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Representing the Elderly or Disabled Client: Forms and Checklists with Commentary - Begley, Jr. & Hook

Chapter 16: Special Needs Trusts

**¶16.01. Third-Party Special Needs Trusts**

## ¶ 16.01 Third-Party Special Needs Trusts

The purpose of a Special Needs Trust is to preserve public benefits for the trust beneficiary while supplementing the beneficiary's lifestyle with private funds. There is a significant difference between third-party Special Needs Trusts and self-settled Special Needs Trusts. A third-party trust is established with the funds of someone other than the beneficiary. Typically, it is a parent or grandparent. A self-settled trust is established with the funds of the beneficiary—typically, a tort victim or a person receiving an inheritance.

Third-party Special Needs Trusts are often used for the following purposes:

- For disabled children or other disabled persons;
- For mentally ill children or other mentally ill persons;
- To assist the beneficiary in managing money;
- To avoid cost-of-care reimbursement claims; and
- To avoid share-of-cost claims.

The key to understanding Special Needs Trusts is the Program Operations Manual System (POMS), published by the Social Security Administration (SSA), which contains operating procedures for the Supplemental Security Income (SSI) program. Under the POMS, a trust is "a property interest whereby property is held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary)." <sup>1</sup>

A discretionary trust is a trust in which the trustee has full discretion as to the time, purpose, and amounts of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust. <sup>2</sup>

It is important that a residual beneficiary be named. A residual beneficiary is defined as "not a current beneficiary of a trust, but [one who] will receive the residual benefit of the trust contingent upon the occurrence of a specific event, e.g., the death of the primary beneficiary." <sup>3</sup>

The key is to make the assets of the trust an unavailable resource. POMS discusses resources as follows:

If an individual (claimant, recipient, or deemor) has legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct that use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. <sup>4</sup> In addition, if the individual can sell his or her beneficial interest in the trust, that interest is a resource. <sup>4.1</sup>

Therefore, there is a two-pronged test for determining "availability." If the beneficiary has no right to revoke or terminate the trust or to compel distributions for his or her support and maintenance, the trust is not an available resource. <sup>5</sup> Therefore, a Special Needs Trust is not a support trust; it is a discretionary trust. It must be irrevocable and must name a residual beneficiary.

The trust must be not only properly drafted but properly administered. Improper distributions from a properly drafted and funded trust can result in loss of benefits. Trust distributions must not be made directly to the beneficiary. They must be made to third parties.

Distributions to third parties that result in "in-kind support and maintenance (ISM)"—that is, food or shelter received because of the distribution—result in a reduction of benefits. If the beneficiary is receiving Medicaid linked to SSI, the reduction of the benefit will not cause a loss of Medicaid but the elimination of the SSI benefit will cause a loss of Medicaid.

An excellent means of funding a third-party Special Needs Trust is through life insurance. Often, such trusts are established by

parents for the benefit of disabled children. By purchasing a separate life-insurance policy on their lives for the purpose of funding the trust, the parents are able to distribute their remaining assets to their healthy children. Paying the premiums on the life-insurance policy establishes a regular savings program that ensures that funds will be available. A second-to-die policy may be appropriate.

In order for the parent to use his or her annual exclusion gifts,<sup>6</sup> the trust should be drafted with Crummey powers.<sup>7</sup> However, if the disabled person is the holder of the Crummey power, the contribution would be considered an "available" resource. Therefore, the right of withdrawal power must be given to another beneficiary of the trust. Also, if the grantor is a trustee, the contribution to the Special Needs Trust is not a completed gift, because the trustee determines whether the disabled or remainder beneficiary benefits from the distributions.<sup>8</sup>

If parents want to keep trust assets out of their estates, the trust must be irrevocable and there should be an independent trustee. If the trust is going to purchase a significant life insurance policy, it is usually important to keep the proceeds out of the parents' estates. If the parents were to serve as trustees, their right to make distributions and to deal with the policy would result in the inclusion of the trust assets including policy proceeds in the parents' estates. By utilizing an independent trustee, this result can be avoided. Form 16.01.02 is a Special Needs Trust with multiple lifetime beneficiaries, one of whom is the disabled child, and discretionary authority for the Independent Trustee to make distributions for any purpose.

### **Form 16.01.01. Third-Party Special Needs Trust**

On this [date] day of [month], [year], [Name of Client], of [Address of Client], as GRANTOR by this Agreement with [Name of Trustee], of [Address of Trustee], as TRUSTEE, have caused or will cause certain property to be transferred and shall be administered by my Trustee as herein provided. This trust is for the benefit of [Name of Beneficiary], my [son/daughter], a disabled person as defined in 42 USC § 1382c(a)(3)(A) (hereinafter referred to as "Beneficiary" or "[First Name of Beneficiary]"), whose address is [Address of Beneficiary]. [First Name of Beneficiary] suffers from [name of disability].

#### **SECTION 1 IDENTIFICATION**

**1.1. Spouse.** My spouse's name is [Name of Spouse]. All references in this Trust to my "spouse" are to said spouse.

**1.2. Children.** I have [number] children, [Names of Children]. All references in this Trust to my "children" are to said named children.

**1.3. Name of Trust.** The name of this trust is the "[Name of Beneficiary] Third-Party Special Needs Trust under Agreement dated [month day], [year].

#### **1.4. Trust Funding**

**1.4.1. Initial Trust Funding.** This Trust shall be funded with such assets as I, or any other person, transfers to my Trustee, or which are bequeathed hereto by me, or any other person.

**1.4.2. Additions to Trust.** Other property, real or personal, may be transferred to my Trustee by anyone with the consent of my Trustee. All property held by my Trustee shall constitute the "Trust Estate." Any property transferred to Trustee by a third party is a gift to [First Name of Beneficiary] and cannot be reclaimed by the third party.

**1.4.3. Right to Substitute Property.** I reserve the right to reacquire the trust assets by substitution of other property of equivalent value pursuant to [IRC § 675\(4\)](#).

**1.5. Intention.** I believe it to be in the best interest of [First Name of Beneficiary] to establish a trust with discretionary and spendthrift provisions to enhance the quality of [First Name of Beneficiary]'s life both now and in the future. I intend that this trust will provide benefits to supplement those which may otherwise be available to [First Name of Beneficiary] from various sources, including parental support during [his/her] minority, insurance benefits and governmentally sponsored programs. It is my intention that [First Name of Beneficiary] receive all government entitlements to which [First Name of Beneficiary] would otherwise be entitled but for the distributions hereunder. I recognize that in view of the vast costs involved in caring for a disabled person, a direct distribution would be rapidly dissipated. The purpose of the trust is to permit the use of trust assets to supplement and not supplant or diminish any benefits or assistance of any federal, state, or other governmental entity to which [First Name of Beneficiary] may be eligible or which [First Name of Beneficiary] may be

receiving. All provisions of this trust shall be interpreted to qualify this trust as a Special Needs Trust. Any provisions of this trust which may prevent this trust from being interpreted as a Special Needs Trust shall be null and void. All provisions of this trust agreement are intended to be construed and interpreted such that the trust agreement meets the requirements of the Social Security Administration's Program Operating Manual ("POMS") SI 01120.200B, SI 01120.200D, and SI 01120.200E. The Independent Trustee may, by instrument in writing, amend this trust agreement in any manner required to meet any of the intentions described in this paragraph. No amendment under this paragraph may increase the class of beneficiaries or provide me with any beneficial interest or economic benefit in this Trust.

**1.6. Irrevocability.** Subject to the provisions of the sections entitled "Intention" and "Optional Termination of Trust" of this Agreement to the contrary, but notwithstanding any other provision of this Agreement or state law to the contrary, this Trust is irrevocable.

**1.7. Annual Withdrawal Power.** Each of my then-living children, other than *[First Name of Beneficiary]*, and each of my then-living more remote descendants, shall have the right to withdraw an amount equal to a proportionate share of each contribution to the Trust (other than a transfer by reason of the transferor's death), subject to the rules described below.

## SECTION 2 DISTRIBUTION OF INCOME AND PRINCIPAL

**2.1. Provisions During Beneficiary's Lifetime.** After the exercise or lapse of the withdrawal powers under paragraph 1.7 and during the lifetime of *[First Name of Beneficiary]*, Trustee may distribute from the principal or income, or both, of this Trust, such amounts that Trustee, in Trustee's sole, absolute, and unfettered discretion, may from time to time deem reasonable or advisable for *[First Name of Beneficiary]*'s Special Needs. Any income of the Trust not so distributed shall be added annually to principal.

### 2.2. Distribution Guidelines

**2.2.1. Special Needs.** As used in this instrument, "special needs" refers to the requisites for maintaining *[First Name of Beneficiary]*'s good health, safety, and welfare when, in the discretion of Trustee, such requisites are not being provided by any governmental agency, office or department, nonprofit organizations, or are not otherwise being provided by any other public or private source. While Trustee is authorized to consider these other sources, and where appropriate and to the extent possible endeavor to maximize the collection of such benefits and to facilitate distribution of such benefits for the benefit of *[First Name of Beneficiary]*, Trustee may also, in the exercise of Trustee's discretion, disregard these other sources when making distributions to, or for the benefit of *[First Name of Beneficiary]*.

**2.2.2. Best Interest Standard.** General distributions shall be based primarily on *[First Name of Beneficiary]*'s best interest and in accordance with the terms of this Agreement.

**2.2.3. No Right to Direct Distribution.** *[First Name of Beneficiary]* shall have no right to direct a distribution from this Trust to make any provision for *[his/her]* food and shelter or to direct a distribution from this Trust for any other purpose.

**2.2.4. Preference.** *[First Name of Beneficiary]* is the preferred beneficiary and *[his/her]* interests shall be given priority over the interests of any Remainder Beneficiaries.

**2.2.5. Trust Revocation.** *[First Name of Beneficiary]* shall have no right to revoke this Trust.

**2.3. Examples of Trust Distributions.** Distributions by Trustee for the benefit of *[First Name of Beneficiary]*, which are not required but may be appropriate and are consistent with the terms of this Trust and pursuant to POMS SI 01120.201.I, include but are not limited to the following:

- (a) Any and all reasonable expenses incident to the implementation of a "life care plan" for *[First Name of Beneficiary]*, as recommended by certified life care planners, physicians, care managers, therapists, counselors, technicians, rehabilitation specialists, nutritionists, home modification and accessibility specialists, or other care providers;
- (b) Medical, dental, rehabilitative, therapeutic and diagnostic treatments, therapies, interventions, evaluations, care, and equipment, whether or not experimental, necessary, or life-saving, including but not limited to vision care, prosthetic and

orthotic devices, mobility and adaptive aids, stabilizers, monitors, appliances, braces, wheelchairs (powered or manual), adaptive tools and instruments, and the cost of maintaining, repairing, and periodically replacing or updating same;

(c) Professional therapy and behavior management programs, including but not limited to occupational, speech, music, art, language and communication, physical, psychological, audiological, recreational, social skills, emotional and behavioral therapy and counseling and all related costs, including but not limited to the equipment or tools used in connection with such therapies and the related cost of training [*First Name of Beneficiary*], [*his/her*] family, educators, and care givers to maximize the benefits to [*First Name of Beneficiary*].

