (a) to require, as a prerequisite to accepting as an addition to any Trust hereunder any property, real or personal, from any person, that the transferring party provide evidence satisfactory to the Trustee that the property is not subject to such environmental hazards as the Trustee may specify; (b) to decline to serve as a Fiduciary or to resign if the potential individual liability relating to environmental problems conflicts with fiduciary duties; (c) to set aside as a separate Trust, to be held and administered upon the same governing terms as any other Trust or Trusts for any one or more of the beneficiaries hereunder which the Settlor may have established, any interests in property, for any reason, including but not limited to a concern that such property could cause potential liability under any federal, state, or local environmental law; and (d) to disclaim any power which, in the sole discretion of such Fiduciary, will or may cause any such Fiduciary to be considered an "owner" or "operator" of property, or which shall otherwise cause any Fiduciary to incur liability under CERCLA or any other federal, state, or local law, rule or regulation. The Fiduciaries shall not be personally liable to any beneficiary of any Trust created hereunder, or to any other party interested in any Trust

created hereunder, for any claim against any Trust for the diminution in value of trust property arising from the compliance by the Fiduciaries with any federal, state, or local law, rule, or regulation. Any expenses incurred by the Trustee under this paragraph may be charged against income or principal as the Trustee (other than a beneficiary) shall determine.

11.22 Uneconomical Trusts. If at any time any Trust created hereunder has a net asset value (adjusted for inflation by the Consumer Price Index from the date hereof), as determined by the Trustee, of One Hundred Thousand (\$100,000) Dollars or less, the Trustee (other than any beneficiary), in his sole and absolute discretion, if he determines that it is uneconomical to continue such Trust, may terminate such Trust and distribute the Trust estate to the Trust's then Beneficiary or Primary Beneficiary, or if none, to the person or persons then permitted to receive or have the benefit of the income therefrom, or to the legal representative of such person. If there is more than one current beneficiary, the Trustee shall make such distribution to such current beneficiaries in the proportion in which they are beneficiaries or if no proportion is designated, to such beneficiaries, per stirpes.

11.23 Limitations. Notwithstanding the foregoing, nothing in this instrument shall be construed as permitting a beneficiary who may also be a Trustee of any Trust created hereunder to exercise any rights or powers which may be in excess of any limitations imposed by law or elsewhere in this instrument upon the exercise of such powers (such as, for example, those limited by ascertainable standards, or otherwise prohibited to such Trustee).

ARTICLE 12

Definitions

12.1 Trustee, Fiduciary, Personal Representative. The words "Trustee", "Fiduciary", and/or "Personal Representative", or any modifying or substituted pronouns therefor shall include singular and plural, as well as the masculine, feminine and neuter genders thereof, and shall apply equally to the personal representative, fiduciary, or trustee named herein and to any successor or substitute fiduciary, trustee or personal representative acting hereunder, and such successor or substitute shall possess all the rights, powers and duties and the authority and responsibility conferred upon the fiduciary, trustee and/or personal representative originally named herein.

12.2 Children, Issue, etc. The terms "children", "issue", "descendant", or words of similar import shall include (a) legally adopted children or their issue, as the case may be, but, in the case of an adopted person, only if the adoption occurred during the adopted person's minority or reflected an earlier parent-child relationship that existed during the adopted person's minority, and (b) persons conceived before the death of such child's parent, but born thereafter. A non-marital child shall be deemed a child of the mother but shall not be deemed a child of the father unless (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even if the attempted marriage is void, (ii) the father is adjudicated to be the father of the child by clear and convincing evidence, either before the death of the father or within the later of eight (8) months after the death of the father or six (6) months after the initial

appointment of a Personal Representative for the father's estate, or (iii) during the father's lifetime, there existed a parent-child relationship between the father and the child, and the Trustee determines that there is clear and convincing evidence that the father is the father of the child. Unless and until condition (i), (ii), or (iii) in the previous sentence have been satisfied, the child shall be excluded from receiving, using or benefitting from any part or all of any trust hereunder and any issue of the child shall not be deemed grandchildren, issue or descendants of the father.

12.3 "Per Stirpes". The term "per stirpes" as used herein is intended to describe the division of shares at each generation regardless of whether there is surviving issue representing that generation. The term "per stirpes" with reference to the issue of any individual shall mean that the stock begins with the children of such individual and that no distribution at any generational level shall be "per capita". If no issue representing a generation are surviving, the number of shares for that generation shall equal the number of predeceased issue of that generation leaving surviving issue. If issue representing a generation are surviving, the number of shares for that generation shall equal the number of issue of that generation surviving, plus the number of predeceased issue of that generation leaving surviving issue.

12.4 Education. The term "education" shall mean education, training or institutional care at any private school, night school, public school, preparatory school, military academy, junior college, college, university, graduate or professional school, trade school, school for retarded, blind or handicapped (whether physically, perceptually, emotionally or mentally) children or adults or school for children or adults subject to learning disabilities, or hostel, half-way houses, sheltered workshops associated with private living arrangements and the like, whether connected with a private institution or not, as well as any other similar institution not mentioned herein, either in the United States or abroad, and expenses incurred for education shall be deemed to include tuition, board, lodging, school uniforms and any special clothing needed for school, books, supplies, tools, instruments, laboratory, health, gymnasium and other fees and incidental expenses, medical and psychiatric care, as well as transportation expenses for trips between home and said institution, and all other services and things (including vocational apprenticeships, internships and residencies) connected with any course of study approved by the Trustee.

12.5 Exercise of Powers of Appointment Hereunder. In exercising a power of appointment given to a donee under this instrument, the donee may appoint the property subject to the power outright to an appointee, in trust, or to a custodian (selected by the donee) for an appointee under the Uniform Gifts (or Transfers) to Minors Act of any state. If the donee appoints in trust, he or she may select the trustee or trustees, may establish such administrative terms for the trust as he or she deems appropriate, and may impose lawful spendthrift restrictions. He or she may give the trustee discretionary powers over the income and principal, and may create a trust that has several permissible distributees. He or she may create life interests or other limited interests in some appointees with future interests in favor of other appointees

(including those not yet in being), may appoint different types of interests among the appointees, and may create new powers of appointment in a trustee or trustees or in any appointee; PROVIDED, however, that the donee of any testamentary general power of appointment or limited power of appointment granted or created under any power under this instrument shall in no event exercise any such power in any manner as to postpone or suspend the vesting, absolute ownership or power of alienation of any interests in property in any beneficiary for any period, beyond the maximum period before vesting is required as defined in this instrument, unless the clause granting such power of appointment in this instrument specifically provides that such donee shall have the power to appoint in further trust in a manner which may postpone or suspend the vesting, absolute ownership or power of alienation of any such property interest. The donee may impose lawful conditions on an appointment and, in general, may appoint to or among the objects of the power in any lawful manner. However, in no event may a limited power of appointment hereunder be exercised in favor of the donee, the donee's estate, the donee's creditors or creditors of the donee's estate.

In determining whether, in what manner and to what extent a testamentary power of appointment has been exercised by a donee, the Trustee may act in reliance upon a court order admitting an instrument to probate as the donee's Last Will or an order finding that the donee died intestate. If within six months after the donee's death the Trustee does not receive notice of the existence of proceedings to probate a will of the donee, the Trustee shall assume that the donee died intestate. The foregoing provisions are intended to expedite the prompt and efficient administration of the Trust and to protect the Trustee from any action taken or distribution made in accordance with these provisions. Nothing in this Section shall limit or qualify any power of appointment given under this instrument or any right which an appointee or taker in default of appointment may have against any person receiving a distribution from the Trustee irrespective of the place of probate or of the time of discovery of a Will exercising the power or any other action taken in the donee's estate.

ARTICLE 13

Investment Advisor

The following provisions shall apply with respect to each Trust created under this instrument at such times as the Settlor is not serving as Trustee:

13.1 Investment Advisor. The Trustee shall exercise the investment powers granted to him in this instrument with respect to each Trust created under this instrument only upon receiving the written direction of the Investment Advisor of such Trust and the Trustee shall have no liability or responsibility for (1) acting in accordance with any direction of the Investment Advisor during such period or for any loss resulting from so acting during such period, or (2) any failure on the part of the Investment Advisor to act or to direct the Trustee to take any action during such period or for any loss resulting from any such failure on the part of the Investment Adviser during such period, and the Trustee shall have no other duties to the

Trust, the beneficiaries, of the Trust or the Investment Advisor of the Trust relating to the exercise of such powers.

The Trustee and the Investment Advisor may from time to time by acknowledged instrument specifically referring to this Section 13.1 consented to by each of them and filed with the records of the trust cancel the applicability of this Section 13.1 for such period of time and with respect to such assets (including all the assets) of such Trust as shall be specified in such instrument of such Trust.

13.1.1 Responsibilities and Liability of the Trustee. The Trustee shall not participate in or have any liability for the selection of the Investment Advisor. The Trustee shall not have any duty to seek any direction from the Investment Advisor. While an Investment Advisor is serving, the Trustee shall have no responsibility to monitor the performance of the Investment Advisor or the performance of the trust portfolio, or to consider the advisability of purchasing, retaining or disposing of any investment or to replace the Investment Advisor. In addition, the Trustee shall have no duty to communicate with, warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the Investment Advisor. In any event, the Trustee shall have no greater liability than as provided in South Carolina Trust Code §62-7-819.

13.1.2 Initial and Successor Investment Advisors. Initially, the position of Investment Advisor shall be held by [_____]. He shall serve so long as he is willing and able to act or until removed pursuant to the provisions of this instrument relating to the removal and appointment of Trustees, such provisions to apply to the Investment Advisor. A party having the power to remove and appoint Investment Advisors shall also have the power to serve as Investment Advisor.

13.1.3 No Investor Advisor Acting. At any time there is no Investment Advisor acting, provided the Trustee shall have received actual written notice of the Investment Advisor's resignation from the Investment Advisor, or of the Investment Advisor's removal by the removing party, or of the Investment Advisor's incompetency from the Investment Advisor's attending physician, or of the Investment Advisor's death by delivery to the Trustee of a copy of the Investment Advisor's death certificate, the Trustee shall have all authority of the Investment Advisor until and unless the persons holding the authority to appoint a successor Investment Advisor have effectively appointed a successor Investment Advisor. At any time or times when the Trustee is exercising the powers theretofore exercised upon the direction of the Investment Adviser, the Trustee shall be under no duty to examine the actions of any Investment Adviser that served theretofore or to inquire into the acts or omissions of any such Investment Adviser and shall not be liable for any

act or omission of any such Investment Adviser and shall not be liable for any failure to seek redress for any act or omission of any such Investment Adviser. The Trustee may also retain any such property for any period, whether or not the same be speculative or be of the character or proportion permissible for investments by fiduciaries under any applicable law, without regard to any effect the retention may have upon the diversification of the investments, and without regard to liquidity of, or any change in the value of any particular investment. The Trustee shall be under no duty to sell or otherwise dispose of any particular investment merely because of the amount or value of such investment or type of investment in relation to the total amount or value of the trust fund.

13.1.4 Duty to Confirm Value of Assets and Other Duties. With regard to trust assets over which the Investment Adviser has investment responsibility and in addition to the Investment Adviser's duties herein, the Investment Adviser shall have the duty (a) to confirm to the Trustee, in writing, the value of trust assets at least annually and upon request by the Trustee, (b) to manage or participate in the management of any entity owned by the trust, to the extent such entity's governing instruments or applicable law require the owners to manage the same, (c) to direct the Trustee with respect to making any representation, warranty or covenant required to be made in order to maintain any investment and (d) to direct and instruct the Trustee on the future actions, if any, to be taken with respect to such representations, warranties and covenants. Costs incurred by the Investment Adviser in satisfying its obligations under this Article shall be promptly paid or reimbursed by the Trust.

13.2 Overriding Direction. To the extent the provisions of this Article 13 restrict, modify, or eliminate the duties and liabilities of the Trustee that would otherwise apply at law, in equity or otherwise, such provisions shall supersede and replace such otherwise applicable duties and liabilities.

ARTICLE 14

Power in Trust Protector to Amend

14.1 Appointment of the Trust Protector. [] shall serve as the Trust Protector. If [] is unwilling or unable to serve as Trust Protector, [] shall serve as the Trust Protector.

After the Settlor's death or disability, so long as he is alive and not a disabled person, [] may remove any then serving Trust Protector and may appoint a successor Trust Protector; provided, however, that any Trust Protector appointed by [] may not be related or subordinate to her within the meaning of Section 672(c) of the Internal Revenue Code.

Any Trust Protector (including the Trust Protector named in this Article and any substitute or successor Trust Protector) shall have the right at any time after being appointed as Trust Protector to appoint a successor Trust Protector to act in the place of the appointing Trust Protector, either immediately or in the future upon any stated contingency. Any such appointment may be changed from time to time prior to the date it becomes effective.

Any Trust Protector may resign at any time by providing written notice to the Trustee and the then beneficiary or one of the then beneficiaries of the affected Trust, setting forth the effective time and date of such resignation on or before such effective time.

14.2 Extraordinary Authority. Because the Settlor recognizes that she may not be able to anticipate developments and changes which may occur during the term of Trusts created under this instrument, she wishes to give the Trust Protector extraordinary power and authority over the modification of the Trusts created herein and the distribution of the Trust assets at a time prior to, or later than, that which has otherwise been provided for herein. These broad powers are granted for the purpose of permitting the Trust Protector to effect the dispositive objectives set forth in this instrument.

14.2.1 Authority to Amend. The Trust Protector shall have the power, by an instrument filed with the Trust records, to amend the dispositive or administrative provisions of any Trust created under this instrument (including the provisions relating to the Trustee); provided, (i) that the Settlor's descendants **[and their spouses]** (or their estates) **[or charitable organizations described in §170(c), 2055(a), or 2522(a) of the Internal Revenue Code]** shall benefit from any dispositive amendment, (ii) that no power of amendment shall be effective to extend the period for the vesting of any property under the Trust beyond the period for vesting defined elsewhere in this instrument, and (iii) that any such amendment shall be for the sole purpose of effecting the Settlor's dispositive objectives as set forth in this instrument or as otherwise known to the Trust Protector.

14.2.2 Authority to Terminate or Extend. In exercising the special powers granted in this instrument, the Trust Protector is requested, but not directed, to consider the wishes of the affected Trust or Trusts then beneficiary(ies). The Settlor wish for the Trust Protector to feel comfortable exercising these broad powers, including the power to terminate any Trust and distribute the assets, or to extend the term of the Trust, even for multiple generations, and direct that the Trust Protector shall be free from challenge or liability for exercising such powers. Such power shall even include the power to distribute assets to certain beneficiaries and to retain other assets in trust for the benefit of other beneficiaries.

14.3 Appointment and Removal of Trustees. Should the need arise, the Trust Protector shall have the power to remove any Trustee and Special Trustee at any time, with or without cause, and may appoint a successor Trustee or Special Trustee to fill any vacancy in the office of Trustee, or Special Trustee, as the case may be, however caused. The Trust Protector may only serve as Trustee after having resigned as the Trust Protector.

14.4 Liability. No personal liability shall attach to the Trust Protector except for willful misconduct. The Trust Protector shall have no responsibilities as a Trustee with respect to such Trust other than the responsibilities which directly relate to those powers which are vested in the Trust Protector alone as described in this Article. The Trust Protector shall not be responsible for supervising or monitoring the Trustee. The Trust Protector shall not be responsible or liable for (i) the acts of the Trustee, (ii) the removal (or the failure to remove) a Trustee (unless such removal or failure to remove results from the willful wrongdoing of such Trust Protector), or (iii) the selection of any Trustee (unless such selection results from the willful wrongdoing of such Trust Protector). Any exercise (or failure to exercise) by the Trust Protector of the powers granted to it in this Agreement to modify the substantive provisions of any Trust created hereunder (including, but not limited to, the power to add or remove beneficiaries, the power to grant or remove powers of appointment, and the power to increase or decrease any distributions to any one or more beneficiaries, including by altering the standard by which distributions are made) shall be protected and no personal liability shall result to the Trust Protector, except for willful misconduct.

14.5 Written Requirements. No exercise of any power, designation of successor, resignation, or other action of the Trust Protector shall be effective until such action shall be manifest in writing, signed by the person or persons authorized to take such action and delivered to the Trustees or, in the case of the exercise of the power to appoint a Trustee for any Trust for which there is no then serving Trustee, to the person designated as Trustee.

14.6 Successor Trust Protectors. All provisions of this instrument relating to the Trust Protector shall apply to the original Trust Protector and to all subsequent Trust Protectors.

ARTICLE 15

[Production Company] and Other Closely Held Business Interests

The following provisions apply to any closely-held stock or other business interests held in this Trust.

15.1 Management and Sale of Business Interests. The Settlor anticipates that a percentage of the Trust Estate will consist of interests in [Production Company], a South Carolina corporation, and/or its

successors, whether by merger or spin-off or any other type of reorganization or restructuring, and/or its subsidiaries and affiliated entities, if any (such entity or entities, together with any other interests in closely held corporations, partnerships, and limited liability companies, referred to collectively as the "Business Entities," whether one or more). If the disposition of the Business Entities has not otherwise been provided for at the Settlor's death, then, in addition to any other authority granted by this Trust, the following provisions of this Section 15.1 shall apply.

