

# Irrevocable Life Insurance Trust (ILIT)

Foreword to counsel and specimen documents



#### Tax considerations

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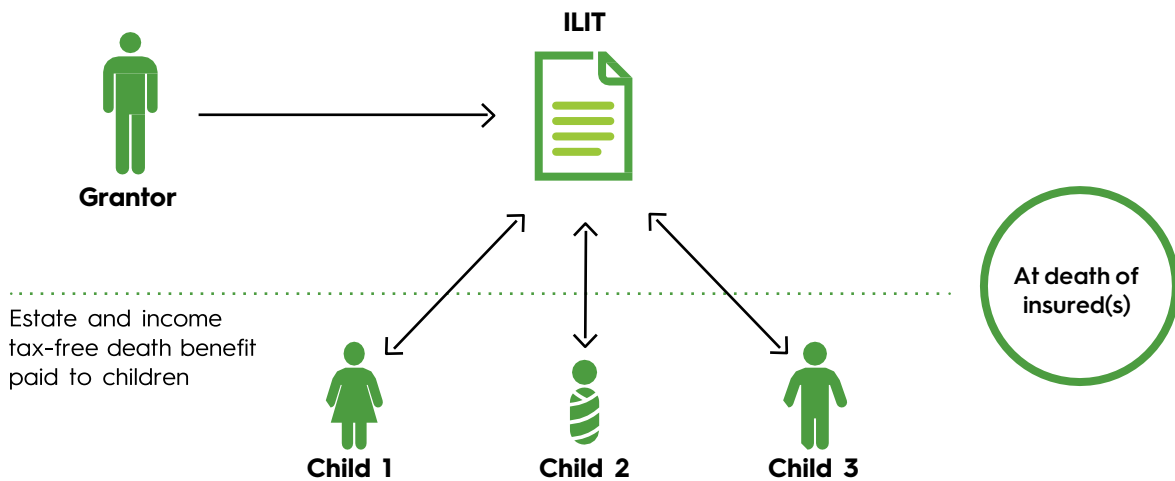
# What is an ILIT?

## A. What is an ILIT?

Traditionally, the Irrevocable Life Insurance Trust (ILIT) provided financial professionals with a tool to create liquidity for a client's estate without including the trust assets in the estate. In fact, the ILIT's ability to solve liquidity needs overshadowed other benefits, such as wealth replacement, gifting strategies, accumulation needs and creditor protection.

An ILIT makes it possible to:

- Remove life insurance death benefits from the taxable estate on the death of the insured;
- Allow the grantor to control the disposition of the policy and the death proceeds;
- Utilize the client's annual and lifetime gift tax exclusion to pay the premiums;
- Provide significantly increased asset protection during lifetime; and
- Provide the grantor with indirect access to the cash value build-up inside trust-owned insurance policies.



## B. Alternatives to the ILIT

Not every client will find the ILIT option attractive because of the costs of implementing and maintaining the ILIT and/or the perceived loss of control over the policy. There are two main alternatives to the ILIT: client ownership and adult child ownership.

### 1. Client ownership

The most frequent choice is to simply continue to own the policy individually with the resulting estate tax inclusion. The issue here is the possibility of death benefit inclusion in your client's estate. One estate planning technique for married clients who wish to own life insurance policies within their estate is Wait-and-See Estate Planning. This strategy allows for lifetime ownership and access to life insurance policies but has specific estate planning strategies at the death of the first spouse.