(d) Medical, physical, and mental health care needs of [*First Name of Beneficiary*], including but not limited to physicians' office visits, prescription medications, evaluations, treatments, injections, surgeries, laboratory tests, procedures, hospitalizations, and diagnostics, including experimental procedures, treatments, and visits related thereto;

(e) Reasonable compensation and appropriate expenses for [*First Name of Beneficiary*]'s care givers, whether professional, paraprofessional, rehabilitative, vocational, attendant, respite or custodial (including, in the Trustee's sole discretion, any members of [*First Name of Beneficiary*]'s family who render requested, necessary and appropriate services to [*First Name of Beneficiary*]), as well as for the services of a "case manager," or other advisor who is experienced in overseeing the implementation of life care plans for individuals such as [*First Name of Beneficiary*], and who is familiar with related governmental or private entitlement or assistance programs;

(f) Attendant care and adaptive aids and equipment for [*First Name of Beneficiary*]'s personal needs, including but not limited to bathing, dressing, grooming, hygiene, skin care, nutrition and meal preparation, and other activities of daily living, as well as domestic services and other household maintenance services;

(g) Private insurance coverage for [*First Name of Beneficiary*], including but not limited to premiums attributable to health, life, disability, and accident insurance, as well as co-payments and deductible amounts with respect to any insurance covering [*First Name of Beneficiary*];

(h) Travel costs for [*First Name of Beneficiary*] and for such travel companions as are necessary or appropriate, associated with access to medical, physical, and/or mental health care services of all types;

(i) Tuition, fees, costs and expenses related to educational and training needs and opportunities of all types, at private or public institutions, and all expenses related thereto, whether vocational, elementary, undergraduate, professional or graduate schools, including special education aides and assistants as well as private tutoring outside of the traditional educational setting, including educational or workshop programs specializing in serving persons with disabilities or impairments such as those of [*First Name of Beneficiary*];

(j) Travel and transportation costs for [*First Name of Beneficiary*], and for such travel companions as may be necessary or appropriate, to and from any school or residential accommodation removed from the residence of [*First Name of Beneficiary*]'s immediate family members or legal guardian of the person, as well as the reasonable out-of-pocket travel and lodging expenses for [*First Name of Beneficiary*]'s immediate family members and legal guardian of the person, if any incurred with their periodic visits to [*First Name of Beneficiary*] at [*his/her*] place of residence;

(k) Purchase of a residence for [*First Name of Beneficiary*], customized and adapted to accommodate [*his/her*] special needs, with title to such real estate to be held by the Trustee as an asset of the Trust Estate, as well as the expense of securing, insuring (at replacement cost), and maintaining such residence, and the land adjoining same, in good condition and repair, and the cost of additional household assistants to accommodate the limitations and needs of [*First Name of Beneficiary*] while living in the residential setting;

(l) Structural and/or nonstructural alterations or adaptations to a residence, which are necessary or appropriate to accommodate [*First Name of Beneficiary*]'s special needs or disabilities, as well as the expense of securing, insuring (at replacement cost), and maintaining such alterations or adaptations;

(m) Appropriate modes of transportation for [*First Name of Beneficiary*], or for [*his/her*] benefit, including but not limited to vans or automobiles specially equipped and adapted for [*First Name of Beneficiary*]'s particular disability, and the cost of insuring, maintaining, repairing, and periodically replacing such transportation;

(n) Appropriate home-based and community-based recreational opportunities and social initiatives, and the expenses and travel costs of [*First Name of Beneficiary*] and such travel companions as may be necessary and appropriate, associated with access to such opportunities and social initiatives;

(o) Appropriate furniture and furnishings required for the care of [*First Name of Beneficiary*], customized and adapted to [*his/her*] use, and periodic replacements of such items;

(p) Expenses associated with periodic vacations and sabbaticals for the benefit of *[First Name of Beneficiary]*, together with the expenses associated with such travel companions as may be necessary or appropriate;

(q) Such technological equipment as may enhance *[First Name of Beneficiary]*'s quality of life or education or training, including but not limited to television, audio and video recording equipment, computers, augmented communication systems and related software and hardware, including the cost of training *[First Name of Beneficiary]*, *[his/her]* family, legal guardian of the person, educators and care givers in the proper use of such equipment to maximize the benefit to *[First Name of Beneficiary]*;

(r) Professional services rendered for the benefit of *[First Name of Beneficiary]*, including but not limited to the legal fees and costs associated with the preparation, execution, funding, administration, and termination of this Trust Agreement, as well as ongoing fiduciary, legal, accounting, bookkeeping, and other services as may be necessary or appropriate for the Trustee in administering this Trust for the benefit of *[First Name of Beneficiary]*; and

(s) Improvements to a vehicle to protect the safety of *[First Name of Beneficiary]*, the driver and any passenger of that vehicle.

## **2.4. Public Assistance Programs**

**2.4.1. Public Resources.** Independent Trustee may, in the exercise of Independent Trustee's best judgment and fiduciary duty, apply on behalf of *[First Name of Beneficiary]* for all available public benefits. Independent Trustee shall take into consideration the applicable resource and income limitations of any public assistance program for which *[First Name of Beneficiary]* is eligible. All costs relating thereto, including reasonable attorney fees, shall be a proper charge to the Trust. It is intended that no part of the corpus of the Trust created herein shall be used to supplant or replace public assistance benefits of any county, state, federal, or other governmental agency.

**2.4.2. Maintain Public Assistance Eligibility.** If Trustee is required to release principal or income of the Trust to or on behalf of *[First Name of Beneficiary]* to pay for benefits or services which such public assistance is otherwise authorized to provide, were it not for the existence of this Trust, or if Trustee is requested to petition the court or any other administrative agency for the release of Trust principal or income for this purpose, Trustee is authorized to deny such request and is authorized in Trustee's discretion to take whatever administrative or judicial steps may be necessary to continue the public assistance program eligibility of *[First Name of Beneficiary]*, including obtaining instructions from a court of competent jurisdiction ruling that the Trust corpus is not available for *[First Name of Beneficiary]* for such eligibility purposes. Any expenses of Trustee in this regard, including reasonable attorney fees, shall be a proper charge to the Trust. No Trustee shall be liable for any loss of Trust assets, except for any loss caused by Trustee's bad faith, wanton conduct, or negligence.

**2.5. Regular Contact With Beneficiary.** Trustee or agent(s) are requested to personally visit or contact or arrange for a Care Manager to visit or contact *[First Name of Beneficiary]* to evaluate *[his/her]* physical condition; educational, residential and vocational and training opportunities; recreational, leisure, and social needs; appropriateness of existing program services; legal rights including access to public benefit programs; and to inspect *[his/her]* living conditions, to inquire of care providers and, to the extent possible, to inquire of *[First Name of Beneficiary]* regarding *[his/her]* treatment by care providers; to let *[him/her]* know that *[he/she]* has a friend and advocate in addition to family members, to see that *[he/she]* has been spending money for the items *[he/she]* may want (within the constraints of this Trust); to know that *[he/she]* is receiving any available educational and recreational programs, and to ensure that governmental assistance, private contractual benefits, and trust funds are in fact being expended by or for *[his/her]* benefit.

## **2.6. Distributions After Death of Beneficiary**

**2.6.1. Taxes and Expenses.** The Trustee shall pay all federal and state taxes due because of the death of *[First Name of Beneficiary]* and any administrative expenses and costs attendant to terminating or settling this Trust, including any costs or fees associated with the preparation of final accountings or making any distributions provided for herein.

**2.6.2. Specific Distributions.** Upon the death of *[First Name of Beneficiary]*, the Trustee shall distribute to *[Name]* the sum of *[amount]* Dollars.

**2.6.3. Last Illness, Funeral, and Debts.** Trustee may then pay all expenses of *[First Name of Beneficiary]*'s last

illness, funeral, and burial costs.

**2.6.4. Distributions.** Upon the death of *[First Name of Beneficiary]*:

**2.6.4.1. *[First Name of Beneficiary]*'s Parents.** Trustee shall distribute the remaining principal and accrued income, if any, to my then-living descendants in per stirpital shares. These remaindermen are herein referred to as my Remainder Beneficiary (ies). Under no circumstances shall *[First Name of Beneficiary]* or *[First Name of Beneficiary]*'s estate receive a share of the trust estate or undistributed income.

**2.7. Community Trust.** My Trustee may enroll *[First Name of Beneficiary]*, with the consent of the guardian, if there is one, in a community trust for the severely disabled. My Trustee may obtain from the community trust follow-along services, guardianship services, and such other services that my Trustee determines, in my Trustee's sole and absolute discretion, to be necessary, subject to the limitations of the subsection titled "Death Tax Clause" below. My Trustee may also increase the community trust services *[First Name of Beneficiary]* is to receive subject to the limitations of the subsection titled "Intent Regarding Distributions" of this Section.

**2.8. Age Requirement.** If any Remainder Beneficiary less than *[age]* years of age is entitled to receive a distribution under this Trust, my Trustee shall retain such distribution to be administered as follows:

**2.8.1. Income.** My Trustee may, in my Trustee's sole and absolute discretion, pay any part or all of the net income to or for the benefit of my Remainder Beneficiary or may add any part of such income to the principal of the Trust; and

**2.8.2. Principal.** My Trustee shall pay to or apply for the benefit of my Remainder Beneficiary as much of the principal of my Remainder Beneficiary's share as my Trustee may deem proper for my Remainder Beneficiary's health, maintenance, support, and education. My Trustee may use principal to assist my Remainder Beneficiary in buying a home or starting a business; and

**2.8.3. Withdrawal Rights.** Any Remainder Beneficiary shall have the right to withdraw principal from his or her trust upon attaining the age of *[age]* years.

**2.8.4 Predecease.** If my Remainder Beneficiary dies before the entire principal of such trust has been withdrawn, the entire principal shall be distributed by my Trustee to my Remainder Beneficiary's then-living descendants by representation; or, in default of such descendants, to my living descendants by representation (the share thus accruing to any descendant of mine for whom, at that time, my Trustee holds a separate trust hereunder shall be added to such trust and thereafter held as though originally forming a part hereof); or, in default of such descendants, then to such persons who would be entitled to inherit from *[me/us]* under the Intestate Laws of the *[Name of State]* (*[cite to state statute]*).

## SECTION 3 FIDUCIARY PROVISIONS

### 3.1. Trustee Provisions

**3.1.1. Appointment of Independent Trustee.** I appoint *[Name of Independent Trustee]* to serve as an "Independent Trustee" as long as I am acting as Trustee hereunder. The Independent Trustee shall have the power to exercise any powers granted hereunder to the Trustees that I am prohibited from exercising under section entitled "Restrictions on Grantor as Trustee" or any other provision of this Agreement. If *[Name of Independent Trustee]*, or any other Independent Trustee appointed pursuant to this provision, shall cease to act as a trustee hereunder, I shall have the power to appoint an "eligible person" (as defined below) as a successor Independent Trustee. Any Independent Trustee acting hereunder shall have the right to designate his or her successor, with one or more alternates in a specified order of priority. Thereafter, if the Independent Trustee ceases to act and no successor is appointed by me within ninety (90) days of the vacancy, the first designated successor who can and will act shall be the successor Independent Trustee. Each Independent Trustee may from time to time alter his or her designation before it takes effect, and the designation by a successor Independent Trustee acting hereunder shall supersede any designation of alternates made by a prior Independent Trustee.

**3.1.2. Successor Trustee Provisions.** If *[Name of Trustee]* fails or ceases to serve for any reason, I appoint *[Name*

of Successor Trustee 1] as Successor Trustee. If [Name of Successor Trustee 1] fails to qualify or ceases to serve for any reason, then I appoint [Name of Successor Trustee 2] as Successor Trustee.