15.1.1 Supplemental Powers. In addition to the powers previously given and the powers enumerated in Article 11, the Settlor gives the Trustees the following additional powers with regard to any transactions relating to the Business Entities:

(1) Employment of Personnel. To hire and discharge officers and employees for the Business Entities, fix their compensation, and define their duties, including the right to employ any beneficiary (or individual Trustee) in any capacity. The Settlor specifically approves [Production Company's] employment of [_____], and his appointment as Chief Executive Officer.

(2) Investment in Business. To invest other trust funds in the Business Entities; to pledge other assets of the Trust as security for loans made to the Business Entities; and to loan funds from the Trust to the Business Entities.

(3) Sale or Purchase of Offerings. To participate as seller or purchaser in public or private offerings for the sale of any securities or partnership interests in the Business Entities; to enter into any related agreements containing representations, warranties, and indemnity provisions; and to incur liabilities in connection with these transactions.

(4) Change of Business Form or Scope. To convert any corporation into a partnership, sole proprietorship, limited liability company, or similar form of entity, and to diminish, enlarge, or change the scope or nature of any business.

(5) Business as Separate Entity; Accountings. To treat the Business Entities as an entity separate from the Trust. In his accountings, if any, the Trustee may report the earnings and condition of the Business Entities in accordance with standard business accounting practices.

(6) Retention of Earnings. To retain in the business such net earnings for working

capital and other purposes as the Trustee deems advisable.

(7) Additional Fees. To receive additional reasonable compensation for his extra efforts and expertise relating to the Business Entities. Such compensation may be paid as a director's or manager's fee or as a guaranteed payment, all of which will be remitted to the Trustee, or may be charged directly as a management consultation fee by the Trustee.

15.1.2 Standards of Risk and Trustees' Liability. The Settlor is aware that certain risks are inherent in the operation of any business and expect that the Trustee will be required to make decisions using a "reasonable business risk" standard in keeping with the "prudent investor" rule. Therefore, the Settlor directs that the Trustee will not be held liable for any loss resulting from the retention and operation of the Business Entities unless such loss results directly from its bad faith or willful misconduct. In determining liability for losses, it should be considered that the Trustee is engaging in a speculative enterprise at the Settlor's express request.

ARTICLE 16

Spendthrift Provisions

With the exception of any powers or discretions which may be exercised by a beneficiary solely in a fiduciary capacity, no beneficiary of any Trust created herein shall have the right, power, or authority to sell, assign, pledge, mortgage, anticipate, or in any manner encumber, alienate, or impair all or any part of his or her interest in such Trust or in the principal or income of such Trust. The beneficial and legal interest in, and the principal and income of, any such Trust and every part thereof shall be free from the interference or control of any creditor or spouse of any beneficiary of this Trust and shall not be subject to the claims of any such creditor or spouse nor liable to attachment, execution, bankruptcy, or any other process of law. This paragraph is intended to cause any Trust created under this instrument to be a "spendthrift trust" as that phrase may be interpreted under the applicable laws of the Trust's jurisdiction.

ARTICLE 17

Termination of Trusts

Except as provided in the following sentence, every Trust established hereunder shall terminate not later than twenty-one (21) years after the death of the survivor of the issue and their spouses of the Settlor's parents who are living (or in being) at the time this instrument becomes irrevocable, or such earlier time as may be required by any then applicable statutory rule against perpetuities, and at such time the property shall be distributed to the income beneficiaries thereof, unless otherwise herein disposed of at that time. To the extent that the laws of any jurisdiction under which any Trust created hereunder is being administered lengthen or abolish any, or have no, otherwise applicable rule against perpetuities, then the laws of such jurisdiction shall be applied to determine any mandatory termination of such Trust. Furthermore, to the

extent determined by the Trustee (other than any beneficiary), the dispositions made hereunder may be modified such that such distributions are made to newly created (or amended) Trusts having the same provisions as those referred to above, except that such newly created (or amended) Trusts may extend beyond the period referred to in the first sentence of this paragraph if permitted under the then laws of such Trust's jurisdiction. To the extent that any provision of this paragraph would cause any Trust established under this instrument to fail, such provision shall be inapplicable.

ARTICLE 18

Fiduciary Limitations

18.1 Limitations on Tax Sensitive Powers. No particular Trustee or other Fiduciary shall possess, or participate in the exercise of, any power given such Fiduciary by this instrument or by law to make any determination with respect to:

18.1.1 Legal Obligations. Any payment or application which would discharge any legal obligation of such particular Fiduciary personally or, unless the Trust may be revoked or amended by the Settlor pursuant to any provisions hereof, the Settlor; or

18.1.2 §2041(b)(1)(A) Powers - Power of Appointment Limitations. Any power to consume, invade, appropriate property for the benefit of, or otherwise benefit in any manner such particular Fiduciary personally (neither the preceding portion of this paragraph nor any otherwise applicable rule of law shall limit such particular Fiduciary's possession or participation in the exercise of any power (or severable portion thereof) granted in this instrument to such Fiduciary personally to consume, invade or appropriate property for the benefit of such Fiduciary which is limited by an ascertainable standard relating to the health, education, support or maintenance of such Fiduciary personally); or

18.1.3 §25.2511-1(g)(2) Powers - Taxable Gift Limitations. Any transfer of, or power to transfer, property to or for the benefit of another person, if such Fiduciary personally has any beneficial interest in the property subject to the determination (neither this subparagraph nor any otherwise applicable rule of law shall limit such particular Fiduciary's possession or participation in the exercise of any fiduciary power (or severable portion thereof) granted in this instrument to such Fiduciary to make any payment to, or expenditure for the benefit of such other person, the exercise or non-exercise of which is limited by a reasonably fixed or ascertainable standard which is set forth in this instrument).

18.2 Additional Fiduciary Limitations. Except to the extent specifically provided otherwise herein, or unless the Trust may be revoked or amended by the Settlor pursuant to any provisions hereof, all powers given to the Trustee and other Fiduciaries in this instrument are exercisable only in a fiduciary

capacity. Notwithstanding any other provisions of this instrument, no Fiduciary who is a beneficiary hereunder (or who is the Settlor, if the Settlor is permitted to serve as a Fiduciary hereunder) or who is obligated to support a beneficiary hereunder shall ever participate in (i) the exercise of, or decision not to exercise, any discretion over payments, distributions, applications, appointments or accumulations of income or principal by the Fiduciary(ies) (which shall not include exercising any discretion over payments, distributions, applications, appointments or accumulations of income or principal which are subject to an ascertainable standard), (ii) the exercise of discretion to allocate receipts or expenses between principal and income, (iii) the exercise of any discretion with respect to an insurance policy held hereunder, (iv) holding property as custodian for a minor or as donee of a power during minority, or selecting any such custodian or donee, (v) decisions to exercise tax options, (vi) any decision to retain or invest in unproductive or underproductive property (which does not produce an appropriate value in beneficial use for the appropriate beneficiary in lieu of income), or (vii) the exercise of any power to amend or affect beneficiaries' powers of withdrawal over additions, which may be in excess of the limitations imposed by the preceding section of this Article, nor may such Fiduciary participate in the removal and replacement of any Fiduciary with any other Fiduciary who is a related or subordinate party to such removing Fiduciary within the meaning of §672(c) of the Code unless (a) the Fiduciary being appointed has a substantial adverse interest to the appointing Fiduciary or (b) the powers of the Fiduciary being replaced are subject to the limitations contained in the preceding section of this Article. In the event that there arises a need to exercise a discretion or power which all of the then acting Fiduciaries (including any Trust Protector or Committee as may then be serving) are prohibited from exercising, that discretion or power may be exercised by a Special or an Independent Trustee or Fiduciary, after being duly appointed as such, pursuant to the provisions of this instrument.

ARTICLE 19

Jurisdiction, Governing Law and Trust Removal

19.1 Jurisdiction and Governing Law. Except as provided in the next Section of this Article, all questions pertaining to the construction, validity and administration of this instrument and any Trusts created hereunder shall be determined in accordance with the laws of the State of South Carolina.

19.2 Trust Removal. The Trustee of any Trust created under this instrument may at any time and from time to time (i) declare that the construction and effect of all or any portion of the Trust shall from that date be determined in accordance with the law of a different jurisdiction; provided, the designated jurisdiction must be a jurisdiction (a) where a portion of the Trust property or its indicia is located or is to be removed and (b) under the laws of which the Trust (or the portion of the Trust) would not be invalid or revocable, (ii) change the situs of the Trust, and (iii) pay or transfer the whole or any part of the Trust's income and principal to the Trustee or Trustees for the time being of any irrevocable Trust with the same or similar provisions under which the beneficiary or beneficiaries of the Trust under this instrument (and no other person or persons) are the beneficiary or beneficiaries to be held by the Trustee or those Trustees as

an addition to the property held in that Trust (freed and discharged from the trusts, powers and provisions of this instrument) whether or not the Trustee or Trustees of that Trust are domiciled or resident in South Carolina or the United States (or in such other place to which this Trust shall have been previously removed), or whether or not the Trust is governed by the laws of South Carolina or the United States (or by such other place to which this Trust shall have been previously removed), and the receipt of such Trustee or Trustees shall constitute full discharge of the Trustee.

ARTICLE 20

Headings

The Article and Section headings used in this instrument are for convenience only and are not to be considered as part of this instrument.

EXECUTION

IN WITNESS WHEREOF, the Settlor has set her hand and affixed her seal, and the Trustee, in acceptance of this Trust, has set her hand and affixed her seal.

Lucille D. Ball, Settlor and Trustee



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Drafting Revocable Trusts-Scenario 4

Catherine Kennedy

Scenario Four – Revocable Trust with Elective Share QTIP and Descendants’ Trust

Lucille is 71 and has been married to Gary Morton for approximately 21 years. Gary has children from a prior marriage. They did sign a prenuptial agreement before getting married, but there are some concerns about its validity. Lucille is still working in the entertainment industry, but has sold her production company.

She would like for 1/3 of her estate to go to Gary in trust to satisfy his elective share, if the prenuptial agreement is not valid, with the remainder to her children in trust. Her only children are: Lucie Arnaz (31) and Desi Arnaz, Jr. (29). Lucille wants her brother Fred to receive her Time Warner stock. She wants her remaining assets to go to her children but wants to protect them from their own indiscretions. At her children’s deaths, she wants the balance to go to her grandchildren or more remote descendants.

She wants her brother to be the primary Personal Representative/Trustee, and her children as alternate Co-Personal Representatives/Co-Trustees. After her death, each child can be trustee over his or her own share.

Assets:

\$. 150,000 - tangible personal property
\$ 250,000 - checking/savings
\$3,600,000 - non-retirement investment account
\$1,000,000 - residence
\$1,200,000 - IRA account

WHAT DRAFTING OPTIONS TO CONSIDER?

WHAT NON-PROBATE OPTIONS TO CONSIDER?

LAST WILL AND TESTAMENT
OF
LUCILLE DÉSIÉE BALL

May __, 2019

Prepared by:

Catherine H. Kennedy
Turner, Padgett, Graham & Laney, PA
1901 Main Street, 17th Floor
Columbia, South Carolina 29201

LAST WILL AND TESTAMENT
OF
LUCILLE DÉsirÉE BALL

I, LUCILLE DÉsirÉE BALL, a resident of Richland County, South Carolina, revoke all prior Wills and publish the following as my Last Will and Testament.

ARTICLE 1
FAMILY

I am married to GARY MORTON, sometimes also known as MORTON GOLDAPPER, who is referred to as "my husband" in this Will. I have been previously married and have two children from that marriage, LUCIE ARNAZ and DESI ARNAZ, JR. References to "my descendants" mean my children named herein and their descendants.

ARTICLE 2
TREATMENT OF BODILY REMAINS

I desire that any needed organs be donated to any medical facility or other qualified recipient for transplantation, therapy, medical research, education, or other similar purposes. I direct that my bodily remains be cremated and that my ashes be interred in Forest Lawn Memorial Park, Lake View Cemetery, where I have made arrangements. My Personal Representative shall pay all costs associated with my cremation as burial expenses.

ARTICLE 3
TANGIBLE PERSONAL PROPERTY

I make the following gifts:

3.1 Separate List for Tangible Personal Property. I may make gifts of tangible personal property by means of one or more separate written lists. To be effective, a separate list must be signed by me, and must identify the items and persons to receive them with reasonable certainty. If there is a conflict, I confirm the gift of that item made in the most recently dated list. My Personal Representative will not be bound by any written list produced or discovered more than three months after my death.

3.2 Other Gifts. I give the following items of tangible personal property:

(i) My four Emmy Awards, two of which I won for *I Love Lucy* and two of which I won for *The Lucy Show*, one to each of my grandchildren who survive me.

(ii) I give all my remaining tangible personal property not given by other provisions of this article, including furniture, household furnishings, motor vehicles, clothing, jewelry, and personal effects (together with all insurance on those items), to my descendants, per stirpes.

3.3 Special Terms. All gifts of tangible personal property under this article are subject to the following conditions.

(a) **Minors.** If any beneficiary under this article is a minor, my Personal Representative in his discretion may distribute such minor's share to such minor or for such minor's use to any person with whom such minor is residing or who has the care or control of such minor without further responsibility and the receipt of the person to whom it is distributed shall be a complete discharge of my Personal Representative.

(b) **Division by Personal Representative.** If the persons entitled to these items cannot agree upon a division within six months after my death, my Personal Representative shall divide these items in his discretion among those persons, and that division will be conclusive and binding.

(c) **Delivery Expenses.** All expenses of storage (before distribution), packing, shipping, insurance, delivery, and other reasonable and necessary charges in distributing these items are to be paid as an expense of administration of my estate.

ARTICLE 4 EXERCISE OF POWER OF APPOINTMENT

I exercise the power of appointment given to me under Article VII of the Will of my mother DÉSIRÉE "DEDE" BALL, and direct that all assets subject to that power of appointment be distributed as soon after my death as possible to the Trustee of the *McGillicuddy Trust* which I created on July 17, 1980, as amended and restated prior to my death.

ARTICLE 5 RESIDUARY ESTATE

I give all my Residuary Estate to the then serving trustee of the *McGillicuddy Trust dated July 17, 1980*, which was amended and restated in its entirety today prior to the execution of this Will (referred to in this Will as "my Revocable Trust"), as it now exists or may be amended after the execution of this Will, for administration under its terms. If the gift to that trust is ineffective for any reason or if my husband is awarded an elective share of my estate and the provisions for him under the *McGillicuddy Trust* do not satisfy his elective share, then I give all my Residuary Estate to the Trustee upon the same terms and conditions set forth in the *McGillicuddy Trust* as of this date. I incorporate those terms by reference, but only for the purpose of this contingent gift.

ARTICLE 6
APPOINTMENT OF PERSONAL REPRESENTATIVE

I appoint my brother FRED BALL as my Personal Representative. If he fails or ceases to serve, I appoint LUCIE ARNAZ and DESI ARNAZ, JR., or the survivor of them, to serve as co-Personal Representatives. I direct that no Personal Representative be required to post bond or other security. A Personal Representative will be entitled to reasonable compensation in accordance with South Carolina law.

ARTICLE 7
SURVIVAL PROVISIONS

If my husband and I die under circumstances in which there is insufficient evidence to determine the order of our deaths, I will be deemed to have survived my husband for all purposes, including the determination of ownership of all nonprobate assets (to the extent not otherwise prohibited by law). If any beneficiary (other than my husband) is required to survive me or another person to receive a distribution, and if the beneficiary does not survive me or that other person by 90 days, the beneficiary will be treated as if he or she died before me or that other person.

ARTICLE 8
PAYMENTS OF OBLIGATIONS, EXPENSES, AND TAXES

My Personal Representative shall pay all of my obligations, expenses, and taxes as follows:

8.1 Obligations. I direct that my legally enforceable obligations (except those secured by mortgages on real estate) be paid in the order and manner prescribed by law.

8.2 Expenses and Taxes. The term "expenses" includes all estate transmission or management expenses of my probate estate and all costs of my last illness, creation and funeral; the term "estate taxes" means all state and federal estate, inheritance, or transfer taxes payable by reason of my death (including the generation-skipping transfer tax on any direct skip created by the express terms of this Will rather than by disclaimer), plus any related interest and penalties attributable to these taxes, but excluding any other generation-skipping taxes. I direct that all expenses of my estate and all estate taxes charged with respect to my gross estate for estate tax purposes (including estate taxes on assets that do not pass under this Will) be paid by the Trustee of my Revocable Trust, as provided in that instrument. For these purposes, I incorporate by reference the tax apportionment provisions of my Revocable Trust. To the extent these amounts are not paid by my Revocable Trust, they are to be paid from my Residuary Estate, without apportionment, except to the extent provided in my Revocable Trust as to nonprobate and nontaxable assets.