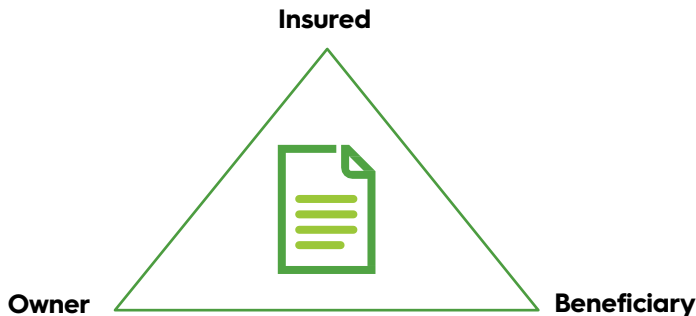
# What is an ILIT? continued

## 2. Adult children ownership

Another alternative to an ILIT is to transfer the ownership of the policy to adult children. This alternative is problematic for several reasons:

- Watch out for the Goodman Rule where the owner, insured and beneficiary are all different individuals. The result of this arrangement is there will be an inadvertent taxable gift, which is a completed gift from the owner of the policy to the beneficiary when the insured dies or the beneficiary becomes irrevocable. This can cause gift tax issues for the owner. For example, let's say Son owns a policy on Father with Son and Daughter as the beneficiaries of the policy with a \$2 million death benefit. If Father dies before Son and Son is the owner of the policy, then it will be treated for gift purposes as a \$1 million gift from Son to Daughter.

### GOODMAN RULE



Insured, Owner and Beneficiary – all separate parties

- In order to avoid the Goodman Rule, the policy will need to be owned by all of the beneficiaries in the same percentage as the death benefit they are to receive. This kind of co-ownership of life insurance policies will be cumbersome to arrange with the insurance companies.
- The adult child might die before the insured, and the insured has no control over whom the ownership of the policy will pass.
- In some states, the policy will be subject to the claims of the child's creditors. In addition, the policy may be lost to the child's spouse in a future divorce.
- If the children are the owners and beneficiaries of the policy, the unspent proceeds of the death benefit will be included in their estate at the time of their death.<sup>1</sup>

1. Treas. Reg. 20.2031-8(a)(1).

# What is an ILIT? continued

## C. ILIT advantages

- It allows the trust assets to pass to the beneficiaries (usually children and grandchildren) in accordance with the grantor's wishes, and during years when an estate tax is applicable, assets pass without being subject to the federal estate tax, and, where applicable, state estate tax.
- With a corporate trustee, it can provide experienced management to help preserve the trust's assets for the beneficiaries. With proper drafting, the proceeds can remain available to provide liquidity to help the estate pay expenses and taxes. A provision that allows the trustee the discretion to purchase assets from either spouse's estate or to make loans to either estate can keep cash available for estate liquidity purposes. However, the trustee should not be required to pay estate transfer costs since that would cause the Internal Revenue Service (IRS) to consider the insurance payable "for the benefit of the estate" and therefore includable in the gross estate.<sup>2</sup>
- Another advantage is wealth replacement. A client may wish to provide for a charity while preserving an inheritance for the client's beneficiaries particularly children or grandchildren.
- An ILIT works well to provide a death benefit that replaces the value of the gift to the charity. In addition, gifts made to the ILIT will reduce the overall value of the client's estate and consequently reduce amounts that would be included for calculating the estate tax.

## D. ILIT disadvantages

- One disadvantage is the cost of creating and administering the trust. This includes the cost of drafting the trust and the annual compensation that may be payable to the trustee.
- Another disadvantage is that the trust is, as its name implies, irrevocable. Once executed, neither the grantor nor the trustee may change its terms. For this reason, these documents are often drafted to give the trustee wide discretion in determining how to manage the insurance policies and the proceeds they create. Another approach to provide flexibility to the agreement and calm client concerns regarding the irrevocability is discussed in the section on Flexible Trust Provisions.

## E. What type of life insurance policy is used in ILIT planning?

The best type of product to put in such a trust is one that matches the objectives and circumstances of the parties involved. Since the main purpose of ILITs is to provide for estate liquidity to help pay estate taxes and other death-related expense at some future indeterminate date, permanent insurance is usually preferable. However, term insurance can be appropriate when budgets are tight, and coverage is needed for a shorter duration. Generally, the term insurance policy should be convertible. Among the types of permanent insurance that can be placed in trust are whole life, universal life or variable life insurance. Policies can be on the life of a single life or second-to-die life insurance policy.