### **3.1.3. Resignation of Trustee (Including any Independent Trustee Acting Hereunder)**

**3.1.3.1. Right of Trustee to Resign** . Any Trustee shall have the right to resign, by duly acknowledged written instrument to me, if I am then serving as Trustee, and to the Remainder Beneficiaries.

**3.1.3.2. Incapacity of Trustee.** A Trustee who becomes incapacitated shall be removed from office and replaced by a Successor Trustee. The incapacity of any individual serving as Trustee shall be conclusively presumed by any acting Co-Trustee(s) or named Successor Trustee, in that order, appointed upon either:

(a) Receipt by such person of a written medical opinion certifying the incapacity of the individual serving as Trustee to manage his or her financial affairs from two physicians licensed to practice in this state or other state of the United States, one of whom shall, if possible, be the Trustee's personal physician certifying the individual was by reason of accident, physical or mental illness, progressive or intermittent physical or mental deterioration, or other similar cause, incapacitated to act rationally and prudently in his or her own financial affairs, or

(b) A judicial determination of the incapacity of the individual serving as Trustee.

Subsequent proof of competency or capacity shall be established by the same procedures. However, the reappointment of an individual serving as Trustee shall be effective upon approval by a court with jurisdiction over this Trust of the previously incapacitated Trustee's petition to act again as a Trustee of this Trust.

**3.1.3.3. Power of Successor Trustee.** Any Successor Trustee shall have the rights, powers, privileges, discretions, and duties conferred upon or vested in my Trustee by the provisions of this Agreement.

**3.1.3.4. Nomination of Successor Trustee.** If a vacancy occurs in the office of Trustee, then the Trustee or Co-Trustees, at that time, may appoint a Successor Trustee or Co-Trustee that is not subordinate to any beneficiary or beneficiaries. Such appointment shall be made in a written instrument that shall be delivered to my beneficiary or beneficiaries. In the default of such appointment, [Name] shall have the right, power, and authority to designate a Successor Trustee.

**3.1.4. Compensation of Trustee.** My Individual Trustee shall be entitled to receive reasonable compensation for services rendered and to reimbursement for all reasonable expenses.

**3.1.5. Powers of Trustee.** In addition to the powers herein provided and those given by law ([cite to state statute]), my Trustee, without any order of the Court and in my Trustee's sole and absolute discretion, may:

**3.1.5.1. Make Investments.** Retain any property and invest and reinvest in any property, including by way of illustration, and not by way of limitation, common stocks up to 100 percent of my estate, any common or diversified trust funds, maintained by any financial institution or association, and any form of life insurance, annuity, or endowment policies. In so doing, my Trustee may act without restriction to so-called legal investments and without responsibility for diversification.

**3.1.5.2. Purchase Investments.** Purchase investments at premiums and charge premiums to income or principal, or partly to each.

**3.1.5.3. Stocks and Bonds.** Subscribe for stocks, bonds, or other investments; exercise any stock option or similar right; join in any plan of lease, mortgage, merger, consolidation, reorganization, foreclosure, or voting trust, and deposit securities thereunder; and generally exercise all the rights of security holders of any corporation.

**3.1.5.4. Registration.** Register securities in the name of his or her nominee or hold them unregistered so that title may pass by delivery.

**3.1.5.5. Voting.** Vote, in person or by proxy, securities held by my Trustee and, in such connection, delegate discretionary powers.

**3.1.5.6. Repair.** Repair, alter, improve, or lease, for any period of time, any property, and give options for leases.

**3.1.5.7. Sell.** Sell property at public or private sale, for cash or credit and with or without security, exchange or partition property, and give options for sales or exchanges.

**3.1.5.8. Real Estate.** Sell any real estate, at public or private sale, upon such terms as my Trustee shall deem appropriate.

**3.1.5.9. Borrow.** Borrow money from any person, including any Trustee, and mortgage or pledge any property. My Trustee is specifically authorized to place a mortgage on any real estate that is owned by the trust.

**3.1.5.10. Compromise.** Compromise claims including any questions relating to any policy of life insurance. However, my Trustee need not institute litigation to collect any policy unless my Trustee is reasonably indemnified for costs, counsel fees, and other expenses of such litigation.

**3.1.5.11. Distributions.** Make distribution of both income or principal in cash or in kind, or partly in each.

**3.1.5.12. Employment of Agents.** Employ such agents as my Trustee may deem advisable in the administration of my estate or any trust pre-owned hereunder and pay them such compensation, if my Trustee may deem proper, out of income or principal or out of both.

**3.1.5.13. Mutual Funds.** Invest in mutual funds.

**3.1.5.14. Trust Additions.** Add to the principal of any trust created hereunder any property received from any person by Deed, Will, or in any other manner, provided such property is acceptable to my Trustee.

**3.1.5.15. Post-Termination.** Exercise all power, authority, and discretion given by this trust, after termination of any trust created herein, until the same is fully distributed.

**3.1.5.16. Limitations.** Notwithstanding any of the powers conferred upon my Trustee, no individual, acting as Trustee hereunder, shall exercise or join in the exercise of discretionary powers over income, principal, or termination of any Trust (1) for his or her own benefit or (2) to discharge his or her legal obligation to support [*First Name of Beneficiary*].

**3.1.5.17. Professional Care Manager.** My Trustee is encouraged to consider retaining the services of a Professional Care Manager to assist in providing the required care for [*First Name of Beneficiary*]. The purpose of the Care Manager would be to coordinate other agencies or professionals or home health aides or personal care providers or homemakers or any other services which the Care Manager and my Trustee feel are in the best interests of [*First Name of Beneficiary*]. The primary purpose of this Trust is to provide funds to be spent on behalf of [*First Name of Beneficiary*]. It is my intention to benefit [*First Name of Beneficiary*] to the fullest extent possible, rather than the Remainder Beneficiary(ies). My Trustee shall pay all costs in connection with the Care Manager.

**3.1.5.18. Residence.** My Trustee may acquire, hold, and maintain any residence (whether held as real property, condominium, or cooperative apartment) for investment or for the use and benefit of [*First Name of Beneficiary*], as my Trustee, in the exercise of sole and absolute discretion, shall determine. If my Trustee, in the exercise of sole and absolute discretion, shall determine that it would be in the best interests of [*First Name of Beneficiary*] to maintain a residence for the use of [*First Name of Beneficiary*], but that the residence owned by my Trustee should not be used for such purpose, my Trustee shall be authorized to sell said residence and to apply all or any part of the net proceeds of sale to the purchase of such other residence or residences or to make such other arrangements as my Trustee, in the exercise of sole and absolute discretion, shall deem suitable for the purposes. Any proceeds of sale not needed for reinvestment in a residence as provided above are to be added to the principal of the trust and thereafter held, administered, and disposed of as a part thereof. My Trustee may use the proceeds to pay all carrying charges of such residence, including but not limited to any taxes, assessments, and maintenance thereon,

and all expenses of the repair and operation thereof, including the employment of domestic servants and other expenses incident to the maintenance of a household for the benefit of *[First Name of Beneficiary]*, to expend such amounts as my Trustee, in the exercise of sole and absolute discretion, shall determine, including, but not limited to, providing for the personal care and comfort of *[First Name of Beneficiary]* in any manner whatsoever.

**3.1.5.19. Life Insurance.** My Trustee may purchase life insurance on the life of any individual in which *[First Name of Beneficiary]* hereunder may have an insurable interest; may enter into any form of split-dollar arrangement with respect to such insurance, including a split-dollar arrangement with another trust of which any Trustee hereunder is acting as a Trustee notwithstanding that such arrangement may constitute an act of self-dealing; may pay any premiums on any such life insurance policy held hereunder from trust income and/or principal; may exercise with respect to said insurance policies held hereunder from time to time all options, rights, elections, and privileges exercisable with respect to said policies, including, but not limited to, the right to demand and collect from the company or companies issuing said policies all such proceeds as shall be payable to my Trustee; may designate and change the beneficiaries thereunder, provided, however, I may not be designated as such beneficiary; may modify, exchange, surrender, or cancel any such policies of insurance; may borrow upon and pledge any such policy in connection with a loan; may assign and distribute any and all of the rights thereunder to or for the benefit of *[First Name of Beneficiary]*; may direct the disposition of dividends or surplus; may convert said policies into different forms of insurance; and may elect methods of settlement with respect thereto.

**3.1.6. Bond-Waived.** Neither my original Trustee nor any Successor Trustee shall be required to give bond or furnish sureties in any jurisdiction.

## SECTION 4 TAX AND ADMINISTRATIVE PROVISIONS

**4.1. Death Tax Clause.** All estate, inheritance, and other death taxes, including any interest and penalties with respect to those taxes not caused by negligent delay, payable to any federal, state, or foreign taxing authority imposed with respect to all property comprising my gross estate, whether or not such property passes under this Trust, shall be paid out of the principal of my residuary trust estate.

**4.2. Income Tax.** I understand that I or any other donor hereto may be treated, for income tax purposes only, as the owners of the property in this Trust. Because I intend to divest myself and any other donor hereto of all rights to, interests in, and powers over the trust property, I direct that even if I am liable for income taxes with respect to the taxable income of this Trust, neither I nor such other donor shall be entitled to reimbursement for any such income taxes.

### 4.3. Tax Refund

**4.3.1. Direct Payment.** The amount of any tax refund shall be paid directly to my Trustee to the extent such refund is attributable to amounts previously paid by my Trustee. For purposes of determining whether an amount is attributable to such prior payments, any refund (including interest thereon) shall be attributed to amounts previously paid by my Trustee to the extent my Trustee made any tax payment for the relevant tax year which has not been previously refunded. For purposes of determining whether an amount previously paid has been previously refunded, any interest included as part of a refund shall not be used to offset a previous payment by my Trustee.

**4.3.2. Incorrect Payment to Beneficiary.** If any tax refund attributable in whole or in part to a prior payment by my Trustee is paid directly to *[First Name of Beneficiary]* or *[his/her]* guardian or other representative, the recipient of such refund or part thereof shall have no interest in or right to such refund or part thereof and shall hold the amount which is attributable to a prior payment by my Trustee as an agent of and for my Trustee and shall immediately turn over such amount to my Trustee.

**4.4. Protective Provision.** This is a Spendthrift Trust. All principal and income shall, until actual distribution, be free of debts, contracts, alienations, and anticipations of *[First Name of Beneficiary]* and Remainder Beneficiaries, and the same shall not be liable to any levy, attachment, execution, or sequestration while in the possession of my Trustee.

**4.5. Non-Accrual of Income.** All income not actually paid for the benefit of *[First Name of Beneficiary]* before termination of his or her interest shall be treated as though it had accrued and become payable thereafter, and no credit or

accrual shall be made for taxes, commissions, or other charges theretofore made against income. Income shall not be apportioned between successive beneficiaries.

**4.6. Optional Termination of Trust.** Notwithstanding any other provisions hereof to the contrary, the independent Trustee during my lifetime, and my Trustee after my death, in such Trustee's sole and absolute discretion and at any time, may terminate any or all of the trust shares under this Trust if the amount thereof does not warrant the cost of continuing said Trust or if its administration would be otherwise impractical. Upon such termination, such Trustee shall pay the principal and any accumulated or undistributed income of such trust share to the "Remainder Beneficiaries" in the proportions which they would be entitled to receive distributions upon the death of *[First Name of Beneficiary]* as set forth in the subsection titled "Distributions After Death of Our Beneficiary" and assuming that *[First Name of Beneficiary]* did not exercise the testamentary power of appointment granted to *[him/her]*.