**ARTICLE 9
FIDUCIARY POWERS**

I grant to my Personal Representative full power to deal freely with any property in my estate. The Fiduciary may exercise these powers, including the power to sell any real or personal property at public or private sale, independently and without the approval of any court. No person dealing with my Personal Representative need inquire into the propriety of any of its actions or into the application of any funds or assets. My Personal Representative shall exercise all powers in a fiduciary capacity for the best interest of the beneficiaries of my estate.

**ARTICLE 10
NO CONTEST CLAUSE**

If any heir at law or beneficiary under this Will or my Revocable Trust contests or attacks this Will or the Revocable Trust Agreement or any of its provisions, or attempts in any manner to prevent any provision of the Will or my Revocable Trust from being carried out in accordance with its terms in legal proceedings or in any other manner, directly or indirectly, then any share or interest given to that contesting beneficiary and his or her descendants shall be revoked and shall be disposed of in the same manner as if that contesting beneficiary and his or her descendants all had predeceased me.

**ARTICLE 11
TAX ELECTIONS**

I direct my Personal Representative to make federal estate and generation-skipping tax elections as instructed by the Trustee of my Revocable Trust with respect to transfers under my Revocable Trust. I direct that my Personal Representative abide by the instructions given in my Revocable Trust with regard to the election allowed under Section 2010(c) of the Internal Revenue Code relating to the Deceased Spousal Unused Exclusion Amount election (the "DSUEA Election"). My Personal Representative is to be held harmless from any liability in making elections as directed in my Revocable Trust and by its Trustee.

**ARTICLE 12
JOINT ACCOUNTS**

I may have established accounts in financial institutions in the joint names of my husband GARY MORTON and me. These accounts are maintained in joint form as a matter of convenience and are not intended to have the attribute of survivorship in favor of GARY MORTON, regardless of the form of contract or signature card employed in establishing the accounts. I specifically override any right of survivorship arising in these accounts, whether by the express terms of the account or by law, and direct that all my funds in these accounts be paid to my Personal Representative and be subject to and pass under the dispositive provisions of this my Will.

ARTICLE 13
TRANSACTIONS WITH OTHER ENTITIES

My Personal Representative may buy assets from other estates or trusts, or make loans to them, so that funds will be available to pay claims, taxes, and expenses. My Personal Representative may make those purchases or loans even if he serves as the fiduciary of that estate or trust, and on whatever terms and conditions my Personal Representative thinks are appropriate, provided that the terms of any transaction must be commercially reasonable and in the best interest of the beneficiaries of my estate.

ARTICLE 14
MISCELLANEOUS PROVISIONS

14.1 Definitions. As used in this Will, the following terms have the meanings set forth below:

(a) **Residuary Estate** means my estate remaining after paying all pre-residuary gifts in this Will and all expenses and charges (other than estate taxes).

(b) **Personal Representative** includes an Executor or Executrix and an Administrator with Will Annexed.

(c) **Per Stirpes** means that distributions will be divided into equal shares, so that there will be one share for each living child (if any) of that person and one share for each deceased child who has then living descendants. The share of each deceased child will be further divided among his or her descendants on a per stirpes basis, by reapplying the preceding rule to that deceased child and his or her descendants as many times as necessary. Notwithstanding the above, the initial division will be made at the highest generation level for which that person has living descendants. For example, if a person has deceased children and living children at the time for distribution, the assets will be divided into equal shares at the child level and distributed per stirpes below that level. If the person has no living children at that time, however, that equal division will be made at the grandchild level (or lower, if appropriate), and distributed per stirpes below that level.

(d) The words **will** and **shall** are used interchangeably in this Will and mean, unless the context clearly indicates otherwise, that my Personal Representative must take the action indicated; as used in this Will, the word **may** means that my Personal Representative has the discretionary authority to take the action but is not automatically required to do so.

(e) **Disabled** or **under a disability** means (i) being under the legal age of majority, (ii) having been adjudicated to be incapacitated, (iii) having been incarcerated for more than thirty consecutive days, (iv) being unaccountably absent for more than thirty days or being detained under duress, or (v) being unable to manage properly personal or financial affairs because of a mental or physical impairment (whether temporary or permanent in nature). A written certificate executed by an individual's attending physician confirming that person's

impairment will be sufficient evidence of disability under item (v) above, and all persons may rely conclusively on such a certificate.

(g) **Husband** means a person who meets the definition of a surviving spouse under South Carolina law, S.C. Code Ann. §62-2-802. If my husband does not meet this definition, then he shall be deemed to have predeceased me for the purposes of my Will.

14.2 Certifications.

(a) **From Trustee.** For some purposes, my Personal Representative is instructed to rely on a certificate from the Trustee of my Revocable Trust as to certain tax elections and other matters. That certificate must be in writing and need not be notarized.

(b) **Facts.** A certificate signed and acknowledged by my Personal Representative or the Trustee of my Revocable Trust stating any fact affecting this Will, my estate, or any trust will be conclusive evidence of such fact in favor of any transfer agent and any other person dealing in good faith with my Personal Representative or the Trustee. My Personal Representative or the Trustee may rely on a certificate signed and acknowledged by any beneficiary stating any fact concerning the estate beneficiaries, including dates of birth, relationships, or marital status, unless an individual serving as Personal Representative or Trustee has actual knowledge that the stated fact is false.

14.3 Dispute Resolution. If there is a dispute or controversy of any nature involving the construction, meaning, or effect of this Will or the disposition or administration of my estate which is not implicated by the No Contest Clause provided above, then, unless all parties in interest who are not disabled waive this section, I direct the disputing parties to agree on a manner of alternative dispute resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation.

14.5 Effect of Adoption. A legally adopted child (and any descendants of that child) will be regarded as a descendant of the adopting parent only if the petition for adoption was filed with the court before the child's eighteenth birthday, except that this limitation will not apply to any child adopted by me. If the legal relationship between a parent and child is terminated by a court while the parent is alive, that child and that child's descendants will not be regarded as descendants of that parent. If a parent dies and the legal relationship with that deceased parent's child had not been terminated before that parent's death, the deceased parent's child and that child's descendants will continue to be regarded as descendants of the deceased parent even if the child is later adopted by another person.

14.6 Infant in Gestation. For all purposes of this Will, an infant in gestation who is later born alive will be deemed to be in being during the period of gestation for the purpose of qualifying the infant, after it is born, as a beneficiary of my estate.

14.7 After-Conceived Descendants. If a child is conceived after the date of death of the person who might otherwise be deemed as a parent, that child shall not be considered a child

of such person and such child and his or her issue shall not be considered as issue of such person and of anyone who is by blood or adoption an ancestor of the person.

14.8 Applicable Law. All matters involving the validity and interpretation of this Will are to be governed by South Carolina law.

14.9 Gender and Number. Reference in this Will to any gender includes either masculine or feminine, as appropriate, and reference to any number includes both singular and plural where the context permits or requires.

14.10 Headings. Use of descriptive titles for articles and paragraphs is for the purpose of convenience only and is not intended to restrict the application of those provisions.

IN WITNESS WHEREOF, I, Lucille Désirée Ball, the Testatrix, have on this _____ of May, 2019 at Columbia, South Carolina, signed my name at the end of this instrument, and being first duly sworn, do hereby declare to the undersigned authority that I sign and executed this instrument as my Last Will and Testament and that I sign it willingly, and that I sign as my free and voluntary act for the purpose therein expressed and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Lucille Désirée Ball

I, Catherine H. Kennedy, and I, _____, the witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, do hereby declare, generally and to the undersigned authority that each of us signs and executes this instrument as the Last Will and Testament of the Testatrix and that each of us signs it willingly, (or each has willingly directed another to sign for her), and that each of us, in the presence and hearing of Testatrix hereby signs this Will as witness to the Testatrix's signing, and that to the best of our knowledge the Testatrix is 18 years of age or older, of sound mind, and under no constraint or undue influence.

Catherine H. Kennedy

Witness 2

Town & State

Town & State

McGILLICUDDY TRUST

Dated July 17, 1980

As Amended and Restated on May ____, 2019

Prepared by:

Catherine H. Kennedy
Turner, Padgett, Graham & Laney, PA
1901 Main Street, 17th Floor
Columbia, South Carolina 29201

MCGILlicuddy TRUST
AS AMENDED AND RESTATED ON MAY ___, 2019

This is an Amendment and Restatement of the McGillicuddy Trust dated July 17, 1980, as previously amended on November 27, 1992 (the "Trust"), by LUCILLE D. BALL, as Settlor (who is referred to in the original trust agreement as "Settlor," but who is referred to in this amendment in the first person) and as Trustee (referred to in this amendment, including any successor Trustee or Co-Trustee, as the "Trustee"). This Amended and Restated Trust supersedes and amends the Trust in its entirety. I confirm all prior transfers of assets to the Trustee, who will continue to hold them as set forth in this Amended and Restated Trust. This amendment is dated and will be effective as of May ___, 2019.

In accordance with the right of amendment I reserved in Article IV of the Trust, I hereby amend the Trust as follows:

ARTICLE 1
FAMILY

I am married to GARY MORTON, who is referred to as "my husband" in this Trust Agreement. I have been previously married and have two children from that marriage, LUCIE ARNAZ and DESI ARNAZ, JR. References to "my descendants" mean my children named herein and their descendants.

ARTICLE 2
ORIGINAL TRUST ESTATE

The trust estate consists of all assets held in the Trust by the Trustee as of this date, as listed on Schedule A, which together with any assets later added to this Trust are referred to as the "Trust Estate." Any person may transfer assets to the Trust Estate, if the Trustee agrees to accept them. Unless otherwise specified in writing at the time of the transfer, those assets will be held as provided in this Trust Agreement. The Trustee acknowledges receipt of the current Trust assets and agrees to hold the Trust Estate as set forth in this Trust Agreement.

ARTICLE 3
RESERVED RIGHTS

I reserve the following personal rights with respect to the Trust during my lifetime:

- To amend or revoke this Trust Agreement;
- To remove a Trustee and to designate a new Trustee;
- To withdraw assets, whether income or principal, from the Trust Estate;
- To require changes in the investments of the Trust Estate, but investments made by me are not subject to review by the Trustee unless my personal rights are suspended under Section 3.2;

- To direct the Trustee to perform any act of administration; and
- To direct the Trustee to make distributions to any person named by me.

3.1 By Whom Exercisable. These rights may be exercised at any time by an instrument signed by me personally, and cannot be exercised by any guardian who may be appointed for me, except that the holder of my durable power of attorney may amend (but not revoke) this Trust Agreement only to the extent necessary to preserve a tax deduction, exemption, or credit consistent with my beneficial intentions as stated in this Trust Agreement. The Trustee is to be held harmless and indemnified from any liability for any of its actions or omissions made in reliance on my actions or instructions under this Article.

3.2 Suspension of Rights. My personal rights under this Article will be suspended immediately if I become disabled. For these purposes, my disability is determined as follows:

(a) **Court Decision.** If I am determined to be incapacitated by a court having jurisdiction, my personal rights reserved in this Article will be suspended until my legal capacity is restored.

(b) **Private Decision.** In the absence of a judicial determination, if the next successor Trustee reasonably believes that I am suffering from any mental or physical disability that would affect my judgment concerning management of the Trust, the next successor Trustee shall obtain written confirmation of that opinion from my personal physician or a medical doctor board certified in psychiatry and shall provide me written notice to that effect. Upon delivery to me of that written notice, my personal rights reserved in this Article will be suspended immediately and the named successor Trustee will serve until my legal capacity is determined by a court or until the person entitled to give such written notice rescind it.

(c) **Other Facts.** My personal powers will be suspended if the next successor Trustee receives credible and timely evidence that I have disappeared, am unaccountably absent, or am being detained under duress so that I am unable to look after my financial interests.

(d) **HIPAA.** For purposes of this Section 3.2, I appoint the next successor Trustee as my personal representative under 45 CFR § 164.502(g), a portion of the regulations implementing the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"), to demand, obtain, review, and release to others medical records or other documents protected by the patient-physician privilege, attorney-client privilege, or any similar privilege, including all records subject to, and protected by, HIPAA.

ARTICLE 4 PAYMENTS DURING MY LIFETIME

The Trustee shall make the following payments during my lifetime:

4.1 For My Benefit. The Trustee shall pay to me or apply for my benefit (without obligation to any guardian or conservator who may be appointed for me) any income and principal that the Trustee in its discretion deems necessary or advisable for my best interests.

The Trustee in its discretion also may make payments to one or more trusts in which I am a beneficiary, or may create a separate trust for my benefit.

4.2 For My Descendants. If my personal rights are suspended as provided in Article 3, the Trustee also may pay to my descendants or apply for their benefit any income and principal that the Trustee in its discretion deems necessary or advisable for their health, education, support, and maintenance, either individually or collectively.

4.3 Preference for Home Care. The Trustee is authorized to provide for the finest available support and health care for me, even if this leaves no assets of the Trust remaining for other beneficiaries. It is my desire that I not be maintained in a nursing home if reasonably possible and, in furtherance of this desire, the Trustee is specifically authorized to use assets of the Trust Estate as necessary to provide for my care at home, including payments for nursing care and the purchase of any equipment or facilities required for this purpose.

4.4 Gifts. If my personal rights are suspended as provided in Article 3, I authorize the Trustee to make gifts from the Trust Estate during my lifetime for estate planning purposes, or to distribute amounts to my legally appointed guardian or conservator or to my attorney-in-fact for those purposes, subject to the following rules:

(a) **Recipients.** The gifts may be made only to my descendants or to trusts for their benefit.

(b) **Trustee Limited.** When a person eligible to receive gifts is serving as Trustee, the combined total of all gifts to that person during the calendar year cannot exceed Five Thousand Dollars (\$5,000), or five percent (5%) of the aggregate value of the Trust Estate, whichever is greater. This limit applies to the entire year even if that person only serves as Trustee for part of that year, but does not apply to gifts made to that person before he or she began serving as Trustee.

(c) **Gifts Among Classes.** Gifts to or for the benefit of my descendants must be made equally among classes. A class will consist of a child of mine and the descendants of that child. If a gift is made to any member in one class of beneficiaries, a concurrent and equal gift must be made to each other class of beneficiaries. Gifts within a class can be made in different amounts to the members of that class (and even exclude one or more members in that class).

(d) **Charitable Pledges.** The Trustee may pay any charitable pledges I made while my personal rights were not suspended (even if not yet due).

ARTICLE 5 DISTRIBUTIONS AFTER MY DEATH

Upon my death and after making provision for the payments under Article 17, the Trustee shall distribute the remaining Trust Estate as follows:

5.1 Specific Gifts. The Trustee shall distribute the following specific gifts:

(a) **Gifts Under Will.** If my Will makes a gift of a specific asset that is held in this Trust when I die, and if this Trust does not make a specific gift of that asset, the Trustee shall distribute that asset to the beneficiary named in my Will. If my Will gives my residuary probate estate to this Trust, and if my probate estate is insufficient to satisfy any other preresiduary gift under my Will, the Trustee shall satisfy the balance of that gift from the Trust.

(b) **Specific Gift of Stock.** The Trustee shall distribute all the stock in Time Warner, Inc. owned by the Trust to my brother FRED BALL, if he survives me.

(c) **Husband's Share.** If my husband survives me and if my husband is entitled to an elective share of my estate, the Trustee shall retain such amount as is necessary to satisfy my husband's elective share as a separate trust to be administered as the Marital Trust under the terms specified in Article 6.

5.2 Residuary Trust Estate. After the distributions as set forth in Paragraph 5.1 above, the Trustee shall divide the Residuary Trust Estate into separate shares for my then surviving descendants, per stirpes, with each beneficiary's share to be administered as a separate trust as provided under Article 7. If I have no descendants surviving at my death, the Trustee shall distribute the Residuary Trust Estate to my brother FRED BALL or, if he is not then surviving, to his descendants, per stirpes, subject to Article 8. If no descendants of FRED BALL are then surviving, then the Trustee shall distribute the Residuary Trust Estate to the NATIONAL WOMEN'S HALL OF FAME, an Exempt Organization located in Seneca Falls, New York, for its general purposes.

ARTICLE 6 ADMINISTRATION OF MARITAL TRUST

The Trustee shall hold, administer, and distribute the Marital Trust in accordance with the powers granted under this Trust Agreement as follows:

6.1 Distribution of Income. The Trustee shall pay to my husband or apply for his benefit, all income of the trust at least quarterly during his lifetime. Any accrued income at his death is to be paid to the succeeding beneficiaries.

6.2 Distribution of Principal. During any period in which my husband is unmarried, the Trustee may pay to my husband or apply for his benefit any principal that the Trustee in its discretion deems necessary or advisable for his health, support, and maintenance, considering his other income and resources.

6.3 Distribution of Remaining Assets. After my husband's death and after payment of any estate taxes as set out in Article 11, the Trustee shall distribute all remaining Marital Trust assets as provided in Article 5.2 above, subject to Article 8.

ARTICLE 7 TRUSTS FOR DESCENDANTS

The Trustee shall hold, administer, and distribute any trust created for a descendant of mine as follows:

7.1 Discretionary Distributions. The Trustee may pay to a beneficiary or apply for his or her benefit any income and principal from that beneficiary's separate trust that the Trustee in its discretion deems necessary or advisable for that beneficiary's health, education, support, and maintenance, or as any Independent Trustee in its discretion determines to be in that beneficiary's best interests.