2. Treas. Reg. §20.2042-1(c)(2).

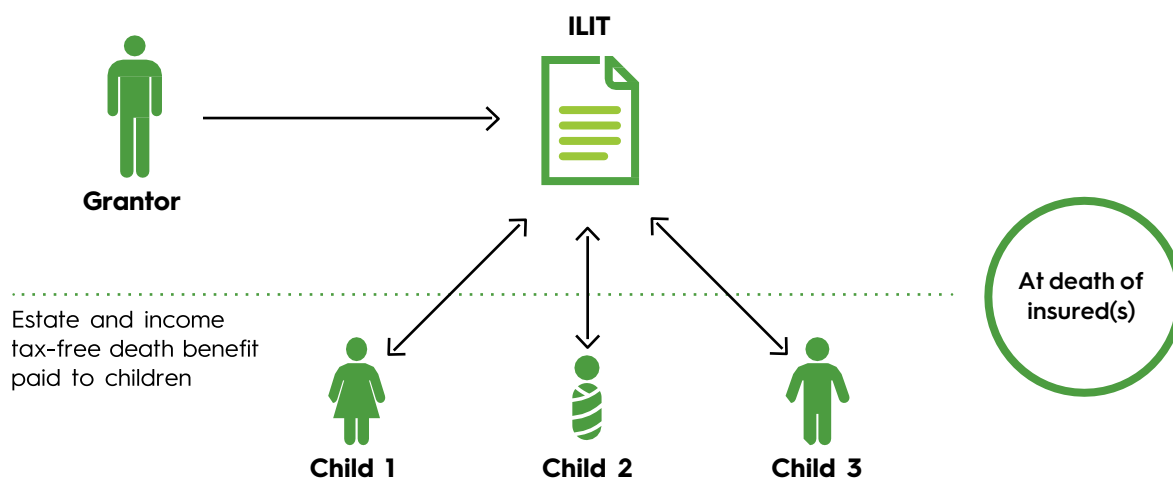
# Types of ILITs

## A. Traditional ILITs

An ILIT is an irrevocable trust designed to own life insurance where the death benefit is taken out of the grantor's estate. At the death of the grantor/insured, the death benefit will be paid to the ILIT and received income tax-free. Ultimately, the proceeds are distributed by the trustee to the beneficiaries. Typically, the premiums are funded by lifetime and/or annual exclusion gifts but can be done utilizing split dollar, private financing, income-producing assets within the trust or premium financing (see Methods to fund ILITs sections).

### The ILIT strategy can be used by:

- High net worth individuals
- Individuals who have a large illiquid asset such as businesses, farms or qualified plans
- Individuals who live in states with a state death tax
- Individuals in blended marriages
- Individuals with minor children



### Ways to fund ILITs:

- Traditional – use of Crummey gifts
  - Private split dollar
  - Private financing
  - Gift of income-producing assets
  - Premium financing
-