**4.7. Disability Provision.** Unless otherwise provided for herein, any income or principal payable to any Remainder Beneficiary who, in the opinion of my Trustee, is mentally or physically disabled, shall be held in a separate trust by my Trustee during such disability unless the trust share is sooner terminated as otherwise provided herein. Income may be accumulated, and income and principal may be expended for the health, maintenance, support, and education of such Remainder Beneficiary as my Trustee, in my Trustee's sole and absolute discretion, may determine. My Trustee may apply the same directly without the intervention of a guardian or pay the same to any person having the care or control of such Remainder Beneficiary or with whom such Remainder Beneficiary resides without duty on the part of my Trustee to supervise or inquire into the application of such funds. The balance of such income and principal shall be paid to such Remainder Beneficiary when the disability ceases, or upon the death of such Remainder Beneficiary, then to such Remainder Beneficiary's descendants by representation.

**4.8. Rule Against Perpetuities.** If any trust hereunder is situated in a jurisdiction which has a Rule Against Perpetuities, then notwithstanding anything herein to the contrary, no Trust hereunder shall extend beyond twenty-one (21) years after the death of the last survivor of myself and my descendants living at the date of my death. At the expiration of that period, my Trustee shall distribute the remaining portion of any Trust property in my Trustee's hands to the beneficiaries entitled to the income at that time.

**4.9. Accountings.** My Trustee shall render an account of the administration of the Trust to the adult Remainder Beneficiaries upon request by any adult Remainder Beneficiary, and the approval thereof by the living adult Remainder Beneficiaries shall be conclusively binding upon all parties in interest under this Agreement. The aforementioned adult Remainder Beneficiaries shall be conclusively presumed to have approved each such account unless he, she, or they file written exceptions thereto with my Trustee within thirty (30) days after the receipt of each account. Nothing herein shall limit the right of my Trustee to file an accounting in a court of competent jurisdiction at appropriate times. The records of the Trust shall be opened at all reasonable times to the inspection of *[First Name of Beneficiary]* and Remainder Beneficiaries of the Trust and their appointed representatives.

**4.10. Government Benefits Advisor.** My Trustee shall have the power to retain legal and professional assistance in administering this Trust and fulfilling its purposes. In particular, in making a determination whether to distribute income or principal to or for *[First Name of Beneficiary]* under the provisions of this Trust, my Trustee may engage a professional advisor knowledgeable on the subject of the availability of funds or benefits from governmental or other sources on account of *[First Name of Beneficiary]*'s mental or physical disability or handicap, to advise Trustee concerning the availability of such funds or benefits. Trustee shall be entitled to rely upon the advice and information obtained from such advisor and shall not be liable for any act or omission on the part of my Trustee attributable thereto. The reasonable costs and expenses of administering the Trust including the retention of legal and professional assistance, shall be paid first out of the Trust's income and then out of principal.

**4.11. Annual Withdrawal Power.** This paragraph applies to the annual withdrawal power granted in paragraph 1.7. above.<sup>8.1</sup>

**4.11.1.** The withdrawal power shall arise immediately after each contribution to the trust.

**4.11.2.** Each proportional share of a contribution is a fraction determined by dividing the amount of the contribution by the number of my then-living children other than *[First Name of Beneficiary]* and more remote descendants.

**4.11.3.** The maximum amount that any child or descendant may withdraw with respect to all contributions made by the same donor in a single calendar year shall be the lesser of (1) the total amount of the donor's contributions to this trust during that year and (2) the amount of the federal gift tax annual exclusion in effect on the date of the earliest of such contributions or twice the gift tax annual exclusion if the donor is married on the date of that last of all contributions made during that year.

**4.11.4.** The withdrawal power takes precedence over any other power or discretion granted the trustee or any other person.

**4.11.5.** Each child or descendant can exercise this withdrawal power by a written request delivered to the Trustee. The legally authorized personal representative of any person unable to exercise a withdrawal power because of a legal disability, including minority, may make the demand on the child's or descendant's behalf. If there is no legally authorized personal representative, the trustee shall designate an appropriate adult individual (who may be a trustee but may not be me) who may make the demand on such child's or descendant's behalf.

**4.11.6.** The Trustee must reasonably notify the person who would exercise a child's or descendant's withdrawal power of its existence and that of any contributions made to the trust that are subject to the power.

**4.11.7.** The unexercised withdrawal power of each child or descendant shall lapse on the last day of each calendar year or, if earlier, thirty (30) days after the contribution to which it relates, but it shall then lapse only in an amount equal to the greater of that sum referred to in Internal Revenue Code of 1986, as amended ("Code") Section 2514(e)(1) (currently, five thousand dollars (\$5,000)) or that percentage referred to in Code Section 2514(e)(2) (currently, five percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. These rights of withdrawal that do not lapse at the end of a calendar year shall continue to be exercisable by the child or descendant subject to this same limited annual lapse. These rights of withdrawal respecting a contribution made fewer than thirty (30) days before the end of a calendar year shall not then lapse but shall remain exercisable until the end of the term otherwise designated in this instrument, without respect to the fact that it occurs during the following calendar year.

**4.11.8.** "Contribution" means any cash or other assets transferred to the trustee to be held as part of the trust funds, and any payment of premiums on life insurance policies owned by the trust. The amount of any contributions is its federal gift tax value, as determined by the trustee at the time of the transfer.

**4.12. Restriction on Grantor as Trust.** Notwithstanding any other provision of this Agreement or state law to the contrary, neither I nor any other donor hereto shall have the right as a trustee hereunder: (1) to terminate this Trust in all or in part, (2) to exercise any incidents of ownership in any policy insuring my life, (3) to the enjoyment of, or the right to the income from, the trust property, or (4) either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the trust property or the income therefrom.

#### **4.13. Situs**

**4.13.1. Original Situs.** Questions pertaining to the validity, construction, and administration of this Trust shall be determined in accordance with the law of the [Name of State].

**4.13.2. Changing the Trust Situs.** After my death, the situs of any trust established herein may be changed by my Trustee, in my Trustee's sole and absolute discretion.

#### **4.14. Definitions**

**4.14.1. Distributions by Representation.** Unless otherwise specifically provided, all distributions are to be made to a person's descendants, by representation. The property is divided into as many equal shares as there are: (1) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants; and (2) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants, as if the surviving descendants who were

allocated a share and their surviving descendants had predeceased the designated ancestor.

**4.14.2. Descendants.** The descendants of a person means all of that person's lineal descendants of all generations. The relationship of parent and child at each generation shall be determined by the definition of parent and child contained under *[Name of State]* law as of the date of my death. A descendant in gestation who is later born alive shall be considered a descendant in being throughout the period of gestation.

**4.14.3. Disability.** Any Remainder Beneficiary under this Trust is considered disabled or under a disability when he or she is under the age of eighteen (18) years and not emancipated; or, if in the judgment of my Trustee, such Remainder Beneficiary is unable to manage his or her property and affairs for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance. If any court of competent jurisdiction has declared such Remainder Beneficiary to be disabled or under a disability, my Trustee shall be bound by that determination as long as that determination is in effect.

**4.14.4. Education.** As used in this Trust, "education" shall include:

**4.14.4.1. College.** Any course of study or instruction at an accredited college or university granting undergraduate or graduate degrees.

**4.14.4.2. Vocational.** Any course of study or instruction at any institution for specialized, vocational, or professional training.

**4.14.4.3. General.** Any curriculum offered by any institution that is recognized for purposes of receiving financial assistance from any state or federal agency or program.

**4.14.4.4. Course of Study.** Any course of study or instruction which may be useful in preparing any beneficiary for any vocation consistent with such beneficiary's abilities and interests.

**4.14.4.5. Types of Distributions.** Distributions for education may include tuition fees, books, supplies, living expenses, travel, and spending money to the extent such education expenses are reasonable.

**4.14.5. Trustee.** Any reference to my "Trustee" shall include the singular or the plural and the masculine, the feminine, or the neuter and is intended to refer to such person or persons serving as my Trustee, including my original Trustee or any successor Trustee whether such Trustee shall be an individual or a corporation.

**4.14.6. Remainder Beneficiaries.** "Remainder Beneficiaries" of the Trust are:

**4.14.6.1.** If the Trust is then terminating, the persons entitled to distribution of the principal thereof, without regard to any requirement that the principal be held in further trust; and

**4.14.6.2.** If the Trust is not then terminating, the persons who would be entitled to distribution of the principal thereof if the trust were to terminate at that time by its terms (and not as a result of any exercise of discretion on the part of the trustees), assuming that no power of appointment with respect to such trust had been exercised and without regard to any requirement that the principal be held in further trust.

**4.14.7. Eligible Person.** Any reference herein to an eligible person shall refer to a person (other than me) who is neither related nor subordinate to me and who has not contributed any assets to the Trust, has no interest in the Trust, whether vested or contingent, and is not the parent or spouse of any person with such an interest. In determining whether a Trustee is an eligible person, any contingent remainder interest that a sibling or niece or nephew of mine has in the trust upon *[First Name of Beneficiary]*'s death shall be disregarded. For the purpose of this paragraph, "related" and "subordinate" have the same meaning that they have under [Internal Revenue Code Section 672\(c\)](#).

**4.14.8. Other Definitions.** Except as otherwise provided in this Trust, terms shall be as defined in the *[Name of State Probate Code]* (*[cite to probate code]*) as amended after the date of this Trust and after my death.

**4.15. Contest Clause.** If *[First Name of Beneficiary]* or any Remainder Beneficiary, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this Trust, including any codicils thereto, or commences or prosecutes

any legal proceedings to set aside this Trust, then in such event such beneficiary shall forfeit his or her share, as well as the share of any of his or her descendants, and cease to have any right or interest in the trust property. *[First Name of Beneficiary]*'s or such contesting Remainder Beneficiary's share shall be distributed as if the contesting Beneficiary or Remainder Beneficiary predeceased me without any living descendants. My Trustee is authorized to defend, at the expense of the trust property, any contest or other attack of any nature on this Trust or any of its provisions.

**SECTION** IN WITNESS WHEREOF, the provisions of this Agreement of Trust shall bind *[Name of Client]* as Grantor and *[Name of Trustee 1]* as Trustee, assuming the role of Trustee hereunder, and the beneficiaries of this Trust as well as their successors and assigns.

GRANTOR:

\_\_\_\_\_  
*[Name of Client]*

ACCEPTED:

\_\_\_\_\_  
*[Name of Trustee]*, Trustee

*[NAME OF STATE]* :

: ss

COUNTY OF *[NAME OF COUNTY]* :

I CERTIFY that on this *[day]* day of *[month]*, *[year]*, *[Name of Client]* personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) Is named in and personally signed the attached document; and
- (b) Signed, sealed, and delivered this document as *[his/her]* act and deed.

\_\_\_\_\_  
*[NAME OF STATE]* :

: ss

COUNTY OF *[NAME OF COUNTY]* :

I CERTIFY that on this *[day]* day of *[month]*, *[year]*, *[Name of Trustee]* personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) Is named in and personally signed the attached document; and
- (b) Signed, sealed, and delivered this document as *[his/her]* act and deed.

\_\_\_\_\_

<sup>8.1</sup>

This section discussing the Annual Withdrawal Power was obtained from Howard Zaritsky's Tax Planning for Family Wealth Transfers: Analysis With Forms; Transfers to Persons With Special Circumstances; Form 7-2, WG&L Estate Planning Treatise (4th ed., Thomson/RIA 2008).