7.2 Income Payments. When the beneficiary for whom a separate trust was established reaches age thirty-five (35), the current income of that trust is to be distributed thereafter to the beneficiary or applied for his or her benefit quarterly or more frequently.

7.3 Payments to Family. After being reasonably assured that the beneficiary has sufficient means for his or her continued support, the Trustee also may pay any principal that the Trustee in its discretion deems necessary or advisable for the health, education, support, and maintenance of the beneficiary's descendants.

7.4 Distribution of Principal. In addition to distributions to be made under the preceding clauses, I request the Independent Trustee to consider making principal distributions to or for the benefit of the beneficiary upon the happening of various significant events in his or her life, including the following:

- (a) Graduation with a bachelor's degree from an accredited college or university;
- (c) Marriage of the beneficiary or his or her child;
- (e) Purchase of a home;
- (g) Start of a business entity or investment in an entrepreneurial enterprise requiring capital, provided that the beneficiary be required to present a comprehensive business plan which the Trustee shall evaluate for feasibility;
- (i) Any other event deemed by the Independent Trustee to be significant.

The beneficiary will not have any enforceable right to a distribution upon the happening of any of the events set forth in this paragraph. The decision whether to make a distribution (and the amounts to be distributed) will be made by the Independent Trustee in its discretion considering the beneficiary's best interests, including the beneficiary's financial circumstances and solvency. It is my expectation that the Independent Trustee will utilize the guidelines set forth in this paragraph unless there are good reasons not to do so.

7.5 General Power of Appointment. If any portion of the beneficiary's separate trust is not wholly exempt from generation-skipping tax, he or she may appoint that portion by exercise of this testamentary general power of appointment as provided in Article 16.

7.6 Special Power of Appointment. Upon the death of the beneficiary for whom the trust was established, the Trustee shall distribute all remaining trust assets (including in further trusts) as that beneficiary directs by exercise of this testamentary special power of appointment exercisable only in favor of any one or more of my descendants.

7.7 Distribution Without Appointment. Upon the death of the beneficiary, the Trustee shall divide the trust assets not effectively appointed into shares for that beneficiary's descendants, per stirpes; or if there are none, for the then surviving descendants, per stirpes, of that beneficiary's closest ancestor in degree who is also a descendant of mine; or if there are none, for my then surviving descendants, per stirpes. The Trustee shall distribute the shares for those descendants outright and free of trust, subject to Article 8.

7.8 Alternative Distribution. If none of the beneficiaries under the preceding provisions survive to receive full distribution of the Trust Estate, the Trustee shall distribute all remaining assets my brother FRED BALL or, if he is not then living, to his descendants, per stirpes, subject to Article 8. If no descendants of FRED BALL are then living, then the Trustee shall distribute the remaining Trust Estate to the NATIONAL WOMEN'S HALL OF FAME, an Exempt Organization located in Seneca Falls, NY, for its general purposes.

ARTICLE 8 STANDBY TRUST

If any assets are distributable under this Trust Agreement to a person other than my husband who has not then reached age 21, or who in the judgment of the Trustee is under a disability, the Trustee will hold that person's share in trust for his or her benefit. In determining a person's disability, the Trustee may rely conclusively upon the opinion of a medical doctor retained by it to make such a determination. The Trustee may pay to that person or apply for his or her benefit any income and principal of this separate trust that the Trustee in its discretion deems necessary or advisable for the person's health, education, support, and maintenance, or as any Independent Trustee in its discretion determines to be in that person's best interests. When the person reaches age 21 or when that person's disability, in the judgment of the Trustee, ceases to exist, the Trustee shall distribute the remaining assets of this separate trust to that person. If that person dies before complete distribution of this separate trust, the remaining trust assets are to be distributed, subject to this Article:

(a) as directed by that person in a testamentary general power of appointment, as provided in Article 16; otherwise,

(b) to that person's then surviving descendants, per stirpes; or if none,

(c) to the then surviving descendants, per stirpes, of that person's closest ancestor in degree who is also a descendant of mine; or if none,

(d) to my then surviving descendants, per stirpes; or if none,

(e) to the NATIONAL WOMEN'S HALL OF FAME, an Exempt Organization located in Seneca Falls, New York.

This Article is to be effective only and is limited in duration to the extent that it does not result in any violation of any applicable rule against perpetuities or similar law.

**ARTICLE 9
SUCCESSOR TRUSTEE**

After my death or disability, I appoint FRED BALL, who shall be considered an Independent Trustee, as the successor Trustee of all trusts created by this Trust Agreement. If he fails or ceases to serve, I appoint LUCIE ARNAZ, DESI ARNAZ, JR. and BANK OF AMERICA, N.A., to serve as successor co-Trustees. No Trustee shall be required to post bond.

**ARTICLE 10
PROVISIONS GOVERNING TRUSTEES**

The following provisions apply to all Trustees appointed under this Trust Agreement, including me while I serve as Trustee:

10.1 Successor Trustees. If I cease to serve as Trustee and if all individuals named in Article 9 fail or cease to serve as Trustee of any trust, then BANK OF AMERICA, N.A., shall serve as the sole Trustee. If BANK OF AMERICA, N.A., fails or ceases to serve, a majority in interest of the permissible current income beneficiaries, including the natural or legal guardians of any beneficiaries who are then disabled (the "beneficiaries"), will nominate as the successor Trustee a Corporate Trustee as defined in this Trust Agreement. If the beneficiaries do not appoint a successor Trustee within a reasonable time, the terminating Trustee or any beneficiary shall petition a court of competent jurisdiction to appoint a successor Corporate Trustee.

10.2 Incapacity of Trustee. If my personal rights are suspended as provided in Article 3, I will cease to serve as Trustee while those rights are suspended.

(a) **Disability.** If any other Trustee becomes disabled (as defined in this Trust Agreement), he or she will immediately cease to act as Trustee.

(b) **Suspension.** For purposes of this Section 10.2, if a Trustee fails to sign a release of relevant medical information necessary to determine his or her capacity, that Trustee will be suspended 30 days after the request for such a release is delivered to him or her by the named successor Trustee, or if none, by the persons then entitled to appoint a successor Trustee.

(c) **Reinstatement.** If a Trustee who ceases to serve because of a disability, or who is suspended as provided above, thereafter recovers from that disability or consents to the release of relevant medical information, he or she may elect to become a Trustee again by giving written notice to the then serving Trustee, and the last Trustee who undertook to serve will then cease to be a Trustee until another successor Trustee is required.

10.3 Resignation. Any Trustee may resign by giving 30 days' written notice delivered personally or by mail to any then serving Co-Trustee and to me if I am then living and not disabled; otherwise to the next named successor Trustee, or, if none, to the persons having power to appoint successor Trustees.

10.4 Powers of Successor Trustees. Successor Trustees will have all powers granted to the original Trustee, except that only an Independent Trustee will succeed to the powers vested exclusively in the Independent Trustee. Unless a Co-Trustee continues to serve, a Trustee

ceasing to serve for any reason has the duties and powers necessary to protect the Trust Estate until it is delivered to a successor Trustee.

10.5 Acts by Other Fiduciaries. The Trustee shall take reasonable steps to compel a former Trustee or other person to deliver trust property to the Trustee, but otherwise is not required to question any acts or failures to act of the fiduciary of any other trust or estate, and will not be liable for any prior fiduciary's acts or failures to act. The Trustee can require a beneficiary who requests an examination of another fiduciary's actions or omissions to advance all costs and fees incurred in the examination, and if the beneficiary does not, the Trustee may elect not to proceed or may proceed and offset those costs and fees directly against any payment that would otherwise be made to that beneficiary.

10.6 Court Supervision. I waive compliance by the Trustee with any law requiring bond, registration, qualification, or accounting to any court.

10.7 Compensation. Each Trustee is entitled to be paid reasonable compensation for services rendered in the administration of the Trust. Reasonable compensation for a Corporate Trustee will be its published fee schedule in effect when its services are rendered unless otherwise agreed in writing, and except that any fees paid to a Corporate Trustee for making principal distributions, for termination of the trust, and upon termination of its services must be based solely on the value of its services rendered, not on the value of the trust principal. During my lifetime the Trustee's fees are to be charged wholly against income (to the extent sufficient), unless directed otherwise by me in writing.

10.8 Indemnity. Any Trustee who ceases to serve for any reason will be entitled to receive (and the continuing Trustee shall make suitable arrangements to provide) reasonable indemnification and security to protect and hold that Trustee harmless from any damage or liability of any nature that may be imposed upon it because of its actions or omissions while serving as Trustee. This protection, however, does not extend to a Trustee's negligent actions or omissions that clearly and demonstrably result in damage or liability. A prior Trustee may enforce these provisions against the current Trustee or against any assets held in the Trust, or if the prior Trustee is an individual, against any beneficiary to the extent of distributions received by that beneficiary. This indemnification right will extend to the estate, personal representatives, legal successors, and assigns of a Trustee.

10.9 Multiple Trustees. If there are two or more Trustees serving at any time, the following will apply:

(a) **Authority.** If only two Trustees are serving, any power or discretion of the Trustees may be exercised only by their joint agreement. If more than two Trustees are serving, and, unless unanimous agreement is specifically required by the terms of this Trust Agreement, any power or discretion of the Trustees may be exercised only by a majority of the Trustees, which must include the Corporate Trustee if a Corporate Trustee is one of the Trustees. Despite the foregoing, if a Co-Trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary disability, and prompt action is necessary to achieve the purposes of the Trust or to avoid injury to the Trust property, the

remaining Co-Trustee if only one, or a majority of the remaining Co-Trustees if more than one, may act for the Trust.

(b) **Delegation.** The Trustees may delegate to any one or more of themselves the authority to act on behalf of all the Trustees and to exercise any power held by the Trustees. Trustees who consent to the delegation of authority to other Trustees will be liable for the consequences of the actions of those other Trustees as if the consenting Trustees had joined the other Trustees in performing those actions. Despite the above, only an Independent Trustee may exercise the powers and discretions vested exclusively in Independent Trustees.

(c) **Dissents.** A dissenting Trustee who did not consent to the delegation of authority to another Trustee and who has not joined in the exercise of a power or discretion cannot be held liable for the consequences of the exercise. A dissenting Trustee who joins only at the direction of the majority will not be liable for the consequences of the exercise if the dissent is expressed in writing delivered to any of the other Trustees before the exercise of that power or discretion.

10.10 Trustee Reporting. The Trustee shall report on Trust activities and account to the beneficiaries, as follows:

(a) **No Requirement for Accounting While Settlor is Trustee.** If I am serving as Trustee, then I shall not be required to render an accounting.

(b) **Trustee Accounting While Settlor is Beneficiary.** During the period of time when this Trust may be revoked by me or I am a beneficiary, the Trustee shall render an accounting of the administration of the Trust to me. My written acceptance and approval of such accounting shall be binding upon all present and future Trust beneficiaries.

(c) **Trustee Accounting After Death of Settlor.** After my death, the Trustee shall be required to render an accounting of each Trust's receipts and disbursements and a statement of the assets and liabilities of each Trust at least annually to each permissible income beneficiary. The Trustee may, but shall not be required to, file such accountings with the Court having jurisdiction of the Trust. I specifically waive any requirement for formal or court-approved accountings.

(d) **Settlement of Trustee Accounting by Beneficiaries.** The Trustee may at any time settle the Trustee's account with respect to the Trust Estate, or any separate share of the Trust Estate, by a written agreement. The written agreement shall be between the Trustee and all qualified beneficiaries of the Trust. Such agreement shall bind all persons then or thereafter entitled to such share of the Trust Estate for which the Trustee and beneficiaries reached written agreement. Such agreement shall constitute a complete release and discharge of the Trustee for the acts of the Trustee covered in the accounting and the period covered by the agreement.

(e) **Settlement of Trustee Accounting Upon Termination of Trust.** Prior to either delivering the Trust Estate to a successor Trustee or making a complete distribution of all or a separate share of the Trust Estate, the Trustee shall prepare and deliver its accounting of the Trust or the applicable Trust share, as appropriate, to the appropriate beneficiaries. The Settlor and/or applicable beneficiaries may waive such requirements for such accounting.

(f) **Representation for Beneficiaries with Legal Disability.** If at any time a beneficiary who is a minor or who is not competent has the right to receive notice or information or the ability to exercise a certain right or power under the provisions of this Trust, then on behalf of such beneficiary such notice or information may be delivered to and such right or power may be exercised in the following order by a person who is (i) the conservator of the beneficiary's estate or, if none, (ii) such person's attorney-in-fact under a durable general power of attorney, or, if none, (iii) the parent of the beneficiary who is a descendant of the Settlor, or if no such parent is living and competent, (v) the other parent of the beneficiary, or, if none, (vi) the guardian of the person of the beneficiary. Provided, however, such representative shall be disqualified if there is a conflict of interest between the beneficiary and the representative.

ARTICLE 11 FUNDING AND QUALIFICATION OF MARITAL TRUST

The following provisions will apply with respect to the administration of the Marital Trust:

11.1 Qualifying Assets. Only assets that can qualify for an estate tax marital deduction are to be used in funding the Marital Trust.

11.2 Preference of Funding. If other assets are available to fund the Marital Trust, the Trustee should (but is not required to) use those assets first before any of the following assets:

- Property for which a tax credit is allowable for estate tax purposes;
- Any life insurance policy insuring my husband;
- Appreciated property received from my husband within one year before my death; or
- Shares of stock that qualify for redemption under IRC §303.

11.3 Tentative and Final Allocations to Marital Trust. The Trustee may tentatively allocate assets to the Marital Trust. The Trustee shall make final adjustments as necessary when my estate tax liability is finally determined.

11.4 Investment of Trust Assets. My husband may require the Trustee to invest the Marital Trust so that it is productive as a whole, as contemplated by the Treasury Regulations, despite any other provisions of this Trust Agreement.

11.5 Payment of Estate Taxes. If any portion of the Marital Trust is included in my husband's gross estate for federal estate tax purposes, unless my husband specifically directs to the contrary in his Last Will, the Trustee shall pay from that portion the amount certified by my husband's Personal Representative that state and federal estate taxes (including penalties and interest) for his estate are increased over the amount of those taxes computed as if that portion were not included in his gross estate (as provided in IRC §2207A). The Trustee may pay those

taxes directly or to the Personal Representative of my husband's estate, and the Trustee is to be held harmless from any liability for making payments in reliance on that certification.

**ARTICLE 12
ELECTION FOR PORTABILITY**

I do not intend to allow any of my unused Applicable Exclusion Amount to be available for use by my husband's estate as provided in Section 2010(c) of the Internal Revenue Code by virtue of the Deceased Spousal Unused Exclusion Amount election (the "DSUEA Election"). Therefore, if my husband survives me and my estate is required to file an estate tax return, I direct my Personal Representative NOT to make the DSUEA Election. If my estate is not required to file an estate tax return, my Personal Representative shall NOT file an estate tax return for my estate to make the DSUEA Election. If my estate is not probated, or if my Personal Representative is unable to follow the terms of this Article, the Trustee of this Trust Agreement shall substitute for my Personal Representative for this purpose and comply with this Article as if the Trustee were that Personal Representative (and, in that case, reference in this Article to "Personal Representative" will mean that Trustee).

**ARTICLE 13
SURVIVAL PROVISIONS**

If my husband and I die under circumstances in which there is insufficient evidence to determine the order of our deaths, I will be deemed to have survived my husband for all purposes, including the determination of ownership of all nonprobate assets (to the extent not otherwise prohibited by law). If any beneficiary (other than my husband) is required to survive me or another person to receive a distribution, and if the beneficiary does not survive me or that other person by 90 days, the beneficiary will be treated as if he or she died before me or that other person.

**ARTICLE 14
PROTECTION OF INTERESTS**

The interest of any beneficiary under this Trust Agreement, in both income or principal, may not be anticipated, alienated, or in any other manner assigned by the beneficiary and will not be subject to any legal process, bankruptcy proceedings, or the interference or control of the beneficiary's creditors or others.

**ARTICLE 15
RESTRICTED BEHAVIORS**

If the Trustee reasonably believes that a beneficiary of any trust:

- routinely or frequently uses or consumes any illegal substance so as to be physically or psychologically dependent upon that substance, or is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist in a current program of treatment supervised by such doctor or psychiatrist,

- is unable to refrain from gambling or other addictive behavior (whether or not legal) to the point that, in the Trustee's judgment, the beneficiary's financial well-being is endangered, or
- is incarcerated involuntarily (whether in a prison, "halfway" house, hospital, clinic, other treatment facility, or house arrest) for any reason, whether criminal or civil in nature,

and if the Trustee reasonably believes that as a result the beneficiary is unable to care for himself or herself, or is unable to manage his or her financial affairs, all mandatory distributions (including distributions upon termination of the trust) to the beneficiary and all of the beneficiary's rights to participate in decisions concerning the removal and appointment of Trustees will be suspended. In that event, the following provisions will apply:

15.1 Suspension for Substance Abuse or Addictive Behavior. If mandatory distributions are suspended because of known or suspected substance abuse, gambling abuse, or other addictive behavior as described above, the Trustee will request the beneficiary to submit to one or more examinations by qualified experts chosen by the Trustee.