# Types of ILITs continued

## B. Spousal Limited Access Trusts (SLATs)

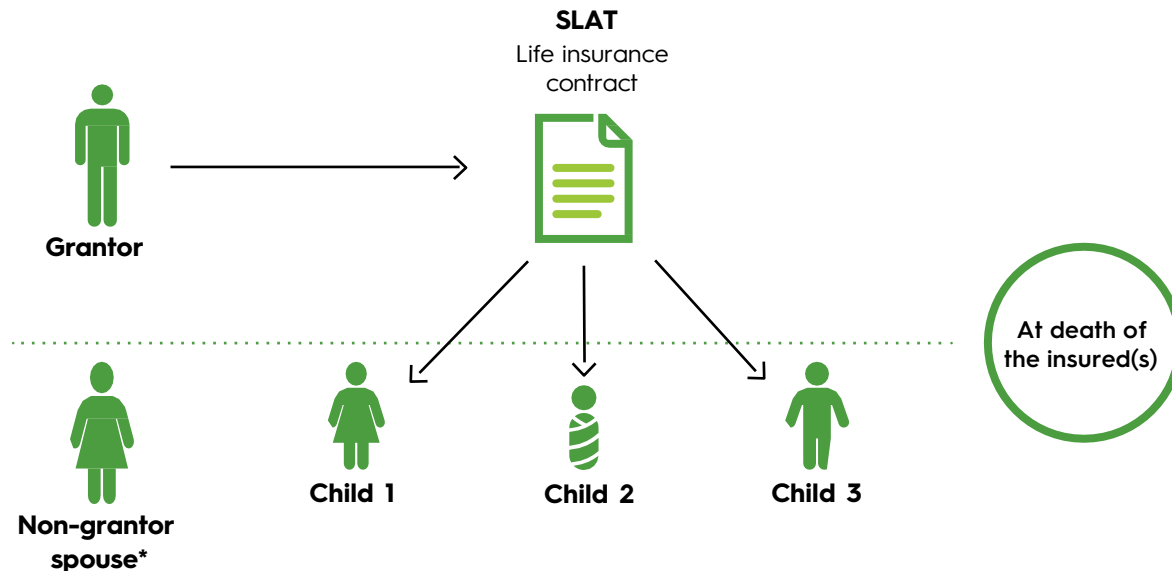
This strategy makes traditional ILITs more flexible by providing access to the life insurance policy's cash value for the family's lifetime needs while still maintaining the death benefit outside the taxable estate.

### The SLAT can be used by:

- Married individuals who want to access the cash value of a life insurance policy in a spouse's ILIT

### How the SLAT strategy works:

A Spousal Limited Access Trust (SLAT) is a special ILIT that allows the grantor's spouse to receive limited access to distributions from the trust during his or her lifetime. This is because the SLAT names the grantor's spouse and children as lifetime beneficiaries of the trust.



\*Non-grantor spouse has access to cash value for his or her health, education, maintenance and support (HEMS).

# Types of ILITs continued

## C. Beneficiary Limited Access Trusts (BLATs)

This strategy makes traditional ILITs more flexible by providing access to the life insurance policy's cash value for a child or other beneficiary while keeping the policy outside of the parents' or child's estate.

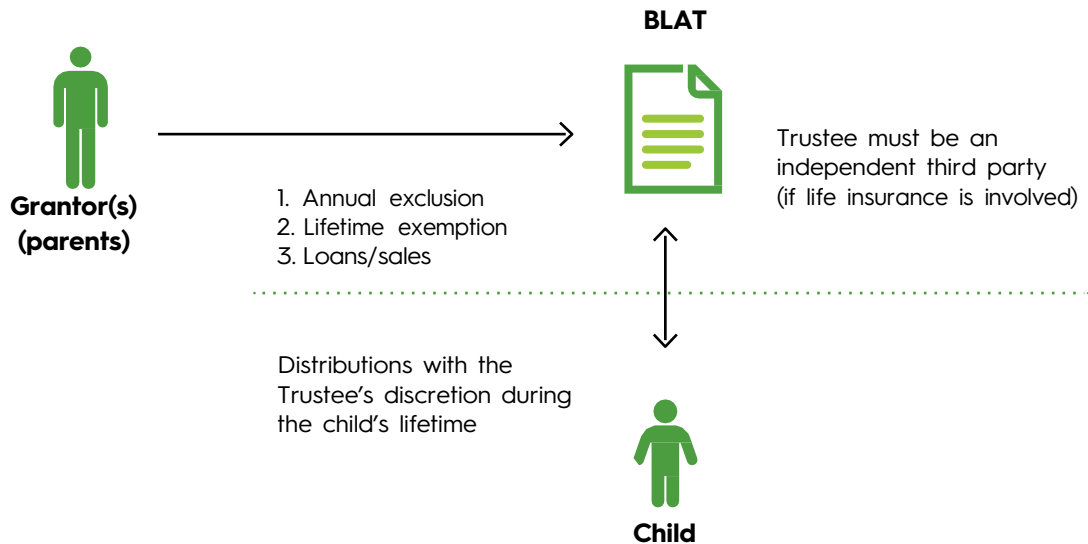
### The BLAT is for parents who desire:

- Control over how their child will access the cash value of a life insurance policy in an ILIT
- Creditor protection over the amounts they are gifting to their child
- A potential dynastic gift for future generations

### How the BLAT strategy works:

A Beneficiary Limited Access Trust (BLAT) is a special ILIT that allows a child of the grantors to receive limited access to distributions from the trust during his or her lifetime. This is because the BLAT guidelines allow the child to receive distributions during his or her lifetime and/or create a potential dynastic gift for future generations.