## Form 16.01.02. Third-Party Discretionary Special Needs Trust (Multiple Beneficiaries)

On this [date] day of [month], [year], [Name of Client], of [Address of Client], as GRANTOR (and sometimes referred to in the first person), by this Agreement with [Name of Trustee], of [Address of Trustee], as TRUSTEE, have caused or will cause certain property to be transferred and shall be administered by my Trustee as herein provided. This trust is for the benefit of [Name of Beneficiary], my [son/daughter], a disabled person as defined in 42 USC § 1382c(a)(3)(A) (hereinafter referred to as "Beneficiary" or "[First Name of Beneficiary]"), whose address is [Address of Beneficiary]. [First Name of Beneficiary] suffers from [name of disability].

### SECTION 1 IDENTIFICATION

**1.1. Spouse.** My spouse's name is [Name of Spouse]. All references in this Trust to my "spouse" are to said spouse.

**1.2. Children.** I have [number] children, [Names of Children]. All references in this Trust to my "children" are to said named children.

**1.3. Name of Trust.** The name of this trust is the "[Name of Beneficiary]" Third-Party Discretionary Special Needs Trust under Agreement dated [month day], [year].

#### 1.4. Trust Funding

**1.4.1. Initial Trust Funding.** This Trust shall be funded with such assets as I, or any other person, transfers to my Trustee, or which are bequeathed hereto by me, or any other person.

**1.4.2. Additions to Trust.** Other property, real or personal, may be transferred to my Trustee by anyone with the consent of my Trustee. All property held by my Trustee shall constitute the "Trust Estate." Any property transferred to Trustee by a third party is a gift to [First Name of Beneficiary] and cannot be reclaimed by the third party.

**1.4.3. Right to Substitute Property.** I reserve the right to reacquire the trust assets by substitution of other property of equivalent value pursuant to IRC § 675(4).

**1.5. Intention.** This Trust is for the primary benefit of [First Name of Beneficiary]. However, no assets or income of this trust shall be considered available to [First Name of Beneficiary] for determining [his/her] assets or income under the rules by which any government agency determines eligibility for need-based services or financial assistance. All provisions of this trust shall be interpreted to qualify this trust as a Special Needs Trust. Any provisions of this trust which may prevent this trust from being interpreted as a Special Needs Trust shall be null and void. All provisions of this trust agreement are intended to be construed and interpreted such that the trust agreement meets the requirements of the Social Security Administration's Program Operating Manual ("POMS") SI 01120.200B, SI 01120.200D, and SI 01120.200E. The Independent Trustee may, by instrument in writing, amend this trust agreement in any manner required to meet any of the intentions described in this paragraph. No amendment under this paragraph may increase the class of beneficiaries or provide me with any beneficial interest or economic benefit in this trust.

**1.6. Irrevocability.** Subject to the provisions of the sections entitled "Intention" and "Optional Termination of Trust" of this Agreement to the contrary, but notwithstanding any other provisions of this Agreement or state law to the contrary, this Trust is irrevocable. I, as Trustee, or Grantor shall have no right to alter, revoke, or terminate this Trust or any of the terms of this Agreement.

**1.7. Annual Withdrawal Power.** Each of my then-living children, other than [First Name of Beneficiary], and each of my then living more remote descendants, shall have the right to withdraw an amount equal to a proportionate share of each contribution to the trust (other than a transfer by reason of the transferor's death), subject to the rules described below.

### SECTION 2 DISTRIBUTION OF INCOME AND PRINCIPAL

**2.1. Provisions During Beneficiary's Lifetime.** After the exercise or lapse of the withdrawal powers under paragraph 1.7 and during the lifetime of [First Name of Beneficiary], the Independent Trustee may distribute from the principal or income, or both, of this Trust, such amounts that the Independent Trustee, in the Independent Trustee's sole, absolute, and unfettered

discretion, may from time to time deem reasonable or advisable for any purpose, to or for the benefit of *[First Name of Beneficiary]* and my other children and more remote descendants. Any income of the Trust not so distributed shall be added annually to principal.

## **2.2. Distribution Guidelines**

**2.2.1. Equal or Unequal Shares.** The Independent Trustee may distribute income and principal unequally and may distribute to some beneficiaries and not to others.

**2.2.2. Other Income and Assets.** The Independent Trustee may consider other income and assets readily available to the beneficiaries in making distributions.

**2.2.3. No Right to Direct Distribution.** *[First Name of Beneficiary]* shall have no right to direct a distribution from this Trust to make any provision for *[his/her]* food and shelter or to direct a distribution from this Trust for any other purpose.

**2.2.4. Preference.** *[First Name of Beneficiary]* is the preferred beneficiary and *[his/her]* interests shall be given priority over the interests of any Remainder Beneficiaries.

**2.2.5. Trust Revocation.** *[First Name of Beneficiary]* shall have no right to revoke this Trust.

**2.2.6. Trust Distributions.** The Independent Trustee shall, to the extent feasible, avoid making any distributions to *[First Name of Beneficiary]* and shall instead apply the trust assets to *[his/her]* benefit, including applying directly those of his bills that are submitted to the Trustee.

## **2.6. Distributions After Death of Beneficiary**

**2.6.1. Taxes and Expenses.** The Trustee shall pay all federal and state taxes due because of the death of *[First Name of Beneficiary]* and any administrative expenses and costs attendant to terminating or settling this Trust, including any costs or fees associated with the preparation of final accountings or making any distributions provided for herein.

**2.6.2. Specific Distributions.** Upon the death of *[First Name of Beneficiary]*, the Trustee shall distribute to *[Name]* the sum of *[amount]* Dollars.

**2.6.3. Last Illness, Funeral, and Debts.** Trustee may then pay all expenses of *[First Name of Beneficiary]*'s last illness, funeral, and burial costs.

**2.6.4. Distributions.** Upon the death of *[First Name of Beneficiary]*:

**2.6.4.1. *[First Name of Beneficiary]*'s Parents.** Trustee shall distribute the remaining principal and accrued income, if any, to *[First Name of Beneficiary]*'s parents, *[Name of Father]* and *[Name of Mother]*, or to the survivor of them.

**2.6.4.2. *[First Name of Beneficiary]*'s Siblings.** If *[First Name of Beneficiary]*'s parents fail to survive *[him/her]*, Trustee shall distribute the remaining principal and accrued income, if any, to my then living descendants in per stirpital shares. These remaindermen are herein referred to as my Remainder Beneficiary(ies). Under no circumstances shall *[First Name of Beneficiary]* or *[First Name of Beneficiary]*'s estate receive a share of the trust estate or undistributed income.

**2.7. Community Trust.** My Trustee may enroll *[First Name of Beneficiary]*, with the consent of the guardian, if there is one, in a community trust for the severely disabled. My Trustee may obtain from the community trust follow-along services, guardianship services, and such other services that my Trustee determines, in my Trustee's sole and absolute discretion, to be necessary, subject to the limitations of the subsection titled "Death Tax Clause" below. My Trustee may also increase the community trust services *[First Name of Beneficiary]* is to receive subject to the limitations of the subsection titled "Intent Regarding Distributions" of this Section.

**2.8. Age Requirement.** If any Remainder Beneficiary less than *[age]* years of age is entitled to receive a distribution

under this Trust, my Trustee shall retain such distribution to be administered as follows:

**2.8.1. Income.** My Trustee may, in my Trustee's sole and absolute discretion, pay any part or all of the net income to or for the benefit of my Remainder Beneficiary or may add any part of such income to the principal of the Trust; and

**2.8.2. Principal.** My Trustee shall pay to or apply for the benefit of my Remainder Beneficiary as much of the principal of my Remainder Beneficiary's share as my Trustee may deem proper for my Remainder Beneficiary's health, maintenance, support, and education. My Trustee may use principal to assist my Remainder Beneficiary in buying a home or starting a business; and

**2.8.3. Withdrawal Rights.** Any Remainder Beneficiary shall have the right to withdraw principal from his or her trust upon attaining the age of [age] years.

**2.8.4. Predecease.** If my Remainder Beneficiary dies before the entire principal of such trust has been withdrawn, the entire principal shall be distributed by my Trustee to my Remainder Beneficiary's then-living descendants by representation; or, in default of such descendants, to my living descendants by representation (the share thus accruing to any descendant of mine for whom, at that time, my Trustee holds a separate trust hereunder shall be added to such trust and thereafter held as though originally forming a part hereof); or, in default of such descendants, then to such persons who would be entitled to inherit from [me/us] under the Intestate Laws of the [Name of State] ([cite to state statute]).

### SECTION 3 FIDUCIARY PROVISIONS

#### 3.1. Trustee Provisions

**3.1.1. Appointment of Independent Trustee.** I appoint [Name of Independent Trustee] to serve as an "Independent Trustee" as long as I am acting as Trustee hereunder. The Independent Trustee shall have the power to exercise any powers granted hereunder to the Trustees that I am prohibited from exercising under section entitled "Restrictions on Grantor as Trustee" or any other provision of this Agreement. If [Name of Independent Trustee], or any other independent trustee appointed pursuant to this provision, shall cease to act as a trustee hereunder, I shall have the power to appoint an "eligible person" (as defined below) as a successor Independent Trustee hereunder. Any Independent Trustee acting hereunder shall have the right to designate his or her successor, with one or more alternates in a specified order of priority. Thereafter, if the Independent Trustee ceases to act and no successor is appointed by me within ninety (90) days of the vacancy, the first designated successor who can and will act shall be the successor Independent Trustee. Each Independent Trustee may from time to time alter his or her designation before it takes effect, and the designation by a successor Independent Trustee acting hereunder shall supersede any designation of alternates made by a prior Independent Trustee.

**3.1.2. Successor Trustee Provisions.** If [Name of Trustee] fails or ceases to serve for any reason, I appoint [Name of Successor Trustee 1] as Successor Trustee. If [Name of Successor Trustee 1] fails to qualify or ceases to serve for any reason, then I appoint [Name of Successor Trustee 2] as Successor Trustee.

#### 3.1.3. Resignation of Trustee (Including any Independent Trustee Acting Hereunder)

**3.1.3.1. Right of Trustee to Resign.** Any Trustee shall have the right to resign, by duly acknowledged written instrument to me, if I am then serving as Trustee, and to the Remainder Beneficiaries.

**3.1.3.2. Incapacity of Trustee.** A Trustee who becomes incapacitated shall be removed from office and replaced by a Successor Trustee. The incapacity of any individual serving as Trustee shall be conclusively presumed by any acting Co-Trustee(s) or named Successor Trustee, in that order, appointed upon either:

- (a) Receipt by such person of a written medical opinion certifying the incapacity of the individual serving as Trustee to manage his or her financial affairs from two physicians licensed to practice in this state or other state of the United States, one of whom shall, if possible, be the Trustee's personal physician certifying the individual was by reason of accident, physical or mental illness, progressive or intermittent physical or mental

deterioration, or other similar cause, incapacitated to act rationally and prudently in his or her own financial affairs, or

(b) A judicial determination of the incapacity of the individual serving as Trustee. Subsequent proof of competency or capacity shall be established by the same procedures. However, the reappointment of an individual serving as Trustee shall be effective upon approval by a court with jurisdiction over this Trust of the previously incapacitated Trustee's petition to act again as a Trustee of this Trust.

**3.1.3.3. Power of Successor Trustee.** Any Successor Trustee shall have the rights, powers, privileges, discretions, and duties conferred upon or vested in my Trustee by the provisions of this Agreement.