(a) In the case of suspected substance abuse, the Trustee will request the beneficiary to submit to examinations (including laboratory tests of tissue and bodily fluids) determined to be appropriate by a board certified medical doctor chosen by the Trustee, and to consent to full disclosure to the Trustee of the results of the examination. If the examination indicates current or recent use of a drug or substance as described above (in the opinion of the examining doctor), the Trustee will request the beneficiary to consult with a medical doctor, psychiatrist, psychologist, or other licensed and qualified counselor chosen by the Trustee with expertise in substance abuse, and to consent to disclosure to the Trustee of the therapeutic recommendations for rehabilitation of the beneficiary.

(b) In the case of suspected gambling abuse or other addictive behavior, the Trustee will request the beneficiary to submit to examination by a psychiatrist, psychologist, or other licensed and qualified counselor with expertise in addictive behavior, and to consent to disclosure to the Trustee of the diagnostic results and if applicable, any therapeutic recommendations.

(c) The Trustee must follow procedures to maintain strict confidentiality of all information disclosed to it, and it may not disclose that information to anyone other than the beneficiary except as provided in Section 15.6 below.

(d) If the beneficiary fails to comply with any such request by the Trustee within 60 days, the Trustee may suspend all distributions to or for the benefit of the beneficiary.

15.2 Suspension for Incarceration. If a beneficiary is incarcerated, as described above, distributions will be suspended upon admittance to the holding facility. If a beneficiary is released on bond or on personal recognizance pending hearing, appeal, or sentencing, distributions may continue in the Trustee's discretion until the beneficiary is incarcerated.

15.3 Administer as a Support Trust. Unless all distributions are suspended as provided in Section 15.1(d), while mandatory distributions are suspended for any of the reasons set forth above, the beneficiary's separate trust will be administered to provide for his or her support and health.

15.4 Resumption of Mandatory Distributions. Any rights to mandatory distributions, withdrawal rights, and rights to participate in decisions concerning the removal and appointment of Trustee will resume:

- in the case of use or consumption of an illegal substance, when examinations indicate no continued use for a period of twelve months, and in all cases (whether the use or consumption is legal or illegal), when the Trustee in its discretion determines that the beneficiary is able to care for himself or herself and to manage his or her financial affairs;
- in the case of gambling abuse or other addictive behavior, when the consulting expert chosen by the Trustee indicates a belief that the beneficiary's financial well-being is no longer endangered as a result of the beneficiary's behavior, and when the Trustee in its discretion determines that the beneficiary is able to care for himself or herself and to manage his or her financial affairs;
- in the case of incarceration, when the beneficiary is no longer incarcerated.

When mandatory distributions to the beneficiary are resumed, the remaining balance, if any, of any mandatory distributions that were suspended will be distributed to the beneficiary at that time, but the beneficiary may exercise any withdrawal rights that were suspended only if they are still exercisable under the other terms of this Trust. If a beneficiary dies before distribution or withdrawal of the suspended amounts or assets, the Trustee will distribute the balance of the suspended amounts or assets to the persons who would be the alternate beneficiaries of those amounts or assets as otherwise provided in this Trust.

15.5 Exoneration and Indemnification. No Trustee (nor any doctor, psychiatrist, psychologist, or other counselor or consultant chosen by the Trustee) will be responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to monitor a beneficiary's behavior or to inquire whether any of the conditions identified in this Article exist. I relieve the Trustee (and each doctor, psychiatrist, psychologist, or other counselor or consultant chosen by the Trustee) from all liability and direct that each of them be indemnified from the assets of the beneficiary's trust for any damages, attorney's fees, expenses, and other costs for exercising their judgment and authority under this clause, including any failure to request a beneficiary to submit to examination, and including a decision to distribute suspended amounts to a beneficiary.

15.6 Disclosure of Results. The Trustee shall maintain the confidentiality of testing results and other information unless the beneficiary consents to release or unless disclosure is required by law, regulation, or judicial order; unless the Trustee is prohibited under that authority from notifying the affected beneficiary, the Trustee must give notice of any legally required disclosure to the affected beneficiary no later than 10 business days after the disclosure is made.

The Trustee has no duty to either support or oppose any actions taken by law enforcement or other governmental agencies seeking to compel the disclosure of a beneficiary's test results and other information obtained under this Article, but the Trustee in its discretion may support or oppose such actions and may expend funds from the beneficiary's trust to do so, including the appeal of any subpoenas, court orders, or other legally binding instruments compelling disclosure.

15.7 Tax Savings Provision. Despite the provisions of this Article, the Trustee cannot suspend any mandatory distributions that are required for that trust to become or remain a Qualified Subchapter S Trust (unless the Trustee elects for the trust to be an Electing Small Business Trust), or to qualify for any federal transfer tax exemption, deduction, or exclusion allowable with respect to that trust.

ARTICLE 16 GENERATION-SKIPPING TAX PROVISIONS

I intend for this Trust Agreement to be interpreted and administered in a way that will minimize generation-skipping transfer ("GST") taxes, but in a manner consistent with directions for division and distribution of the Trust Estate. This is to be achieved by the proper allocation of my GST exemption and, to the greatest extent possible, the creation of trusts having an inclusion ratio of either zero or one. All other provisions of this Trust Agreement are subject to this Article.

16.1 Definitions. The terms used in this Article have the meaning given to them in Chapter 13 of the Internal Revenue Code. Other defined terms are:

(a) **Exempt Trust.** "Exempt trust" or "exempt property" means a trust (or trust equivalent) or property that has a GST inclusion ratio of zero.

(b) **Nonexempt Trust.** "Nonexempt trust" or "nonexempt property" means a trust (or trust equivalent) or property that has a GST inclusion ratio greater than zero.

(c) **Unused GST Exemption.** "My unused GST exemption" means whatever remains of my GST exemption when I die, after allocating exemption to transfers made during my lifetime (whether the allocation is made by me on a tax return or is made by the operation of law), and to all direct skip transfers occurring by reason of my death that do not qualify for any other exemption or exclusion from the GST tax. If a gift tax return is due after my death (including any extensions granted), I will be deemed to have allocated an amount of my GST exemption to the full extent of any direct skip transfer required to be reported on that gift tax return that does not qualify for any other exemption or exclusion from the GST tax.

16.2 Division Into Separate Trusts. If the value (for purposes of allocating GST exemption) of any trust under this Trust Agreement exceeds the amount of GST exemption to be allocated to it, the Trustee shall divide that trust into exempt and nonexempt trusts. The exempt trust will consist of a fractional share of the trust assets. The numerator of the fraction for the exempt trust will be the amount of GST exemption to be allocated to the trust, and the denominator will be the federal estate tax value of the property held in the trust. The nonexempt trust will consist of the remaining fraction of the trust assets. The exempt and nonexempt trusts

will be administered as provided under the terms that govern the trust that was divided. The Trustee may make different decisions with respect to the trusts concerning tax elections, the exercise of the Trustee's discretionary powers and authority (including decisions whether to make discretionary distributions), investment decisions, and any other actions consistent with treatment as separate trusts.

16.3 Trust Additions. Exempt or nonexempt property can be added only to a trust of the same character. If because of this rule a trust cannot receive property, the property will be held as a separate exempt or nonexempt trust by the Trustee of the trust designated to receive the property and administered and distributed as provided for that trust.

16.4 Multiple Transferors. If portions of a single trust are attributable to transfers from different transferors, the Trustee shall maintain sufficient records to preserve the treatment of those portions as separate trusts under IRC §2654(b)(1).

16.5 Exemption Allocation. I direct my Personal Representative and the Trustee to allocate my GST exemption so as to maximize the benefit of that exemption. I anticipate that, absent unusual circumstances, my exemption would be best allocated first to direct skips then to other transfers as the Trustee deems appropriate, but I do not restrict my Personal Representative and the Trustee from allocating my GST exemption in a different manner if more beneficial.

16.6 Appropriate Interest. If GST exemption is allocated to a residuary gift and a pecuniary gift is not entitled to income or interest under state law, the Trustee must allocate to that pecuniary gift a pro rata share of the income of the Trust Estate between my date of death and the date of payment, unless that pecuniary gift is paid in full (or irrevocably segregated and held in a separate account pending distribution) within 15 months after my death.

16.7 General Power of Appointment. The following rules apply if another provision of this Trust Agreement gives a beneficiary a general power of appointment over a nonexempt trust exercisable upon death, but only if that other provision specifically refers to this Article. If GST tax would be owed upon a distribution of trust assets to the takers in default if the beneficiary did not exercise the power (whether or not the beneficiary actually exercises the power), the beneficiary also can appoint the assets of the trust to creditors of the beneficiary's estate, subject to the following limit. This additional power of appointment is limited to the minimum amount that will cause the least aggregate amount of transfer taxes to be incurred by reason of the beneficiary's death (whether as estate tax in the beneficiary's estate or as GST tax), taking into account all applicable credits, deductions, exclusions, and exemptions.

16.8 Distributions From Multiple Trusts. If a trust has been divided into exempt and nonexempt trusts, the following rules will govern how distributions are made as between those trusts.

(a) **Marital Trust.** Discretionary distributions to my husband are to be made first from the nonexempt Marital Trust that was elected to qualify for the marital deduction until it is exhausted. Those distributions are to be made next from the nonexempt Marital Trust that was not elected to qualify for the marital deduction, or from the exempt Marital Trust that was elected to qualify for the marital deduction, as the Trustee in its discretion deems appropriate.

Thereafter, those distributions are to be made from the exempt Marital Trust that was not elected to qualify for the marital deduction.

(b) **Nonexempt Trust Primary.** If the Trustee has discretion to make a distribution from more than one trust to or for the benefit of the same person, the distribution is to be made from the nonexempt trust unless it would be a taxable distribution to that person, in which case the distribution is to be made from the exempt trust, unless compelling circumstances require otherwise.

(c) **Allocating Charges.** If a trust charged with the payment of taxes or expenses is divided into exempt and nonexempt trusts, those taxes and expenses are to be paid first from the nonexempt trust, and from the exempt trust only after the nonexempt trust has been exhausted.

16.9 Paying GST Tax. If a federal or state GST tax is imposed with respect to any transfer under this Trust Agreement, the amount of the tax will be charged to the property constituting the transfer as provided in IRC §2603(b).

ARTICLE 17 PAYMENTS OF OBLIGATIONS, EXPENSES, AND TAXES

The Trustee shall pay all of my obligations, expenses, and taxes as follows:

17.1 Obligations. I direct that my legally enforceable obligations (except those secured by mortgages on real estate) be paid in the order and manner prescribed by law.

17.2 Expenses. The term "expenses" includes all estate transmission or management expenses of my probate estate, all administrative expenses of this Trust, and all costs of my last illness and funeral. I direct that all expenses be paid first from the nonmarital gift and, to the extent insufficient, then from that portion of the Marital Trust that does not qualify for the federal estate tax marital deduction. If any expenses remain, the balance is to be paid from the remaining portion of the Marital Trust other than management expenses attributable to property passing to the Marital Trust. Payments may be made from and charged to either income or principal, at the discretion of the Trustee.

17.3 Taxes. The term "estate taxes" means all state and federal estate, inheritance, or transfer taxes payable by reason of my death (including the generation-skipping transfer tax on any direct skip created by the express terms of this Trust Agreement rather than by disclaimer), plus any related interest and penalties attributable to these taxes, but excluding any other generation-skipping taxes.

(a) **Source of Taxes.** I direct that all of my estate taxes be paid and apportioned as provided by law, except as follows:

(1) **Deductibility.** No estate taxes are to be apportioned to any interest to the extent it is homestead property or to any other interest if that would diminish the aggregate estate tax deductions available.

(2) **Credits.** If any credit under IRC §§2012 or 2014 is attributable to property in my gross estate, that credit is to be applied against the tax apportioned to the property as to which the credit is attributable.

(b) **Reimbursement.** I waive all rights of recovery under IRC §§2206, 2207, and 2207B. I direct the Trustee to exercise all rights of recovery of estate taxes granted by IRC §2207A as in effect at my death, to the extent that the Trustee determines that exercising those rights is economically justifiable.

(c) **Interest on Tax.** All taxes apportioned under this Article also are to include interest from 30 days after my Personal Representative or the Trustee makes a written demand for payment upon the recipient of the property against which tax has been apportioned until the tax is paid, provided that the federal estate tax return has already been filed. This interest is to be calculated at the same rate and in the same manner as for the underpayment of taxes under IRC §6621. For the purposes of such demand and the payment by the recipient, the amount of the estate taxes shown on the federal and state estate tax return initially will be deemed to be correct, subject to appropriate adjustment when the estate taxes are finally determined and paid. If the amount so apportioned (together with any interest) is not paid within three months of the final determination of tax, it will become an offset against any amount otherwise due to the beneficiary under this Trust Agreement. To the extent that the amount so apportioned (together with the interest) is fully offset by the amounts due the beneficiary, interest is to cease at the end of the three month period. Alternatively, the beneficiary may notify my Personal Representative or the Trustee of his or her desire to offset a portion (or all) of that beneficiary's interest under this Trust Agreement to pay those taxes. In that event, interest will not be charged against that beneficiary for the amount offset.

(d) **Method of Payment.** The Trustee may rely on a written statement signed by my Personal Representative as to the amount of those expenses and taxes. The Trustee may make payment directly or to my Personal Representative, as my Personal Representative requests. The Trustee will be held harmless from any liability in making payments as so directed.

(e) **Excluded Property.** If any funds become available to the trustees of any trust, including without limit, life insurance, qualified employee benefit plans, individual retirement accounts, or other property from sources specified in IRC §2039, and those funds are not otherwise included in my gross estate for federal estate tax purposes, then none of those funds may be used to pay, directly or indirectly, any debts, taxes, or expenses of mine or my estate.

ARTICLE 18 FIDUCIARY POWERS

I grant to the Trustee full power to deal freely with any property in the Trust. The Trustee may exercise these powers independently and without the approval of any court. No person dealing with the Trustee need inquire into the propriety of any of its actions or into the application of any funds or assets. The Trustee however, shall exercise all powers in a fiduciary capacity in good faith, as a prudent person would using reasonable care, skill, and caution, for

the best interest of the beneficiaries of any trust created in this Trust Agreement. Without limiting the generality of the foregoing, the Trustee is given the following discretionary powers in addition to any other powers conferred by law:

18.1 Type of Assets. Except as otherwise provided to the contrary, to hold funds uninvested for such periods as the Trustee deems prudent, and to invest in any assets the Trustee deems advisable even though they are not technically recognized or specifically listed in so-called "legal lists," without responsibility for depreciation or loss on account of those investments, or because those investments are non-productive, as long as the Trustee acts in good faith.

18.2 Original Assets. Except as otherwise provided to the contrary, to collect and retain the original assets it receives for as long as it deems best, and to dispose of those assets when it deems advisable, even though such assets, because of their character or lack of diversification, would otherwise be considered improper investments for the Trustee.

18.3 Tangible Personal Property. To receive and hold tangible personal property; to pay or refrain from paying storage and insurance charges for such property; and to permit any beneficiaries to use such property without either the Trustee or beneficiaries incurring any liability for wear, tear, and obsolescence of the property.

18.4 Financial Accounts. To deposit trust money in one or more accounts in regulated financial service institutions, including but not limited to banks, savings institutions, and brokerage houses, and to draw checks, drafts, or other forms of withdrawal, including electronic transfers, from those accounts.

18.5 Specific Securities. To invest in assets, securities, or interests in securities of any nature, whether obtained in domestic or foreign markets, including (without limit) precious metals, and currencies; to invest in mutual or investment funds, including funds for which the Trustee or any affiliate performs services for additional fees, whether as manager, custodian, transfer agent, investment advisor or otherwise, or in securities distributed, underwritten, or issued by the Trustee, its affiliates, or syndicates of which it is a member; to trade on credit or margin accounts (whether secured or unsecured); and to pledge assets of the Trust Estate for that purpose.

18.6 Property Transactions. To buy, sell, pledge, exchange, or lease any real or personal property, publicly or privately, for cash or credit, without court approval and upon the terms and conditions that the Trustee deems advisable; to execute deeds, leases, contracts, bills of sale, notes, mortgages, security instruments, and other written instruments; to grant, acquire, or exercise options; to abandon or dispose of any real or personal property in the Trust which has little or no monetary or useful value, after notifying the beneficiaries or their legal representatives; to improve, repair, insure, subdivide and vacate any property; to erect, alter or demolish buildings; to adjust boundaries; and to impose easements, including conservation easements, restrictions, and covenants as the Trustee sees fit. An instrument described in this section will be valid and binding for its full term even if it extends beyond the full duration of the Trust.

18.7 Borrow Money. To borrow money from any source (including the Trustee in its nonfiduciary capacity), to guarantee indebtedness, and to secure the loan or guaranty by mortgage or other security interest.