## BENEFICIARY LIMITED ACCESS TRUST





# Types of ILITs continued

## D. Partner Limited Access Trusts (PLATs)

This strategy makes traditional ILITs more flexible by providing access to the life insurance policy's cash value for an unmarried partner's lifetime needs while still maintaining the death benefit outside the taxable estate. In addition, Grantor partner can stipulate the ultimate beneficiary of the assets while providing for the other partner.

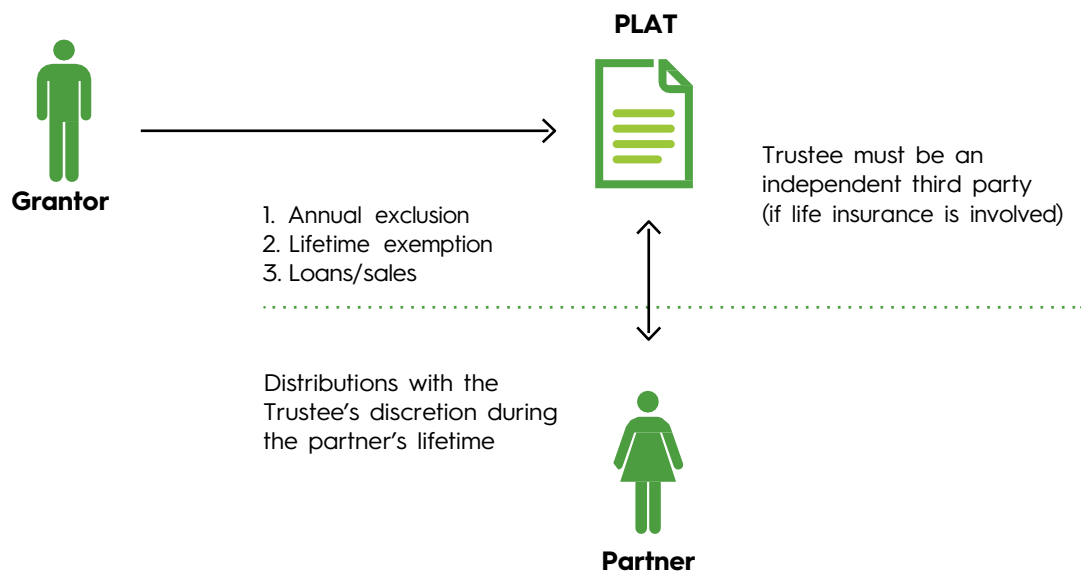
### The PLAT can be used by:

- Young unmarried partners
- Second marriages with children from previous marriages
- Divorced couples with children who don't officially marry
- Senior couples who don't officially marry

### How the PLAT strategy works:

A PLAT is a special ILIT that allows the non-grantor partner to receive limited access to distributions from the trust during his or her lifetime.

## PARTNER LIMITED ACCESS TRUST



# Types of ILITs continued

## E. Dynasty Trusts

A Dynasty Trust is a special type of ILIT for clients who want to create a legacy using life insurance for future generations.