**3.1.3.4. Nomination of Successor Trustee.** If a vacancy occurs in the office of Trustee, then the Trustee or Co-Trustees, at that time, may appoint a Successor Trustee or Co-Trustee that is not subordinate to any beneficiary or beneficiaries. Such appointment shall be made in a written instrument that shall be delivered to my beneficiary or beneficiaries. In the default of such appointment, [Name] shall have the right, power, and authority to designate a Successor Trustee.

**3.1.4. Compensation of Trustee.** My Individual Trustee shall be entitled to receive reasonable compensation for services rendered and to reimbursement for all reasonable expenses.

**3.1.5. Powers of Trustee.** In addition to the powers herein provided and those given by law ([cite to state statute]), my Trustee, without any order of the Court and in my Trustee's sole and absolute discretion, may:

**3.1.5.1. Make Investments.** Retain any property and invest and reinvest in any property, including by way of illustration, and not by way of limitation, common stocks up to 100 percent of my estate, any common or diversified trust funds, maintained by any financial institution or association, and any form of life insurance, annuity, or endowment policies. In so doing, my Trustee may act without restriction to so-called legal investments and without responsibility for diversification.

**3.1.5.2. Purchase Investments.** Purchase investments at premiums and charge premiums to income or principal, or partly to each.

**3.1.5.3. Stocks and Bonds.** Subscribe for stocks, bonds, or other investments; exercise any stock option or similar right; join in any plan of lease, mortgage, merger, consolidation, reorganization, foreclosure, or voting trust, and deposit securities thereunder; and generally exercise all the rights of security holders of any corporation.

**3.1.5.4. Registration.** Register securities in the name of his or her nominee or hold them unregistered so that title may pass by delivery.

**3.1.5.5. Voting.** Vote, in person or by proxy, securities held by my Trustee and, in such connection, delegate discretionary powers.

**3.1.5.6. Repair.** Repair, alter, improve, or lease, for any period of time, any property, and give options for leases.

**3.1.5.7. Sell.** Sell property at public or private sale, for cash or credit and with or without security, exchange or partition property, and give options for sales or exchanges.

**3.1.5.8. Real Estate.** Sell any real estate, at public or private sale, upon such terms as my Trustee shall deem appropriate.

**3.1.5.9. Borrow.** Borrow money from any person, including any Trustee, and mortgage or pledge any property. My Trustee is specifically authorized to place a mortgage on any real estate that is owned by the trust.

**3.1.5.10. Compromise.** Compromise claims including any questions relating to any policy of life insurance. However, my Trustee need not institute litigation to collect any policy unless my Trustee is reasonably indemnified for costs, counsel fees, and other expenses of such litigation.

**3.1.5.11. Distributions.** Make distribution of both income or principal in cash or in kind, or partly in each.

**3.1.5.12. Employment of Agents.** Employ such agents as my Trustee may deem advisable in the administration of my estate or any trust pre-owned hereunder and pay them such compensation, if my Trustee may deem proper, out of income or principal or out of both.

**3.1.5.13. Mutual Funds.** Invest in mutual funds.

**3.1.5.14. Trust Additions.** Add to the principal of any trust created hereunder any property received from any person by Deed, Will, or in any other manner, provided such property is acceptable to my Trustee.

**3.1.5.15. Post-Termination.** Exercise all power, authority, and discretion given by this trust, after termination of any trust created herein, until the same is fully distributed.

**3.1.5.16. Limitations.** Notwithstanding any of the powers conferred upon my Trustee, no individual, acting as Trustee hereunder, shall exercise or join in the exercise of discretionary powers over income, principal, or termination of any Trust (1) for his or her own benefit or (2) to discharge his or her legal obligation to support [*First Name of Beneficiary*].

**3.1.5.17. Professional Care Manager.** My Trustee is encouraged to consider retaining the services of a Professional Care Manager to assist in providing the required care for [*First Name of Beneficiary*]. The purpose of the Care Manager would be to coordinate other agencies or professionals or home health aides or personal care providers or homemakers or any other services which the Care Manager and my Trustee feel are in the best interests of [*First Name of Beneficiary*]. The primary purpose of this Trust is to provide funds to be spent on behalf of [*First Name of Beneficiary*]. It is my intention to benefit [*First Name of Beneficiary*] to the fullest extent possible, rather than the Remainder Beneficiary(ies). My Trustee shall pay all costs in connection with the Care Manager.

**3.1.5.18. Residence.** My Trustee may acquire, hold, and maintain any residence (whether held as real property, condominium, or cooperative apartment) for investment or for the use and benefit of [*First Name of Beneficiary*], as my Trustee, in the exercise of sole and absolute discretion, shall determine. If my Trustee, in the exercise of sole and absolute discretion, shall determine that it would be in the best interests of [*First Name of Beneficiary*] to maintain a residence for the use of [*First Name of Beneficiary*], but that the residence owned by my Trustee should not be used for such purpose, my Trustee shall be authorized to sell said residence and to apply all or any part of the net proceeds of sale to the purchase of such other residence or residences or to make such other arrangements as my Trustee, in the exercise of sole and absolute discretion, shall deem suitable for the purposes. Any proceeds of sale not needed for reinvestment in a residence as provided above are to be added to the principal of the trust and thereafter held, administered, and disposed of as a part thereof. My Trustee may use the proceeds to pay all carrying charges of such residence, including but not limited to any taxes, assessments, and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of domestic servants and other expenses incident to the maintenance of a household for the benefit of [*First Name of Beneficiary*], to expend such amounts as my Trustee, in the exercise of sole and absolute discretion, shall determine, including, but not limited to, providing for the personal care and comfort of [*First Name of Beneficiary*] in any manner whatsoever.

**3.1.5.19. Life Insurance.** My Trustee may purchase life insurance on the life of any individual in which [*First Name of Beneficiary*] hereunder may have an insurable interest; may enter into any form of split-dollar arrangement with respect to such insurance, including a split-dollar arrangement with another trust of which any Trustee hereunder is acting as a Trustee notwithstanding that such arrangement may constitute an act of self-dealing; may pay any premiums on any such life insurance policy held hereunder from trust income and/or principal; may exercise with respect to said insurance policies held hereunder from time to time all options, rights, elections, and privileges exercisable with respect to said policies, including, but not limited to, the right to demand and collect from the company or companies issuing said policies all such proceeds as shall be payable to my Trustee; may designate and change the beneficiaries thereunder, provided, however, I may not be designated as such beneficiary; may modify, exchange, surrender, or cancel any such policies of insurance; may borrow upon and pledge any such policy in connection with a loan; may assign and distribute any and all of the rights thereunder to or for the benefit of [*First Name of Beneficiary*]; may direct the disposition of dividends or surplus; may convert said policies into different forms of insurance; and may elect methods of settlement with respect thereto.

**3.1.6. Bond-Waived.** Neither my original Trustee nor any Successor Trustee shall be required to give bond or furnish sureties in any jurisdiction.

#### **SECTION 4 TAX AND ADMINISTRATIVE PROVISIONS**

**4.1. Death Tax Clause.** All estate, inheritance, and other death taxes, including any interest and penalties with respect to those taxes not caused by negligent delay, payable to any federal, state, or foreign taxing authority imposed with respect to all property comprising my gross estate, whether or not such property passes under this Trust, shall be paid out of the principal of my residuary trust estate.

**4.2. Income Tax.** I understand that I or any other donor hereto may be treated, for income tax purposes only, as the owners of the property in this Trust. Because I intend to divest myself and any other donor hereto of all rights to, interests in, and powers over the trust property, I direct that even if I am liable for income taxes with respect to the taxable income of this Trust, neither I nor such other donor shall be entitled to reimbursement for any such income taxes.

#### **4.3. Tax Refund**

**4.3.1. Direct Payment.** The amount of any tax refund shall be paid directly to my Trustee to the extent such refund is attributable to amounts previously paid by my Trustee. For purposes of determining whether an amount is attributable to such prior payments, any refund (including interest thereon) shall be attributed to amounts previously paid by my Trustee to the extent my Trustee made any tax payment for the relevant tax year which has not been previously refunded. For purposes of determining whether an amount previously paid has been previously refunded, any interest included as part of a refund shall not be used to offset a previous payment by my Trustee.

**4.3.2. Incorrect Payment to Beneficiary.** If any tax refund attributable in whole or in part to a prior payment by my Trustee is paid directly to *[First Name of Beneficiary]* or *[his/her]* guardian or other representative, the recipient of such refund or part thereof shall have no interest in or right to such refund or part thereof and shall hold the amount which is attributable to a prior payment by my Trustee as an agent of and for my Trustee and shall immediately turn over such amount to my Trustee.

**4.4. Protective Provision.** This is a Spendthrift Trust. All principal and income shall, until actual distribution, be free of debts, contracts, alienations, and anticipations of *[First Name of Beneficiary]* and Remainder Beneficiaries, and the same shall not be liable to any levy, attachment, execution, or sequestration while in the possession of my Trustee.

**4.5. Non-Accrual of Income.** All income not actually paid for the benefit of *[First Name of Beneficiary]* before termination of his or her interest shall be treated as though it had accrued and become payable thereafter, and no credit or accrual shall be made for taxes, commissions, or other charges theretofore made against income. Income shall not be apportioned between successive beneficiaries.

**4.6. Optional Termination of Trust.** Notwithstanding any other provisions hereof to the contrary, the Independent Trustee during my lifetime, and my Trustee after my death, in such Trustee's sole and absolute discretion and at any time, may terminate any or all of the trust shares under this Trust if the amount thereof does not warrant the cost of continuing said Trust or if its administration would be otherwise impractical. Upon such termination, such Trustee shall pay the principal and any accumulated or undistributed income of such trust share to the "Remainder Beneficiaries" in the proportions which they would be entitled to receive distributions upon the death of *[First Name of Beneficiary]* as set forth in the subsection titled "Distributions After Death of Our Beneficiary" and assuming that *[First Name of Beneficiary]* did not exercise the testamentary power of appointment granted to *[him/her]*.

**4.7. Disability Provision.** Unless otherwise provided for herein, any income or principal payable to any Remainder Beneficiary who, in the opinion of my Trustee, is mentally or physically disabled, shall be held in a separate trust by my Trustee during such disability unless the trust share is sooner terminated as otherwise provided herein. Income may be accumulated, and income and principal may be expended for the health, maintenance, support, and education of such Remainder Beneficiary as my Trustee, in my Trustee's sole and absolute discretion, may determine. My Trustee may apply the same directly without the intervention of a guardian or pay the same to any person having the care or control of such Remainder Beneficiary or with whom such Remainder Beneficiary resides without duty on the part of my Trustee to supervise

or inquire into the application of such funds. The balance of such income and principal shall be paid to such Remainder Beneficiary when the disability ceases, or upon the death of such Remainder Beneficiary, to such Remainder Beneficiary's descendants by representation.

**4.8. Rule Against Perpetuities.** If any trust hereunder is situated in a jurisdiction that has a Rule Against Perpetuities, then notwithstanding anything herein to the contrary, no Trust hereunder shall extend beyond twenty-one (21) years after the death of the last survivor of myself and my descendants living at the date of my death. At the expiration of that period, my Trustee shall distribute the remaining portion of any Trust property in my Trustee's hands to the beneficiaries entitled to the income at that time.