18.8 Maintain Assets. To expend whatever funds it deems proper for the preservation, maintenance, or improvement of assets. The Trustee in its discretion may elect any options or settlements or exercise any rights under all insurance policies that it holds. However, no fiduciary who is the insured of any insurance policy held in the Trust may exercise any rights or have any incidents of ownership with respect to the policy, including the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke any assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy. All such power is to be exercised solely by the remaining Trustee, if any, or if none, by a special fiduciary appointed for that purpose by a court having jurisdiction.

18.9 Digital Assets and Accounts. As provided in and in furtherance of the South Carolina Uniform Fiduciary Access to Digital Assets Act ("SCUFADAA"), to access and control communications intended for me, and communicate on my behalf, whether by mail, electronic transmission, telephone, or other means; to access and control all of my accounts involving web-based communications or storage and web-hosted media, including but not limited to emails, messages, blogs, subscriptions, pictures, videos, e-books, audiobooks, memberships in organizations or commercial enterprises, and all forms of social media, whether or not those require a user name and password for access, even to the extent of compelling the provider to reset my information to data of my Trustee's choosing, all in keeping with the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986, and SCUFADAA, as those may be amended; and to hold, control, and have access to and the use of any digital asset (as defined in SCUFADAA) held by any kind of computing or digital storage device or service.

18.10 Insurance. To obtain property, casualty, liability or any other insurance for the Trust, including insurance for the Trustee and its agents against damage or liability arising from administration of the Trust.

18.11 Advisors. To employ and compensate attorneys, accountants, advisors, financial consultants, managers, agents, and assistants (including any individual or entity who provides investment advisory or management services, or who furnishes professional assistance in making investments for the Trust) without liability for any act of those persons, if they are selected and retained with reasonable care. Fees may be paid from the Trust Estate even if the services were rendered in connection with ancillary proceedings.

18.12 Indirect Distributions. To make distributions, whether of principal or income, to any person under age 21 or to any person the Trustee reasonably believes is disabled according to the terms of this Trust Agreement by (i) making distributions directly to that person whether or not that person has a guardian; to the parent, guardian, or spouse of that person; to a custodial account established by the Trustee or others for that person under an applicable Uniform Gift to Minors Act or Uniform Transfers to Minors Act; to any adult who resides in the same household with that person or who is otherwise responsible for the care and well-being of that person; (ii) managing the amount as a separate fund on that person's behalf, subject to his or her continuing

right to withdraw that amount; or (iii) applying any distribution for the benefit of that person in any manner the Trustee deems proper. The receipt of the person to whom payment is made will constitute full discharge of the Trustee with respect to that payment.

18.13 Non-Pro Rata Distribution. To make any division or distribution in money or in kind, or both, without allocating the same kind of property to all shares or distributees, and without regard to the income tax basis of the property. Any division will be binding and conclusive on all parties.

18.14 Nominee. Except as prohibited by law, to hold any assets in the name of a nominee without disclosing the fiduciary relationship; to hold the property unregistered, without affecting its liability; and to hold securities endorsed in blank, in street certificates, at a depository trust company, or in a book entry system.

18.15 Custodian. To employ a custodian or agent ("the Custodian") located anywhere within the United States, at the discretion of the Trustee but at the expense of the Trust, whether or not such Custodian is an affiliate of the Trustee or any person rendering services to the Trust; to register securities in the name of the Custodian or a nominee thereof without designation of fiduciary capacity; and to appoint the Custodian to perform such other ministerial functions as the Trustee may direct. While such securities are in the custody of the Custodian, the Trustee will be under no obligation to inspect or verify such securities nor will the Trustee be responsible for any loss by the Custodian.

18.16 Administer Claims. To contest, compromise, arbitrate, or otherwise adjust claims in favor of or against the Trust, including paying those claims in full; to agree to any rescission or modification of any contract or agreement; and to refrain from instituting any suit or action unless indemnified for reasonable costs and expenses.

18.17 Corporate Rights. To vote and exercise any option, right, or privilege to purchase or to convert bonds, notes, stock (including shares or fractional shares of stock of any Corporate Trustee), securities, or other property; to borrow money for the purpose of exercising any such option, right, or privilege; to delegate those rights to an agent; to enter into voting trusts and other agreements or subscriptions; to participate in any type of liquidation or reorganization of any enterprise; and to write and sell covered call options, puts, calls, straddles, or other methods of buying or selling securities, as well as all related transactions.

18.18 Business Interests. To hold interests in sole proprietorships, general or limited partnerships, joint ventures, business trusts, land trusts, limited liability companies, and other domestic and foreign forms of organizations; and to exercise all rights in connection with such interests as the Trustee deems appropriate, including any powers applicable to a non-admitted transferee of any such interest.

18.19 Self-Dealing. To exercise all its powers even though it may also be acting individually or on behalf of any other person or entity interested in the same matters. The Trustee, however, shall exercise these powers at all times in a fiduciary capacity, primarily in the interest of the beneficiaries of the Trust. Despite any other provision of this Trust Agreement, no Trustee may participate in the decision to make a discretionary distribution that would discharge

a legal support obligation of that Trustee. No Trustee who has made a disclaimer, either individually or as a Trustee, may exercise any discretion in determining the recipient of the disclaimed property, except pursuant to an ascertainable standard. All power to make such unlimited distributions, or to determine recipients of disclaimed property, will be exercised solely by the remaining Trustees, if any, or if there are no other Trustees then serving, by the person or persons named to serve as the next successor Trustee, or if there are none, by a special Trustee appointed for that purpose by a court having jurisdiction.

18.20 Elections. If no Personal Representative is serving for my estate, and to the extent permitted by law, to perform in a fiduciary capacity any act and make any and all decisions or elections under state law or the Internal Revenue Code on behalf of me or my estate, including but not limited to, joining in the filing of income and gift tax returns with my husband, claiming the whole or any part of the expenses of administration as income tax deductions for my estate or this Trust, electing the marital deduction in whole or in part, making allocations of my exemption from the federal generation-skipping transfer tax, adopting alternate values for estate tax purposes, and selecting taxable years and dates of distribution. The Trustee is specifically excused from making equitable adjustments among beneficiaries because of any election.

18.21 Qualified Property. To manage any qualified real property or qualified family-owned business interests so as to avoid imposition of the additional estate tax under IRC §§2032A or 2057, and to furnish security for the payment of any additional estate taxes imposed under those sections.

18.22 Expenses. To pay all expenses of administration for the Trust Estate, including all taxes, assessments, compensation of the Trustee and its employees and agents, and reimbursements for expenses advanced (with interest as appropriate). An Independent Trustee may determine how expenses of administration and receipts are to be apportioned between principal and income.

18.23 Terminate Small Trusts. After my death, to exercise its discretion to refrain from funding or to terminate any trust whenever the value of the principal of that trust (or if a trust has been divided into exempt and nonexempt trusts, the principal value of those combined trusts) would be or is too small to administer economically, and to distribute the remaining principal and all accumulated income of the trust to include the types of distributions described in Section 18.12 to the beneficiaries then entitled to receive income in proportion to their shares of that income (or on a per capita basis if their shares are not fixed). The Trustee shall exercise this power to terminate in its discretion as it deems prudent for the best interest of the permissible income beneficiaries at that time. This power cannot be exercised by my husband or any beneficiary, either alone or in conjunction with any other Trustee, but must be exercised solely by the other Trustee, or if none, by a special Trustee appointed for that purpose by a court having jurisdiction.

18.24 Allocations to Income and Principal. The Trustees may allocate to income and principal pursuant to South Carolina Uniform Principal and Income Act, South Carolina Code of Laws §62-7-901 through §62-7-932.

18.25 Use of Income. Except as otherwise provided in this Trust Agreement, and in addition to all other available sources, to exercise its discretion in the use of income from the assets of the Trust to satisfy the liabilities described in this Trust Agreement, without accountability to any beneficiary.

18.26 Sever or Join Trusts. To sever any trust on a fractional basis into two or more separate trusts, and to segregate by allocation to a separate account or trust a specific amount from, a portion of, or a specific asset included in any trust. The Trustee may consolidate two or more trusts (including trusts created by different transferors) having substantially the same beneficial terms and conditions into a single trust. The Trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering any separate account or trust, in making applicable tax elections, and in making distributions. A trust created by severance or consolidation will be treated as a separate trust for all purposes from the date on which the severance or consolidation is effective (which may be before the exercise of this power), and will be held on the same beneficial terms and conditions as those before the severance or consolidation. Income earned on a consolidated or severed amount, portion, or specific asset after the consolidation or severance is effective will pass with that amount, portion, or specific asset.

18.27 Consolidated Funds. Unless inconsistent with other provisions of this Trust Agreement, to hold two or more trusts or other funds in one or more consolidated funds, in which the separate trusts or funds have undivided interests, except that an accounting must be rendered to each trust showing its undivided interests in those funds.

18.28 Valuations. In making distributions or allocations under the terms of this Trust Agreement to be valued as of a particular date, to use asset valuations obtained for a date reasonably close to that particular date (such as a quarterly closing date before or after that date) if, in the Trustee's judgment, obtaining appraisals or other determinations of value on that date would result in unnecessary expense, and if in the Trustee's judgment, the fair market value as determined is substantially the same as on that actual date. This paragraph will not apply if valuation on a specific date is required to preserve a qualification for a tax benefit, including any deduction, credit, or most favorable allocation of an exemption.

18.29 Incorporation. To incorporate any business or venture, and to continue any unincorporated business that the Trustee determines to be not advisable to incorporate.

18.30 Delegation. To delegate periodically among themselves the authority to perform any act of administration of any trust.

18.31 Loans; Advances. To make loans to anyone under commercially reasonable terms, and to make cash advances or loans to beneficiaries, with or without security. The Trustee may retain a lien on future distributions to a beneficiary to repay those loans.

18.32 Election of Benefits. To select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under such plan, annuity, or insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds.

18.33 Investment Manager. To employ any investment management service, financial institution, or similar organization to advise the Trustee and to handle all investments of the Trust and to render all accountings of funds held on its behalf under custodial, agency, or other agreements. If the Trustee is an individual, these costs may be paid as an expense of administration in addition to fees and commissions.

18.34 Depreciation. To deduct from all receipts attributable to depreciable property a reasonable allowance for depreciation, computed in accordance with generally accepted accounting principles consistently applied.

18.35 Disclaim Assets or Powers. To disclaim any assets otherwise passing or any fiduciary powers pertaining to any trust created hereunder, by execution of an instrument of disclaimer meeting the requirements of applicable law generally imposed upon individuals executing disclaimers. No notice to or consent of any beneficiary, other interested person, or any court is required for any such disclaimer, and the Trustee is to be held harmless for any decision to make or not make such a disclaimer. No disclaimer by the Trustee, whether as a fiduciary or as an individual, will cause that person to be treated as having predeceased me for purposes of serving as Trustee.

18.36 Related Parties. To enter into any transaction on behalf of the Trust despite the fact that another party to that transaction may be: (i) a business or trust controlled by the Trustee, or of which the Trustee, or any director, officer, or employee of the Corporate Trustee, is also a director, officer, or employee; (ii) an affiliate or business associate of any beneficiary or the Trustee; or (iii) a beneficiary or Trustee under this Trust Agreement acting individually, or any relative of such a party.

18.37 Additional Powers for Income-Producing Real Estate. In addition to the other powers set forth above or otherwise conferred by law, the Trustee has the following powers with respect to any income-producing real property which is or may become a part of the Trust Estate:

- To retain and operate the property for as long as it deems advisable;
- To control, direct, and manage the property, determining the manner and extent of its active participation in these operations, and to delegate all or any part of its supervisory power to other persons that it selects;
- To hire and discharge employees, fix their compensation, and define their duties;
- To invest funds in other land holdings and to use those funds for all improvements, operations, or other similar purposes;
- Except as otherwise provided with respect to mandatory income distributions, to retain any amount of the net earnings for working capital and other purposes that it deems advisable in conformity with sound and efficient management; and

- To purchase and sell machinery, equipment, and supplies of all kinds as needed for the operation and maintenance of the land holdings.

18.38 Winding Up. On termination of a trust, to exercise the powers appropriate to wind up the administration of that trust and distribute the remaining assets to the persons entitled to them, and to retain a reasonable reserve for the payment of debts, expenses, and taxes.

ARTICLE 19 ENVIRONMENTAL PROVISIONS

The following rules govern administration of the Trust with respect to assets that could cause the Trustee to incur liability for environmental contamination or hazardous wastes.

19.1 Vesting of Title. Title to the following types of assets will not vest in any Trustee (including a successor Trustee when it begins to serve) until the Trustee executes a written instrument accepting title to those assets:

- Real property or any interest of any nature in real property (including mortgages secured by real property), and
- Any interest in a partnership, limited liability company, or closely held corporation which owns real property or an interest in real property and in which the Trustee would have the ability to vote or otherwise participate in the management and control of the entity's operations.

If the Trustee refuses to accept title to an asset that has never been part of this Trust, title to that asset will revert to the transferor or pass to such other persons (other than the Trustee) as may be provided by applicable law. If a successor Trustee refuses to accept title to such an asset accepted by the prior Trustee, the prior Trustee (or his or her Personal Representative) will continue to hold title to and administer that asset until it is distributed, sold, or otherwise disposed of, or until other relief is granted by a court having jurisdiction over the Trust. Until it accepts title to such an asset, the Trustee will have no fiduciary duty with respect to that asset.

19.2 Audits. The Trustee may require environmental audits acceptable to it to be made at any time at the expense of the Trust.

19.3 Liability. The Trustee will not be liable to any beneficiary for any claims against or losses incurred by the Trust because of compliance with laws regulating environmental contamination or hazardous wastes, including reporting or abating contamination, cleaning up property, incurring expenses in connection with administrative or judicial proceedings, and establishing reserves for such payments, even if amounts expended exceed the value of the property. The Trustee may require indemnities or other arrangements satisfactory to it that will protect and hold it harmless from liability that might be incurred for environmental contamination or hazardous substances.

19.4 Other Laws. These provisions are in addition to other remedial powers and rights given to fiduciaries under applicable law.

ARTICLE 20 SAVINGS CLAUSES

20.1 Perpetuities Provision. Despite any contrary provisions of this Trust Agreement, the share of each beneficiary will vest (in the beneficiary or his or her estate) immediately prior to the expiration of 90 years after its creation.

20.2 Marital Savings Clause. It is expressly provided that the grant of rights, powers, privileges and authority to the Trustee in connection with the imposition of duties upon the Trustee by any provision of this Trust Agreement or any statute relating thereto shall not be effective if and to the extent that the same, if effective, would disqualify the marital deduction as established in the Marital Trust created hereunder. All provisions of this Trust Agreement are to be interpreted and limited accordingly.

20.3 Withdrawal Power for Marital Property. Despite the provisions of Article 3, if my personal rights over this Trust have been suspended as provided in that Article, and transfers are made to the Trust that would qualify for a federal estate or gift tax marital deduction but for that suspension, my power of withdrawal will remain in effect as to those transferred assets.

20.4 Productive Property. If any trust is otherwise eligible to qualify for the federal or any state marital deduction, or as an elective share trust but would not qualify because my husband does not have the right to require the Trustee to make the trust property productive or to convert it to income producing property, I specifically give my husband that right.

ARTICLE 21 QUALIFIED PLAN PROCEEDS

If any funds from qualified employee benefit plans, individual retirement accounts, or other property from sources specified in Section 2039 of the Internal Revenue Code (collectively referred to as the "Accounts") become available to the Trustee of any trust created under this Trust, the provisions of this Article will apply to these trusts and the Accounts paid to them.

21.1 Designated Beneficiaries. I wish to allow the maximum deferral of distributions from the Accounts. Therefore, unless a contrary intent appears in the appropriate beneficiary designation form, I intend and direct that any trust to which one or more of the Accounts are payable qualify as a "see-through" trust and its beneficiaries be treated as "designated beneficiaries" within the meaning of the minimum distribution rules under Section 401(a)(9) of the Internal Revenue Code and applicable regulations. No portion of the Accounts will be payable to an entity, such as my estate or an Exempt Organization, unless there are no qualified recipients eligible to receive those funds.

21.2 Restrictions on Accounts. No portion of the Accounts payable to a trust may be used, paid, or appointed in such a way as to disqualify the trust beneficiaries as designated beneficiaries. By way of example and not in limitation:

(a) No portion of the Accounts may be used to pay, directly or indirectly, any debts or expenses of mine or of my estate, including any share of estate taxes payable from this Trust or chargeable to my estate.

(b) No portion of the Accounts may be used to satisfy a gift to a beneficiary other than a qualified recipient.

(c) Upon the death of the beneficiary whose measuring life was used for calculating minimum required distributions after my death, further payments from the Accounts (including payments pursuant to the exercise of a power of appointment) may be made only to qualified recipients who are younger than that beneficiary, despite any other provision of this Trust. For example, if my husband is the measuring life for distributions after my death, at his death payments may not be made to anyone older than my husband (such as a sibling or parent of mine) unless there are no younger qualified recipients (such as a descendant of mine). For purposes of the distribution of any portion of the Accounts as specified under this Trust, any successor beneficiary who is older than the measuring life beneficiary will be deemed to have predeceased the measuring life beneficiary.