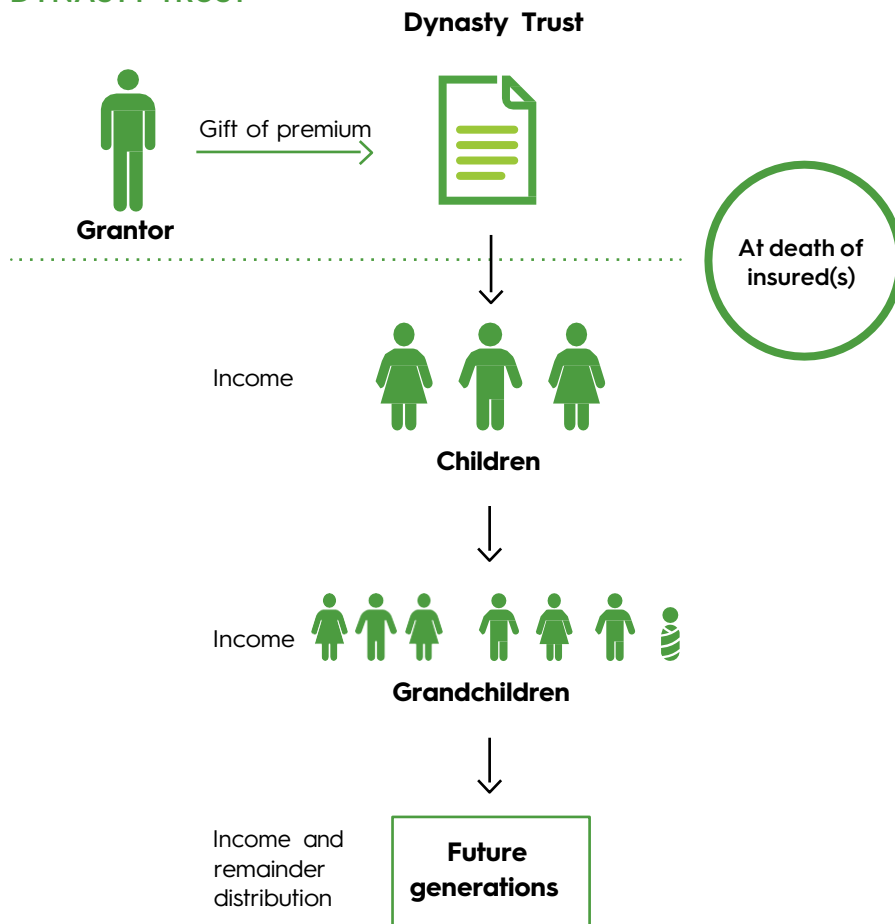
**The Dynasty Trust strategy is for:**

- Individuals who want to create a legacy for future generations

**How the Dynasty Trust strategy works:**

Dynasty Trusts are ILITs set up for the clients' children, grandchildren and future generations. Instead of paying the full amount of the life insurance death benefit proceeds to beneficiaries, a Dynasty Trust pays income for a specified period of time. This time frame could be indefinite or limited, depending on the applicable state's rule of perpetuities. Typically, Dynasty Trusts are best in the 31 states that have repealed or modified the Rule against perpetuities. Those states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Washington, D.C.

## DYNASTY TRUST



# Estate tax considerations

There are three main provisions of the Internal Revenue Code (IRC) to consider when drafting ILITs:

- IRC 2042 – incidents of ownership and paid to or applied for benefit of the estate
- IRC 2035 – three-year rule
- IRC 2036 – retained interest

## A. IRC Section 2042

IRC Section 2042 states life insurance proceeds are included in the insured's estate if the insured possessed any incidents of ownership or if the proceeds are payable to, or for the benefit of, the insured's estate.

### 1. Incidents of ownership

Incidents of ownership<sup>2</sup> include any rights to the economic benefits of the policy, including:

- The power to change the beneficiary;
- The power to surrender or cancel the policy;
- The power to assign the policy;
- The power to revoke an assignment;
- The power to pledge the policy for a loan or to obtain from the insurer a loan against the surrender value of the policy; and
- A reversionary interest in the policy.

Please note, absent from the list is the mere payment of premiums. Payment of premiums by the insured will not cause any part of the policy proceeds to be includible in the insured's gross estate.<sup>3</sup>

If the decedent had the right to exercise any of these incidents of ownership alone or jointly with another person, the policy's value will be included in the estate.