**4.9. Accountings.** My Trustee shall render an account of the administration of the Trust to the adult Remainder Beneficiaries upon request by any adult Remainder Beneficiary, and the approval thereof by the living adult Remainder Beneficiaries shall be conclusively binding upon all parties in interest under this Agreement. The aforementioned adult Remainder Beneficiaries shall be conclusively presumed to have approved each such account unless he, she, or they file written exceptions thereto with my Trustee within thirty (30) days after the receipt of each account. Nothing herein shall limit the right of my Trustee to file an accounting in a court of competent jurisdiction at appropriate times. The records of the Trust shall be opened at all reasonable times to the inspection of [*First Name of Beneficiary*] and Remainder Beneficiaries of the Trust and their appointed representatives.

**4.10. Government Benefits Advisor.** My Trustee shall have the power to retain legal and professional assistance in administering this Trust and fulfilling its purposes. In particular, in making a determination whether to distribute income or principal to or for [*First Name of Beneficiary*] under the provisions of this Trust, my Trustee may engage a professional advisor knowledgeable on the subject of the availability of funds or benefits from governmental or other sources on account of [*First Name of Beneficiary*]'s mental or physical disability or handicap, to advise Trustee concerning the availability of such funds or benefits. Trustee shall be entitled to rely upon the advice and information obtained from such advisor and shall not be liable for any act or omission on the part of my Trustee attributable thereto. The reasonable costs and expenses of administering the Trust including the retention of legal and professional assistance, shall be paid first out of the Trust's income and then out of principal.

**4.11. Annual Withdrawal Power.** This paragraph applies to the annual withdrawal power granted in paragraph 1.7. above.<sup>8,2</sup>

**4.11.1.** The withdrawal power shall arise immediately after each contribution to the trust.

**4.11.2.** Each proportional share of a contribution is a fraction determined by dividing the amount of the contribution by the number of my then-living children (other than [*First Name of Beneficiary*] and more remote descendants).

**4.11.3.** The maximum amount that any child or descendant may withdraw with respect to all contributions made by the same donor in a single calendar year shall be the lesser of (1) the total amount of the donor's contributions to this trust during that year and (2) the amount of the federal gift tax annual exclusion in effect on the date of the earliest of such contributions or twice the gift tax annual exclusion if the donor is married on the date of that last of all contributions made during that year.

**4.11.4.** The withdrawal power takes precedence over any other power or discretion granted the trustee or any other person.

**4.11.5.** Each child or descendant can exercise this withdrawal power by a written request delivered to the Trustee. The legally authorized personal representative of any person unable to exercise a withdrawal power because of a legal disability, including minority, may make the demand on the child's or descendant's behalf. If there is no legally authorized personal representative, the trustee shall designate an appropriate adult individual (who may be a trustee but may not be me) who may make the demand on such child's or descendant's behalf.

**4.11.6.** The Trustee must reasonably notify the person who would exercise a child's or descendant's withdrawal power of its existence and that of any contributions made to the trust that are subject to the power.

**4.11.7.** The unexercised withdrawal power of each child or descendant shall lapse on the last day of each calendar year or, if earlier, thirty (30) days after the contribution to which it relates, but it shall then lapse only in an amount equal to the greater of that sum referred to in Internal Revenue Code of 1986, as amended ("Code") Section 2514(e)(1) (currently, five thousand dollars (\$5,000)) or that percentage referred to in **Code Section 2514(e)(2)** (currently, five percent (5%)) of the trust corpus out of which, or the proceeds of which, the exercise of this withdrawal right could be satisfied. These rights of withdrawal that do not lapse at the end of a calendar year shall continue to be exercisable by the child or descendant subject to this same limited annual lapse. These rights of withdrawal respecting a contribution made fewer than thirty (30) days before the end of a calendar year shall not then lapse but shall remain exercisable until the end of the term otherwise designated in this instrument, without respect to the fact that it occurs during the following calendar year.

**4.11.8.** "Contribution" means any cash or other assets transferred to the trustee to be held as part of the trust funds, and any payment of premiums on life insurance policies owned by the trust. The amount of any contributions is its federal gift tax value, as determined by the trustee at the time of the transfer.

**4.12. Restriction on Grantor as Trustee.** Notwithstanding any other provision of this Agreement or state law to the contrary, neither I nor any other donor hereto shall have the right as a trustee hereunder: (1) to terminate this Trust in all or in part, (2) to exercise any incidents of ownership in any policy insuring my life, (3) to the possession or enjoyment of, or the right to the income from, the trust property, or (4) either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the trust property or the income therefrom.

#### **4.13. Situs**

**4.13.1. Original Situs.** Questions pertaining to the validity, construction, and administration of this Trust shall be determined in accordance with the laws of [*Name of State*].

**4.13.2. Changing the Trust Situs.** After my death, the situs of any trust established herein may be changed by my Trustee, in my Trustee's sole and absolute discretion.

#### **4.14. Definitions**

**4.14.1. Distributions by Representation.** Unless otherwise specifically provided, all distributions are to be made to a person's descendants, by representation. The property is divided into as many equal shares as there are: (1) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants; and (2) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants, as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the designated ancestor.

**4.14.2. Descendants.** The descendants of a person means all of that person's lineal descendants of all generations. The relationship of parent and child at each generation shall be determined by the definition of parent and child contained under [*Name of State*] law as of the date of my death. A descendant in gestation who is later born alive shall be considered a descendant in being throughout the period of gestation.

**4.14.3. Disability.** Any Remainder Beneficiary under this Trust is considered disabled or under a disability when he or she is under the age of eighteen (18) years and not emancipated; or, if in the judgment of my Trustee, such Remainder Beneficiary is unable to manage his or her property and affairs for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance. If any court of competent jurisdiction has declared such Remainder Beneficiary to be disabled or under a disability, my Trustee shall be bound by that determination as long as that determination is in effect.

**4.14.4. Education.** As used in this Trust, "education" shall include:

**4.14.4.1. College.** Any course of study or instruction at an accredited college or university granting undergraduate or graduate degrees.

**4.14.4.2. Vocational.** Any course of study or instruction at any institution for specialized, vocational, or professional training.

**4.14.4.3. General.** Any curriculum offered by any institution that is recognized for purposes of receiving financial assistance from any state or federal agency or program.

**4.14.4.4. Course of Study.** Any course of study or instruction which may be useful in preparing any beneficiary for any vocation consistent with such beneficiary's abilities and interests.

**4.14.4.5. Types of Distributions.** Distributions for education may include tuition fees, books, supplies, living expenses, travel, and spending money to the extent such education expenses are reasonable.

**4.14.5. Trustee.** Any reference to my "Trustee" shall include the singular or the plural and the masculine, the feminine, or the neuter and is intended to refer to such person or persons serving as my Trustee, including my original Trustee or any successor Trustee whether such Trustee shall be an individual or a corporation.

**4.14.6. Remainder Beneficiaries.** "Remainder Beneficiaries" of the Trust are:

**4.14.6.1.** If the Trust is then terminating, the persons entitled to distribution of the principal thereof, without regard to any requirement that the principal be held in further trust; and

**4.14.6.2.** If the Trust is not then terminating, the persons who would be entitled to distribution of the principal thereof if the trust were to terminate at that time by its terms (and not as a result of any exercise of discretion on the part of the trustees), assuming that no power of appointment with respect to such trust had been exercised and without regard to any requirement that the principal be held in further trust.

**4.14.7. Eligible Person.** Any reference herein to an eligible person shall refer to a person (other than me) who is neither related nor subordinate to me and who has not contributed any assets to the Trust, has no interest in the Trust, whether vested or contingent, and is not the parent or spouse of any person with such an interest. In determining whether a Trustee is an Independent Trustee, any contingent remainder interest that a sibling or niece or nephew of mine has in the trust upon *[First Name of Beneficiary]*'s death shall be disregarded. For the purpose of this paragraph, "related" and "subordinate" have the same meaning that they have under [Section 672\(c\) of the Internal Revenue Code](#).

**4.14.8. Other Definitions.** Except as otherwise provided in this Trust, terms shall be as defined in the *[Name of State Probate Code]* (*[cite to probate code]*) as amended after the date of this Trust and after my death.

**4.15. Contest Clause.** If *[First Name of Beneficiary]* or any Remainder Beneficiary, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this Trust, including any codicils thereto, or commences or prosecutes any legal proceedings to set aside this Trust, then in such event such beneficiary shall forfeit his or her share, as well as the share of any of his or her descendants, and cease to have any right or interest in the trust property. *[First Name of Beneficiary]*'s or such contesting Remainder Beneficiary's share shall be distributed as if the contesting Beneficiary or Remainder Beneficiary predeceased me without any living descendants. My Trustee is authorized to defend, at the expense of the trust property, any contest or other attack of any nature on this Trust or any of its provisions.

**SECTION** IN WITNESS WHEREOF, the provisions of this Agreement of Trust shall bind *[Name of Client]* as Grantor and *[Name of Trustee 1]* as Trustee, assuming the role of Trustee hereunder, and the beneficiaries of this Trust as well as their successors and assigns.

GRANTOR: \_\_\_\_\_

*[Name of Client]*

ACCEPTED: \_\_\_\_\_

*[Name of Trustee]*, Trustee

*[NAME OF STATE]* :

: ss

COUNTY OF [NAME OF COUNTY] :

I CERTIFY that on this [day] day of [month], [year], [Name of Client] personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) Is named in and personally signed the attached document; and
- (b) Signed, sealed, and delivered this document as [his/her] act and deed.

\_\_\_\_\_  
[NAME OF STATE] :

: ss

COUNTY OF [NAME OF COUNTY] :

I CERTIFY that on this [day] day of [month], [year], [Name of Trustee] personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) Is named in and personally signed the attached document; and
- (b) Signed, sealed, and delivered this document as [his/her] act and deed.

8.2

This section discussing the Annual Withdrawal Power was obtained from Howard Zaritsky's Tax Planning for Family Wealth Transfers: Analysis With Forms; Transfers to Persons With Special Circumstances; Form 7-2, WG&L Estate Planning Treatise (4th ed., Thomson/RIA 2008).

### **Form 16.01.03. Petition to Establish 42 USC Section 1396p(d)(4)(A) Special Needs Trust**

[STATE]: IN THE CIRCUIT COURT OF [CITY/COUNTY]

In Re: [NAME OF INCAPACITATED PERSON]

PETITION TO ESTABLISH THE [NAME OF INCAPACITATED PERSON] SPECIAL NEEDS TRUST

[NAME OF PETITIONER], guardian and conservator of [NAME OF INCAPACITATED PERSON], by counsel, asks this Court to establish the [NAME OF INCAPACITATED PERSON] Special Needs Trust pursuant to 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual, and for her Petition, [NAME OF PETITIONER] states the following:

1. The Petitioner's name is [NAME OF PETITIONER], and her place of residence is [ADDRESS]. The Petitioner is the wife of [NAME OF INCAPACITATED PERSON].
2. [NAME OF INCAPACITATED PERSON] was born [DATE], and he resides in his home at [ADDRESS].
3. [NAME OF INCAPACITATED PERSON] suffered a traumatic brain injury as a result of a traffic accident on [DATE], in [CITY/STATE]. [NAME OF INCAPACITATED PERSON] needs and will benefit from long-term assistance with his financial affairs.
4. [NAME OF INCAPACITATED PERSON] is disabled within the meaning of the Social Security Administration Act.
5. By an Order entered [DATE], in the [CITY/COUNTY] Circuit Court, [NAME OF PETITIONER] was appointed the guardian and conservator of [NAME OF INCAPACITATED PERSON]. A copy of the [DATE] Order is attached is hereto and marked

"Exhibit A."