21.3 Notification by Trustee. If I have not provided a copy of this Trust, including relevant amendments, to any custodian of an Account, the Trustee shall provide the information required by the Treasury Regulations to allow a trust to qualify as described above, within the time frame specified in the Regulations.

21.4 Qualified Recipients. The term "qualified recipient" means an individual or a trust that is treated as a see-through (or conduit) trust so that its beneficiaries are recognized as designated beneficiaries under the Treasury Regulations. For purposes of determining the age of a qualified recipient, a see-through trust will be deemed to have the same age as its oldest beneficiary (excluding succeeding beneficiaries as specified in Treasury Regulations §1.401(a)(9)).

21.5 Separate Trust. For ease of administration, the Trustee may hold payments to a trust designated (or allowed) to receive distributions from the Accounts as a separate trust, to be administered under the same terms as the larger trust entitled to those payments, subject to the special terms of this Article.

ARTICLE 22 ADMINISTRATION AND CONSTRUCTION

22.1 Separate Trusts. This Trust may call for the creation of separate trusts under one or more gifts, such as trusts for separate beneficiaries or exempt and nonexempt trusts for marital or generation-skipping purposes. If so, those trusts are to arise as of the event creating them, e.g., my death or the death of another person, even if those trusts are not immediately funded or their shares not exactly determined, so as to be considered separate trusts as of that event under all provisions of the Internal Revenue Code.

22.2 Rules for Distributions. In making distributions to beneficiaries under this Trust Agreement, the Trustee must use the following criteria.

(a) **Other Resources.** Whenever the Trustee has the authority to decide how much to distribute to or for the benefit of a beneficiary, the Trustee should make decisions taking into account any information readily available to it about the beneficiary's other available income and resources (including any obligations owed to him or her by any person that are reasonably

able to be discharged). The Trustee may rely on financial statements or tax returns from the beneficiary. The Trustee can make payments directly to a beneficiary or to other persons for the beneficiary's benefit, but it does not have to make payments to a court appointed guardian.

(b) Trustee's Decision. Absent clear and convincing evidence of bad faith, the Trustee's decisions as to amounts to be distributed will be final.

(c) Standard of Living. Distributions to a beneficiary for health, education, support, or maintenance are to be based on his or her standard of living, determined as of the date of the distribution.

(d) Unequal Distributions. For any trusts having multiple beneficiaries, distributions may be unequal among them due to differences in their resources, age, health, needs, educational inclinations, and talents. The Trustee may make unequal distributions to or for those beneficiaries without making equalizing adjustments among them, unless specifically provided to the contrary in this Trust Agreement.

22.3 Funding Gifts. The following rules will apply to funding gifts under this Trust Agreement.

(a) Pecuniary Gifts. All pecuniary gifts under this Trust Agreement that are paid by an in-kind distribution of assets must use values having an aggregate fair market value at the date or dates of distribution equal to the amount of this gift as finally determined for federal estate tax purposes.

(b) Fractional Gifts. Any allocation of a fractional share of assets need not be pro rata nor include any particular asset, and may be made subject to encumbrances, pre-existing or newly created, as the Trustee in its discretion determines.

(c) Adjustments. The Trustee shall select one or more dates of allocation or distribution for purposes of satisfying gifts and funding shares or trusts. The Trustee may make allocations before the final determination of federal estate tax, with those allocations being based upon the information then available to the Trustee, and may thereafter adjust properties among the shares or trusts if it is determined that the allocation should have been made differently.

22.4 Accumulated Income. Any income not distributed to the beneficiaries pursuant to either a mandatory direction or a discretionary power is to be incorporated into principal, at such intervals as the Trustee deems convenient.

22.5 Estate Tax on Included Property. Except as provided for the Marital Trust, if assets of any trust created under this Trust Agreement are included in a beneficiary's estate for federal estate tax purposes, the following will apply.

(a) Appointed Assets. If the beneficiary exercises a power of appointment over those assets, the Trustee is authorized to withhold from those assets the amount of estate taxes apportioned to them by applicable law, if the beneficiary does not make provisions for the payment of those taxes from other sources.

(b) **Other Assets.** If the beneficiary does not have or does not exercise a power of appointment over those assets, the Trustee will pay the estate taxes attributable to those assets. The estate taxes attributable to those assets will be the amount that the beneficiary's estate taxes are increased over the amount those taxes would have been if those assets had not been included in the beneficiary's gross estate.

(c) **Certification and Payment.** The Trustee may rely upon a written certification by the beneficiary's personal representative of the amount of the estate taxes, and may pay those taxes directly or to the personal representative of the beneficiary's estate. The Trustee will not be held liable for making payments as directed by the beneficiary's personal representative.

22.6 Transactions With Other Entities. The Trustee may buy assets from other estates or trusts, or make loans to them, so that funds will be available to pay claims, taxes, and expenses. The Trustee can make those purchases or loans even if it serves as the fiduciary of that estate or trust, and on whatever terms and conditions the Trustee thinks are appropriate, except that the terms of any transaction must be commercially reasonable.

22.7 Coordination With Guardian. If a separate trust is created for a beneficiary who is under a legal disability, I request the Trustee to consult with the guardian of the person for that beneficiary, or if none, the person having custody of the beneficiary, and to

- establish a reasonable budget to provide for the needs of the beneficiary;
- conduct a financial analysis of the beneficiary's needs and determine the amounts reasonably required for his or her care; and
- implement procedures for disbursing funds to the guardian for those purposes.

The Trustee is authorized to make distributions that provide some incidental or indirect benefit to the beneficiary's guardian, but only if the expenditure is for the primary benefit and needs of the beneficiary.

ARTICLE 23 APPLICABLE LAW; TRUST SITUS

All questions regarding the law to be applied or the appropriate situs of any trust will be governed by the terms of this Article as follows:

23.1 Validity; Construction. All matters involving the validity, interpretation, construction, and meaning (or effect) of the Trust created under this instrument are to be governed by South Carolina law, which is currently my domicile.

23.2 Principal Place of Administration. All matters involving the administration of the Trust created under this instrument are to be governed by South Carolina law, which is currently my domicile and the initial principal place of administration (the "situs") of those

trusts. A Trustee may change the principal place of administration of any trust as provided below.

23.3 Determining Situs. The Trustee will have a continuing duty to administer the Trust at a place appropriate to its purposes and its administration. In exercising this duty, the Trustee should consider the impact of a change to a different situs on the following: state and local taxes; compensation of fiduciaries; investment authority; duties, responsibilities, and liabilities of the Trustee; and any other factor appropriate to the new jurisdiction.

23.4 Transferring Situs. The Trustee, acting from time to time and without court approval, may transfer the situs of the Trust to any jurisdiction within the United States, provided it provides reasonable notice to and receives no objection from the beneficiaries who are entitled to receive the Trustee's reports. The Trustee may thereafter change the governing law of the Trust if the Trustee determines it to be in the best interest of the beneficiaries.

23.5 Substitute Trustee. If the Trustee is unable or unwilling to serve in the new trust situs, the Trustee may designate a substitute Trustee to act with respect to that property in the new situs; delegate to the substitute Trustee any or all of the powers given to the Trustee; elect to act as advisor to the substitute Trustee and receive reasonable compensation for that service; and remove any acting substitute Trustee and appoint another, or reappoint itself, if appropriate, at will.

ARTICLE 24 MISCELLANEOUS PROVISIONS

24.1 Definitions. As used in this Trust Agreement, the following terms have the meanings set forth below:

(a) Fiduciaries.

(1) **Independent Trustee** means a trustee of a particular trust, either individual or corporate, who is designated as an Independent Trustee in this Trust Agreement or is not me or a beneficiary. For purposes of this definition a beneficiary is a person who is a permissible distributee of income or principal, or someone with an interest in the trust in excess of five percent (5%) of its value, assuming a maximum exercise of discretion in his or her favor. Whenever this Trust Agreement requires an action be taken by, or in the discretion of, an Independent Trustee but no such Trustee is then serving, a court may appoint an Independent Trustee to serve as an additional Trustee whose sole function and duty will be to exercise the specified power.

(2) **Corporate Trustee** means a trustee that is a bank, trust company, or other entity authorized to serve as a trustee under the laws of the United States or any state thereof.

(b) Internal Revenue Code Terms.

(1) **IRC** or **Internal Revenue Code** means the federal Internal Revenue Code of 1986, as amended from time to time, or successor provisions of future federal internal revenue laws.

(2) **Gross estate** means gross estate for federal estate tax purposes as defined in IRC §2031.

(3) The terms **health, education, support, and maintenance** are intended to set forth an "ascertainable standard," as described in the Internal Revenue Code and its associated Regulations. To the extent not inconsistent with the foregoing, "health" means a beneficiary's physical and mental health, including but not limited to payments for examinations, surgical, dental, or other treatment, medication, counseling, hospitalization, and health insurance premiums; "education" means elementary, secondary, post-secondary, graduate, or professional schooling in an accredited institution, public or private, or attendance at other formal programs in furtherance of the beneficiary's spiritual, athletic, or artistic education, including but not limited to payments for tuition, books, fees, assessments, equipment, tutoring, transportation, and reasonable living expenses.

(4) **Exempt Organization** means an organization contributions to which are deductible under IRC §§2055 and 2522.

(c) **Other Terms.**

(1) **Residuary Trust Estate** means the Trust Estate (including assets added to the Trust by reason of my death) left after paying all pre-residuary gifts in this Trust Agreement and all expenses and charges (other than estate taxes).

(2) An individual who is the genetic child of parents who were not married to each other at his or her birth will be deemed not to be a **descendant** of his or her father unless the father (i) is married to that individual's mother at any time during the period starting at that individual's conception and ending at his or her birth, (ii) marries that individual's mother after that individual's birth, (iii) adopts the individual at any time, or (iv) acknowledges his paternity of the individual in a signed instrument filed with any court or governmental agency or delivered to any fiduciary during that father's lifetime. In all events, a person must have been born or be in gestation at his or her parent's death to be considered a descendant of that parent.

(3) Distributions that are to be made to a person's **descendants, per stirpes**, will be divided into equal shares, so that there will be one share for each living child (if any) of that person and one share for each deceased child who has then living descendants. The share of each deceased child will be further divided among his or her descendants on a per stirpes basis, by reapplying the preceding rule to that deceased child and his or her descendants as many times as necessary. Notwithstanding the above, the initial division will be made at the highest generation level for which that person has living descendants. For example, if a person has deceased children and living children at the time for distribution, the assets will be divided into equal shares at the child level and distributed per stirpes below that level. If the person has no living children at that time, however, that equal division will be made at the grandchild level (or lower, if appropriate), and distributed per stirpes below that level.

(4) **Disabled or under a disability** means (i) being under the legal age of majority, (ii) having been adjudicated to be incapacitated, (iii) having been incarcerated for more than thirty consecutive days, (iv) being unaccountably absent for more than thirty days or being detained under duress, or (v) being unable to manage properly personal or financial affairs because of a mental or physical impairment (whether temporary or permanent in nature). A written certificate executed by an individual's attending physician confirming that person's impairment will be sufficient evidence of disability under item (v) above, and all persons may rely conclusively on such a certificate.

(5) The words **will** and **shall** are used interchangeably in this Trust Agreement and mean, unless the context clearly indicates otherwise, that the Trustee must take the action indicated; as used in this Trust Agreement, the word **may** means that the Trustee has the discretionary authority to take the action but is not automatically required to do so.

24.2 Powers of Appointment. The following provisions relate to all powers of appointment created by me at any time and to any power exercisable by or under this Trust Agreement.

(a) A **general power of appointment** granted to a person is one that can be exercised in favor of any one or more of the following: that person or his or her estate, his or her creditors, or the creditors of his or her estate.

(b) A **special power of appointment** is any power that is not a general power; it may be exercisable in favor of a specified class or, if no class is specified, in favor of any person or entity (other than the appointees specified in (a) above.) A **limited special power of appointment** is one under which the person holding the power may restrict another person's interest in quality (e.g., change a disposition from outright to a beneficial interest in trust), but not in quantity.

(c) A **testamentary power of appointment** (either general or special) is exercisable upon the powerholder's death by his or her Last Will or by a revocable trust agreement established by that person, but only by specific reference to the instrument creating the power. A testamentary power of appointment may not be exercised in favor of the person possessing the power. Unless otherwise indicated, any power under this Trust Agreement may be exercised so as to create an interest held in trust.

(d) Unless otherwise limited, a power of appointment extends to all assets in a trust at the exercise of the power, even if added after the creation of the trust.

(e) In determining whether a person has exercised a testamentary power of appointment, the Trustee may rely upon an instrument admitted to probate in any jurisdiction as that person's Last Will, or upon any trust agreement certified to be valid and authentic by sworn statement of the trustee who is serving under that trust agreement. If the Trustee has not received written notice of such an instrument within six months after the powerholder's death, the Trustee may presume that the powerholder failed to exercise that power and will not be liable for acting in accordance with that presumption.

24.3 Right to Information. During my lifetime and while I am not disabled, the Trustee shall provide me with any information I request concerning actions taken by the Trustee and the operation of the Trust, including a full listing of its assets.

24.4 Notices. Any person entitled or required to give notice under this Trust Agreement shall exercise that power by a written instrument clearly setting forth the effective date of the action for which notice is being given. The instrument may be executed in counterparts. Notice of my exercise of any power under this Trust Agreement need be given only to the affected Trustees.

24.5 Certifications.

(a) **From Personal Representative.** For some purposes, the Trustee is authorized to rely on a certificate from my Personal Representative as to certain facts. That certificate must be in writing and witnessed by two persons, but need not be notarized. It is to be delivered to the Trustee in the same fashion as provided for other notices.

(b) **Facts.** A certificate signed and acknowledged by the Trustee stating any fact affecting the Trust Estate or the Trust Agreement will be conclusive evidence of such fact in favor of any transfer agent and any other person dealing in good faith with the Trustee. The Trustee may rely on a certificate signed and acknowledged by any beneficiary stating any fact concerning the Trust beneficiaries, including dates of birth, relationships, or marital status, unless an individual serving as Trustee has actual knowledge that the stated fact is false.

(c) **Copy.** Any person may rely on a copy of this instrument (in whole or in part) certified to be a true copy by me, or by any then serving Trustee, or by any person specifically named as a Trustee (or successor Trustee) even if not then serving.

24.6 Dispute Resolution. If there is a dispute or controversy of any nature involving the construction, meaning, or effect of this Trust or any trust created under it, or the disposition or administration of any such trust, then unless all parties in interest who are not incapacitated waive this section, I direct the disputing parties to agree on a manner of alternative dispute resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation. If any party rejects mediation or refuses to participate in good faith, I authorize the court having jurisdiction over the subject trust to award costs and attorney's fees from that party's beneficial share or from other amounts payable to that party (including amounts payable to that party as compensation for service as fiduciary) as in equitable actions.

24.8 Effect of Adoption. A legally adopted child (and any descendants of that child) will be regarded as a descendant of the adopting parent only if the petition for adoption was filed with the court before the child's eighteenth birthday, except that this limitation will not apply to any child adopted by me. If the legal relationship between a parent and child is terminated by a court while the parent is alive, that child and that child's descendants will not be regarded as descendants of that parent. If a parent dies and the legal relationship with that deceased parent's child had not been terminated before that parent's death, the deceased parent's child and that child's descendants will continue to be regarded as descendants of the deceased parent even if the child is later adopted by another person.

24.9 Infant in Gestation. For all purposes of this Trust Agreement, an infant in gestation who is later born alive will be deemed to be in being during the period of gestation for the purpose of qualifying the infant, after it is born, as a beneficiary of this Trust.

24.10 Gender and Number. Reference in this Trust Agreement to any gender includes either masculine or feminine, as appropriate, and reference to any number includes both singular and plural where the context permits or requires.

24.11 Headings. Use of descriptive titles for articles and paragraphs is for the purpose of convenience only and is not intended to restrict the application of those provisions.

24.12 Further Instruments. I agree to execute such further instruments as may be necessary to vest the Trustee with full legal title to the property transferred to this Trust.

24.13 Acknowledgments. Acknowledgments of this Trust Agreement and matters affecting the administration of the Trust may be given for purposes of recording such instruments, but the absence of an acknowledgment does not affect the validity of those instruments.

24.14 Binding Effect. This Trust Agreement extends to and is binding upon my Personal Representative, successors, and assigns, and upon the Trustee.

IN WITNESS WHEREOF, I, LUCILLE D. BALL, as Settlor and as Trustee, have on the date first written above, at Columbia, South Carolina, signed my name at the end of this instrument and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my amended and restated Revocable Trust and that I sign it willingly, and that I sign as my free and voluntary act for the purpose therein expressed and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

SETTLOR and TRUSTEE

LUCILLE D. BALL

Witnesses:

Catherine H. Kennedy

Witness 2

Town & State

Town & State

Schedule A
Assets of Trust

All assets presently contained in the McGillicuddy Trust

My tangible personal property

Funds in my checking account #7896 with Bank of America

Funds in my savings account #7897 with Bank of America

Assets contained in my investment account #428-5612 with Merrill Lynch

SETTLOR and TRUSTEE

LUCILLE D. BALL



South Carolina Bar

Continuing Legal Education Division

Estate Planning Essentials

Friday, May 31, 2019

Ethical Pitfalls in Estate Planning

Patricia Scarborough

Ethical Pitfalls in Estate Planning

F. PATRICIA SCARBOROUGH

EVANS, CARTER, KUNES, & BENNETT, P.A.

Clients with Diminished Capacity

RULE 1.14

SC Rule 1.14 – Client With Diminished Capacity

(a) When a client's **capacity to make adequately considered decisions in connection with a representation is diminished**, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comments to Rule 1.14

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for or by the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Comments to Rule 1.14

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Comments to Rule 1.14

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Standards of Capacity

An estate planning attorney needs to know the applicable standards and which standards apply to which types of documents:

1. Testamentary Capacity - Whether the testator has the capacity to know (1) his estate, (2) the objects of his affections and (3) to whom he wished to give his property. The capacity to know or understand, rather than the actual knowledge or understanding, is sufficient. The degree of capacity necessary to execute a will is less than that needed to execute a contract. Even an insane person may execute a will if it is done at a sane interval. *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010); *Weeks v. Drawdy (In re Estate of Weeks)*, 329 S.C. at 263, 495 S.E.2d at 461; *Hembree v. Estate of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993).
2. Contract capacity - A person's ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract. *In re Nightingale's Estate*, 182 S.C. 527, 541, 189 S.E. 890, 896 (1937).

What to do if you have concerns about a client's capacity?

What to do if you have capacity concerns:

1. Understand the cause of the concern:
 1. May be temporary (medication related to treatment of a physical condition)
 2. May be an untreated medical issue (ex. An untreated UTI may cause confusion, disorientation and agitation in an elderly person)
 3. Consider seeking the opinion of another practitioner
 4. Consider seeking medical opinions (from the client's physician or a physician specializing in capacity assessments)
 5. Consider speaking to family members
2. But remember:
 1. Don't confuse physical issues with capacity issues (lack of hearing or eye sight, speech limitations)
 2. Can the issue be elevated by meeting at a different time of day, meeting at the client's home, having in-person conversations rather than phone conversations, etc.?
 3. Speak to the client alone (family members may try to mask symptoms)

REMEMBER THAT THE ASSESSMENT OF "LEGAL CAPACITY" IS ULTIMATELY MADE BY THE LAWYER

Representation of client's legal representative

Who may you ethically represent? ABA Op. 96-404

1. A lawyer may file a petition for guardianship of lawyer's client (ABA Op. 96-404 0 examining an earlier version of model RPC 1.14).
2. However, a lawyer may not represent a third party seeking guardianship over that lawyer's client. This would violate Rule 1.7.
3. A lawyer may recommend or support the appointment of a particular person as guardian without violating Rule 1.7.
 1. "A lawyer petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a **reasonable assessment** of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward."

Useful Resources

1. The American Bar Association/American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers - https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/
2. The ACTEC (American College of Trust and Estate Counsel) Commentaries on the Model Rules of Professional Conduct - <https://actecfoundation.org/trust-and-estate-professional-resources/professional-conduct-rules-for-trust-and-estate-practitioners/>

Unauthorized Practice of Law

RULE 5.5

SC Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not debarred, disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - ...
- (d) A lawyer admitted in another United States jurisdiction, and not debarred, disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
- ...
 - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Supervise Your Staff

Doe v. Condon, 532 S.E. 2d 879 (S.C. 2000) – Request for a Declaratory Judgment

Paralegal employed by Attorney proposed to:

- Conduct seminars on Wills and Trusts without the Attorney present
- Conduct meetings with clients to answer specific estate planning questions without supervision of Attorney

Supreme Court found both of these proposed activities to be the unauthorized practice of law by the paralegal.

- “It is well settled that a paralegal may not give legal advice, consult, offer legal explanations, or make legal recommendations.” *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (S.C.1995).
- As to the **seminars**, the Court found “[a]t the very least, [Paralegal] will implicitly advise participants that they require estate planning services. Whether a will or trust is appropriate in any given situation is a function of legal judgment. To be sure, advising a potential client on his or her need for a living trust (or other particular estate planning instrument or device) fits squarely within the practice of law. These matters cry out for the exercise of professional judgment by a licensed attorney.”
- As to **client meetings**, “[w]hile [Paralegal] may properly compile client information, [Paralegal] may not answer estate planning questions....While [Law Firm] plans to direct clients to an attorney for “follow-up” consultations, a paralegal may not give legal advice in any event.”

Associations with other professionals

In re Deddish, 347 S.C. 614 (S.C. 2001) (Disciplinary Proceeding)

Facts:

1. Non-lawyer created Firm, which marketed estate planning and revocable trusts in SC through advertising. Non-lawyer also gave seminars where he dispensed legal advice to the public.
2. In Firm advertisements and at seminars, it was represented that Attorney was associated with the Firm. Firm represented as having a locally staffed office and an attorney on staff who was a member of a network of estate planning attorneys and was certified as "an elder law trust attorney".
3. Services offered by the firm included: preparation of estate plan summaries, revocable living trusts, affidavits of trusts, pour-over trusts, durable powers of attorney, and real estate deeds. Firm provided changes to any document prepared by Firm free of charge and unlimited consultations regarding living trust questions. Firm also offered instructions on how to settle an estate without an attorney.
4. Attorney was not employed by Firm, but was an independent attorney for the Firm. Firm would provide Attorney with preliminary information on Firm's clients. Attorney would then meet with clients, obtain additional information and completed documents. Attorney received 1/3 of the fee paid to Firm by client.

In re Deddish, 347 S.C. 614 (S.C. 2001) (Disciplinary Proceeding)

The Court held:

1. Actions of non-attorney constituted the unauthorized practice of law.
2. The “association, affiliation, and cooperation” of Attorney with non-lawyer assisted non-lawyer in the unauthorized practice of law.
3. The Court found that Attorney had violated: Rule 1.2(e) (when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct); Rule 5.4(a) (sharing fees with a non-lawyer); Rule 5.5(b) (assisting in the unauthorized practice of law); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).
4. Attorney was suspended from the practice of law for nine months.
 - Upon reinstatement to the practice of law, Attorney was required to provide the services promised to clients of Firm, including additional consultation and updating of documents without additional charge or fee.

Associations with other attorneys

Ethics Advisory Opinion 93-24

Facts:

1. Lawyer X was admitted to practice law in Florida and was not admitted in South Carolina. Lawyer X will conduct estate planning seminars in South Carolina in conjunction with a non-lawyer financial planner. South Carolina residents attending the seminar may engage Lawyer X to prepare estate planning documents, to include wills, revocable trusts, and powers of attorney.
2. Lawyer Y, admitted to practice law in South Carolina, has been asked by Lawyer X to be associated with him in connection with his work for the residents of South Carolina. Lawyer Y will review all documents prepared for any South Carolina client.
3. Lawyer Y will be paid a fee by Lawyer X for his services and will render an opinion in writing to Lawyer X concerning the compliance and conformity of the documents with South Carolina law. Lawyer Y will be identified in writing to the South Carolina residents as the South Carolina lawyer who has been associated to review legal documents to assure compliance with South Carolina law. Lawyer Y will be available to answer directly to any client any questions pertaining to South Carolina law. Lawyer Y will maintain a file of all documents reviewed on behalf of a client.

Ethics Advisory Opinion 93-24

Question: Was Lawyer Y ethically permitted to engage in the contemplated conduct (the review of estate planning documents for South Carolina clients and the fee agreement)?

1. "It is obvious that Lawyer X intends to use estate planning seminars as a means of marketing legal services in this state. Lawyer X will be providing legal advice to, and drafting legal documents for, these clients. Though Lawyer [Y] will review documents, the chief attorney-client relationship will be between the South Carolina clients and Lawyer X. The South Carolina lawyer's involvement is formalistic; it seems designed mainly to make the South Carolina lawyer an overseer of Lawyer X's rendition of legal services to South Carolina residents. The attempt to provide a semblance of quality control would not serve to insulate Lawyer X from unauthorized practice charges."
2. "Lawyer X's intended course of conduct clearly falls within the ambit of the practice of law as outlined in Froelich and other cases. Lawyer X, however, is not admitted to practice in South Carolina. Hence, Rule 5.5 prohibits a South Carolina lawyer from assisting Lawyer X by providing oversight or otherwise."
3. Additionally, the contemplated course of conduct may involve Lawyer Y in fee splitting with a non-lawyer, which is prohibited by Rule 5.4.

Lawyer serving as Fiduciary

Ethics Advisory Opinion 90-21

Facts: "At the direction of a client, an attorney prepares a Will naming himself as Executor and Trustee."

Question: Is it ethical for the attorney to take a Trustee's commission and an Executor's commission?

1. "An attorney would be entitled to take a Trustee's commission and an Executor's commission under the same circumstances that a non-attorney would be entitled to take such a double commission."
2. Although there is little case law in South Carolina addressing the question of when one may take a Trustee's commission and Executor's commission, there is substantial law in other jurisdictions. See, e.g., *In Re Norris' Estate*, 153 S.C. 203, 150 S.E. 693 (1929)."
3. "In the event the method of determining commissions is set forth in the Will, the method should be one that is reasonable and customary for all Executors and Trustee so as not to be construed as violative of Rule 1.8 (c)."
4. "This opinion does not address the situation where the attorney who prepared the document naming himself as Trustee and Executor is also asked to be or retained as the attorney for the estate or any of the beneficiaries of the estate. See, e.g., *In the matter of Richard W. James*, 229 S.E.2d 594 (1976)."

What is Rule 1.8(c)?

(c) A lawyer shall not **solicit** any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

What is Rule 1.8(c)?

Comment [7] - If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

Comment [8] - This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position if the lawyer complies with Rule 1.8. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

In the Matter of W. Richard James, 229 S.E.2d 594 (S.C. 1976) (Disciplinary Proceeding)

Facts:

1. Attorney was named executor for the estate of Mr. Farmer. Attorney, as executor, wrote to Insurance Company advising them that he was the executor of the estate of Mr. Farmer and requesting information relative to an insurance policy on the decedent in the amount of \$31,000.
2. The Insurance Company sent Attorney three forms to return. One of these forms was an attending physician's statement.
3. Attorney's law partner ("Partner"), returned to Insurance Company two of the three (3) forms, but sent a death certificate in lieu of the attending physician's statement. On this same date, a complaint against Insurance Company was drafted, showing Attorney as Executor for the Estate of Mr. Farmer and Partner, as attorney for the plaintiff.
4. Insurance Company wrote to Attorney that "it is essential that we have the attending physician's statement completed because the claim is being considered under waiver of premium because of total disability prior to age 60" etc. Attorney then sent the attending physician's form to the physician with the request that it be completed and returned to Insurance Company. This form was allegedly sent to Insurance Company from the physician's office. One month later, the complaint was filed in federal District Court.
5. Insurance company, still contending that the attending physician's report had not been filed, wrote to Partner nine days later requesting that such form be completed. Over a month later, Partner sent the completed physician's statement to Insurance Company. Insurance Company paid the face amount of the policy three days later.
6. The litigation with the District Court was then ended. Plaintiff's attorney, Partner, was awarded 1/3 of the face amount of policy as attorneys' fees. Attorney consented to the fee, along with the estate beneficiaries. There was no indication on any of the pleadings Attorney and Partner were law partners and that Attorney was to receive 2/3s of the fee resulting from the litigation.
7. The Probate Court records reflect that respondent received an executor's fee, but the records fail to show that he also received two-thirds of the attorney's fee realized from the litigation.

In the Matter of W. Richard James, 229 S.E.2d 594 (S.C. 1976) (Disciplinary Proceeding)

1. "In order to act properly in his capacity as executor/lawyer respondent would have to have (1) determined in good faith, after exhausting all nonlitigative means (as executor), that the insurance company would not voluntarily pay the benefits due, (2) explained this fact fully and disclosed the fee arrangement with the estate beneficiaries, (3) obtained the consent of the estate beneficiaries to act in the dual capacity, and (4) fully disclosed all relevant facts to the court approving his fee and the court approving the accounting rendered."
2. Attorney "fulfilled none of the foregoing essential duties, and that he violated his fiduciary duty as executor of the estate of [Farmer] by failing to exhaust all reasonable means to collect the insurance due the estate without litigation and his duty to the beneficiaries of the estate and the courts to disclose his dual relationship as executor and attorney."
3. "The evidence sustains the finding that respondent **deliberately** failed to complete the forms necessary to collect the insurance until after litigation had been instituted and that this was done" to obtain additional fees from the Estate.
4. Attorney "failed to disclose his dual capacity as executor and attorney to the courts...It is undisputed, however, that [Attorney] actually received two-thirds of the attorney's fee allowed by the United States District Court from the insurance proceeds and that [Attorney], in his fiduciary capacity as executor consented to the payment of that fee to the attorney of record, without ever disclosing to the court that he was, in fact, consenting, and thereby procuring the setting of his own fee."
5. "[Probate Court records] show that the executor received only \$20,666.67 from the life insurance policy instead of \$31,000.00 actually paid by the insurance company. Nowhere is there any mention or reference to the fact that [Attorney], the executor of the estate, received, as he did, the sum of approximately \$7,000.00 as an attorney's fee."
6. "Respondent owed the highest fiduciary responsibility to the estate that he represented and a duty to speak the truth to the courts. His actions in subjecting his trust to unnecessary expenses of litigation and his **deliberate and deceitful** failure to disclose to the court his dual capacity constituted flagrant professional misconduct. We agree with the Panel that respondent's conduct warrants **indefinite suspension from the practice of law.**"

Sample Language:

Appointment of Attorney as Fiduciary. I have appointed my attorney, [name] as [Personal Representative and/or Trustee] in this Will. I have asked him to serve in this capacity after having discussed with him the choices of using various family, friends, or professional fiduciaries in this capacity. I have chosen him because I have worked with him for many years and I feel that he has a clear understanding of my interests both as to the management and as to the ultimate disposition of my Estate [and the trusts created hereunder]. I expect that my attorney acting hereunder will be subject to the same restrictions, liabilities, and normal fiduciary duties as would any other fiduciary appointed hereunder. Finally, I have discussed the issue of fiduciary compensation with him. I understand that he will be entitled to the receipt of commissions as provided herein [and/or by law] and I also expect that his law firm may be employed (and I approve such employment) and receive compensation for rendering legal services to my Estate and any Trusts established hereunder. Notwithstanding my approval of the payment of both fees as a fiduciary and fees to him or his firm for legal and administration work, it is understood that he shall perform separate functions and duties as a fiduciary and as an attorney and each such separate function shall be subject to separate compensation - there shall not be a duplication of fees or time.

_____ (initials)

SC Ethics Advisory Opinion 96-21

Facts: Attorney is serving as a conservator for a minor. Following the appointment of Attorney as conservator, the minor child has a cause of action arising out of an accident and needs the services of an attorney. Attorney would like to represent the minor in the personal injury claim. Attorney intends to present any settlement for approval before the Court of Common Pleas.

Question: Is a conflict of interest created if the attorney acts both as conservator for the minor child and the child's attorney in the personal injury claim?

Summary: Notwithstanding the legal issue of whether SC law allows a conservator to serve as attorney for the protected person with court approval, A lawyer who has been appointed as conservator for a ward may not act as attorney for the ward even with court approval. The South Carolina Rules of Professional Conduct contemplate that a lawyer's representation of a client is subject to control either by a competent client or by a conservator appointed to represent the client. S.C. Rules 1.2 and 1.14. If a lawyer serves in the dual capacity of conservator and attorney, this system of control is undermined. Court approval cannot provide the degree of oversight contemplated by these rules. In addition, the roles of conservator and attorney create a number of potential conflicts. Under Rule 1.7(b), these conflicts are so pervasive that a lawyer could not reasonably undertake the representation.

SC Ethics Advisory Opinion 96-21

1. “Even if South Carolina law would allow an attorney to serve in the dual capacity of conservator and attorney for the ward, the Committee concludes that the attorney may not ethically do so under the South Carolina Rules of Professional Conduct.”
2. Cited Opinion RI-213 issued by the Standing Committee on Professional and Judicial Ethics of the Michigan Bar, for the reasoning that “the Rules of Professional Conduct contemplate a system of checks and balances in which the lawyer's advice is subject to approval by either a competent client (Rule 1.2), or by a person duly appointed to represent the interests of an incompetent client (Rule 1.14). If the attorney serves as both conservator and attorney, this system of checks and balances is undermined: In other words, the scheme contemplated in MRPC 1.14 is that there are two distinct individuals assisting the client or ward, and each acts as a check on the other. In the arrangement proposed in this inquiry, there is no check on the authority of the lawyer who serves as both legal counsel and as guardian/conservator for the ward.”
3. “The decision-making ability of the lawyer as guardian/conservator regarding the conduct of the legal matter may be overshadowed by the fiduciary's judgment as counsel of record.”