6. [NAME OF PETITIONER], as the guardian and conservator of [NAME OF INCAPACITATED PERSON], filed a suit in the [CITY/COUNTY] Circuit Court seeking compensation for the personal injuries he sustained. This suit is styled [NAME OF PETITIONER], Guardian and Conservator of [NAME OF INCAPACITATED PERSON], an incompetent person, v. [DEFENDANT].

7. This suit will be settled by mutual agreement of the parties, and an Order Approving Settlement will be submitted to this Court to approve the payment of compensation for [NAME OF INCAPACITATED PERSON]'s personal injuries and attorney's fees, costs, and expenses.

8. The net proceeds from the settlement of [NAME OF INCAPACITATED PERSON]'s claim for personal injuries, while too small to provide for his care, are still too great to allow him to maintain eligibility for government benefits programs for income and medical care. Thus, the best application of these net settlement proceeds is to transfer these funds to a special needs trust with discretionary and spendthrift provisions.

9. Such a transfer is allowable, and 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual, permit such transfers to a special needs trust, also known as a d(4)(A) trust.

10. On behalf of [NAME OF INCAPACITATED PERSON], [NAME OF PETITIONER] expects to receive a lump sum award as a result of the settlement of this case, and the proceeds from this settlement, less attorney's fees, costs, and expenses, are to be paid to [NAME OF TRUSTEE], as Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust created for his benefit under 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual. A copy of the [NAME OF INCAPACITATED PERSON] Special Needs Trust is attached to this Petition and marked "Exhibit B." [NAME OF PETITIONER] will ask this Court to approve this Special Needs Trust or one with substantially the same provisions.

11. It is in [NAME OF INCAPACITATED PERSON]'s best interest to establish an irrevocable disability trust under the [Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 \(OBRA '93\)](#), with the payments [NAME OF INCAPACITATED PERSON] will receive from the settlement of his claim for personal injuries. It is also in [NAME OF INCAPACITATED PERSON]'s best interest to provide the trustee with the discretion to make distributions as authorized by the provisions of 42 USC § 1396p (d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual. (This will allow [NAME OF INCAPACITATED PERSON] to continue to receive those public assistance benefits to which he would otherwise be eligible, and to conserve the payments he will receive from the settlement of claim for personal injuries for such of his needs that may remain unmet by the public assistance benefits he receives.)

12. [OBRA '93](#) substantially revised the Medicaid laws to authorize the establishment of an irrevocable trust for the benefit of a disabled individual such as [NAME OF INCAPACITATED PERSON] by his parent, grandparent, legal guardian, or the court, and to fund the trust with his assets. [OBRA '93](#) authorizes a disabled individual as beneficiary of such a trust to qualify for public benefits assistance, including Supplemental Security Income and Medicaid, if the trust provides for reimbursement to the state for its public assistance expenditures. A copy of 42 USC § 1396p (d)(4)(A) is attached to this Petition and marked "Exhibit C." The [STATE] enacted conforming regulations in [STATE REGULATION], which regulations are implemented in [SECTION] of the [STATE] Medicaid Manual, copies of which are attached to this Petition and marked "Exhibit D" and "Exhibit E," respectively.

13. The [NAME OF INCAPACITATED PERSON] Special Needs Trust Agreement complies with the provisions of [OBRA '93](#), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual because it will be funded with the payments [NAME OF INCAPACITATED PERSON] will receive from the settlement of his claim for personal injuries, and because Medicaid reimbursement is provided for in [SECTION] of this Trust, which states:

The Trust shall terminate upon the death of Beneficiary, at which time the Trustee shall pay the Trust Estate and undistributed income to the [STATE] and to any other state which has paid for Beneficiary's care under the Medicaid program up to an amount equal to the total of medical assistance paid on behalf of Beneficiary under the Medicaid program. Such payment or payments from the Trust shall be apportioned among [STATE] and other states in proportion to each state's share of the total medical assistance paid on behalf of Beneficiary.

14. [NAME], has agreed to serve as the Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust.

15. It is in [NAME OF INCAPACITATED PERSON]'s best interest for this Court to establish the [NAME OF INCAPACITATED PERSON] Special Needs Trust, and to name [NAME], as the Trustee of this trust.

WHEREFORE, [NAME OF PETITIONER] asks this Court to:

1. Promptly schedule a time and date for a hearing on this Petition.
2. Establish and fund the [NAME OF INCAPACITATED PERSON] Special Needs Trust on behalf of [NAME OF INCAPACITATED PERSON], pursuant to 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual.
3. Authorize [NAME OF PETITIONER], as guardian and conservator of [NAME OF INCAPACITATED PERSON], to execute the documents necessary to establish the [NAME OF INCAPACITATED PERSON] Special Needs Trust.
4. Designate [NAME], as the Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust.
5. Direct that the net payments [NAME OF PETITIONER] will receive on behalf of [NAME OF INCAPACITATED PERSON] from the settlement of his claim for personal injuries to be paid to [NAME], as Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust created for his benefit under 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual.
6. Allow [NAME], as Trustee, to pay from the Trust the attorney's fees, costs, and expenses [NAME OF PETITIONER] will incur in this matter on behalf of the settlement of [NAME OF INCAPACITATED PERSON]'s claim for personal injuries.
7. Grant [NAME OF PETITIONER] such other and further relief as the nature of this case may require or to equity shall seem fair.

[NAME OF PETITIONER]

By: \_\_\_\_\_  
OF COUNSEL

[NAME AND CONTACT INFORMATION OF ATTORNEY]

**Form 16.01.04. Order to Establish the 42 USC Section 1396p(d)(4)(A) Special Needs Trust**

[STATE]: IN THE CIRCUIT COURT OF [CITY/COUNTY]

In Re: [NAME OF INCAPACITATED PERSON]

ORDER TO ESTABLISH THE [NAME OF INCAPACITATED PERSON]  
SPECIAL NEEDS TRUST

THIS CAUSE came [DATE], on the Petition of [NAME OF PETITIONER], guardian and conservator of [NAME OF INCAPACITATED PERSON], who asked this Court to establish the [NAME OF INCAPACITATED PERSON] Special Needs Trust pursuant to 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual, and to appoint [NAME], the Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust. At this hearing, [NAME OF PETITIONER] appeared in person, represented by [ATTORNEY]. [NAME], guardian ad litem, appeared on behalf of [NAME OF INCAPACITATED PERSON], who was not present. Evidence was heard and was argued by counsel. It appears to this Court that

1. All interested parties are before the Court or have received notification of these proceedings.
2. [NAME OF INCAPACITATED PERSON] suffered a traumatic brain injury as a result of a traffic accident on [DATE], in [CITY/STATE].
3. [NAME OF INCAPACITATED PERSON] is a person unable to manage his legal affairs with respect to the creation of a Special Needs Trust pursuant to 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual, thus making him a "person under a disability" as defined under [STATE CODE SECTION].
4. [NAME OF INCAPACITATED PERSON] is currently receiving retirement benefits from [NAME OF FORMER EMPLOYER], Social Security Disability Income, and Medicaid benefits.
5. [NAME OF PETITIONER] has petitioned this Court to establish a Special Needs Trust for the benefit of [NAME OF INCAPACITATED PERSON], and she has requested that [NAME], be appointed the Trustee of this Special Needs Trust.

6. On behalf of [NAME OF INCAPACITATED PERSON], [NAME OF PETITIONER] has settled a claim seeking compensation for personal injuries sustained by [NAME OF INCAPACITATED PERSON], and this settlement, less attorney's fees, costs, and expenses, is to be paid by the Defendant or the Defendant's Insurer directly to [NAME], as Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust created for his benefit under 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual.

Upon consideration whereof, and for good cause shown, it is ADJUDGED, ORDERED, AND DECREED THAT

1. Pursuant to 42 USC § 1396p(d)(4)(A), [STATE REGULATION], and [SECTION] of the [STATE] Medicaid Manual, the Court hereby establishes the [NAME OF INCAPACITATED PERSON] Special Needs Trust on behalf of [NAME OF INCAPACITATED PERSON]. The Grantors of the [NAME OF INCAPACITATED PERSON] Special Needs Trust are [NAME OF PETITIONER], guardian and conservator of [NAME OF INCAPACITATED PERSON] and this Court.
2. As the Grantors of the [NAME OF INCAPACITATED PERSON] Special Needs Trust, this Court and [NAME OF PETITIONER], guardian and conservator of [NAME OF INCAPACITATED PERSON], hereby designate and appoint [NAME], the Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust.
3. This Court authorizes [NAME OF PETITIONER], guardian and conservator of [NAME OF INCAPACITATED PERSON] and [NAME], to execute all documents necessary or appropriate to establish and fund the [NAME OF INCAPACITATED PERSON] Special Needs Trust, including, but not limited to, the execution of the Trust document.
4. The Defendant, or the Defendant's Insurer, is hereby authorized to pay directly into the [NAME OF INCAPACITATED PERSON] Special Needs Trust the sums it receives from the settlement of [NAME OF INCAPACITATED PERSON]'s claim for personal injuries.
5. [NAME], Trustee, shall not be required to post a bond for the faithful performance of its duties as Trustee of the [NAME OF INCAPACITATED PERSON] Special Needs Trust.
6. [NAME] shall be paid a fee of \$ for his serving as the guardian ad litem of [NAME OF INCAPACITATED PERSON] in these proceedings.
7. [NAME], Trustee, shall file an inventory and annual accountings with the Commissioner of Accounts of this Court as designated by the Clerk of this Court.
8. This Court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate, enforce, and modify this Order and the terms of the [NAME OF INCAPACITATED PERSON] Special Needs Trust.

ENTERED: \_\_\_\_\_

\_\_\_\_\_  
Judge

WE ASK FOR THIS:

\_\_\_\_\_  
[NAME OF ATTORNEY], Counsel for  
[NAME OF PETITIONER]

SEEN:

\_\_\_\_\_  
[NAME], guardian ad litem of  
[NAME OF INCAPACITATED PERSON]

<sup>1</sup>  
POMS S.I. 01120.200.B.1.

<sup>2</sup>  
POMS S.I. 01120.200.B.10.

<sup>3</sup>

POMS S.I. 01120.200.B.12.

<sup>4</sup>

POMS S.I. 01120.200.D.1.a.

<sup>4.1</sup>

POMS S.I. 01120.200.D.1.a.

<sup>5</sup>

POMS S.I. 01120.200.D.2.

<sup>6</sup>

**IRC § 2503(b).**

<sup>7</sup>

**Crummey v. Comm'r, 397 F.2d 82 (9th Cir. 1968) .**

<sup>8</sup>

For a complete discussion of planning concerns for the disabled client or disabled beneficiary, including third-party special needs trusts, see **L. Frolik & M. Brown, Advising the Elderly or Disabled Client, 2d ed., ch. 17 (WG&L 2003).**

<sup>8.1</sup>

This section discussing the Annual Withdrawal Power was obtained from Howard Zaritsky's Tax Planning for Family Wealth Transfers: Analysis With Forms; Transfers to Persons With Special Circumstances; Form 7-2, WG&L Estate Planning Treatise (4th ed., Thomson/RIA 2008).

<sup>8.2</sup>

This section discussing the Annual Withdrawal Power was obtained from Howard Zaritsky's Tax Planning for Family Wealth Transfers: Analysis With Forms; Transfers to Persons With Special Circumstances; Form 7-2, WG&L Estate Planning Treatise (4th ed., Thomson/RIA 2008).