It makes no difference if the decedent was mentally or physically incapable of exercising an incident of ownership prior to death; the mere existence of the incident of ownership is enough to cause the policy to be taxed in the estate. The IRS has agreed that the right to convert a group term life insurance policy into a permanent policy upon termination of employment is not an incident of ownership.<sup>4</sup>

### 2. Paid to or applied for the benefit of the estate

Code Section 2042 also provides that insurance proceeds will be included in the decedent's gross estate if they are paid to the estate or applied for the benefit of the estate. If the trustee is under a binding obligation to pay the debts, taxes and other charges against the estate, then the amount of the proceeds needed to pay those costs is included in the decedent's estate. This is true even if the proceeds are not actually used for this purpose.<sup>5</sup>

2. Treas. Reg. §20.2042-1(c)(2).

3. Rev. Rul. 71-497.

4. Rev. Rul. 84-130, I.R.B. 1984-35,5,6.

5. Regulation 20.2042-(b)(1). †

# Estate tax considerations continued

Finally, under Code Section 2042, incidents of ownership held by a corporation may be attributed to a controlling shareholder. This may result in the insurance proceeds being taxed in the controlling shareholder's gross estate even if he or she holds no incidents of ownership personally.<sup>6</sup> A controlling shareholder is one who owns more than 50 percent of the total combined voting power of a corporation. Any incidents of ownership the corporation holds will be deemed to be owned by a shareholder who owns more than 50 percent.

## **B. IRC Section 2035 – three-year rule**

Under this section, when the insured transfers an insurance policy or an interest in an insurance policy and dies within three years of that transfer, the death proceeds will be included in the insured's estate.

Several cases suggest that when the trustee initiates the purchase and is the original owner of the policies, the three-year rule is not applicable.<sup>7</sup>

To lessen the chance of an IRS challenge, some precautions can be taken.

- The trustee should initiate the purchase and apply for the insurance coverage.
- The trustee should not be required to purchase life insurance, only authorized or allowed to purchase life insurance.
- The grantor(s) should not make premium payments to the life insurance company, but instead should make cash gifts to the trustee.
- The trustee should make the premium payments to the life insurance company out of a separate checking account for the trustee.
- If possible, gifts to the trustee should be of an amount different from the annual premium and made before premiums are due.

The trust may be drafted with a safety-net provision in the event the insured dies within three years of the purchase of the policy and Section 2035 is applied. This provision would change the distribution scheme of the trust by giving the surviving spouse an interest in the proceeds that would qualify for the marital deduction.

Such a clause can postpone the estate tax on the proceeds until the surviving spouse's death to the extent not consumed or given away before that time.

Such a provision is included in this specimen trust agreement.

If the grantor transfers, without consideration, an insurance policy or any incident of ownership with respect to the policy during the three-year period preceding his or her death; the death benefit will be included in the insured's estate.<sup>8</sup> Practitioners should plan to avoid this problem where possible. Fortunately, it can be avoided in several different ways.

6. Regulation 20.2042-1(c)(6).

7. See *Perry v. Commissioner* 91-1 USTC Paragraph 60,064 (5th Cir. 1991); *Estate of Headrick v. Commissioner*, 90-2 USTC Paragraph 60,049 (6th Cir. 1990); *Estate of Leder v. Commissioner* 893 F.2d 237 (10th Cir. 1989).

8. See IRC §2035.

# Estate tax considerations continued

## 1. New policies

If it is a new policy, then use an informal inquiry to start the life insurance process. In one case, the insured submitted an application wherein the insured was listed as the owner. The application stated that the policy would not be issued until the premium was paid. A supplemental application was subsequently submitted with a child of the insured as owner and the premium paid. When the insured died a year later, the Service held that the insured never possessed an incident of ownership since the initial application stated that the policy would not be issued until the payment of premium.<sup>9</sup>

## 2. Existing policies

If it is an old policy, then consider:

- **Purchase of a new policy**

Financial professionals should consider using a new policy rather than existing policy owned in the client's estate. The main reason for using a new policy is that a gift of an existing policy owned by the insured clearly falls under the three-year rule. But the purchase of a new policy by the irrevocable trust will not be subject to the three-year rule. Please note: financial professionals should consider the age and health of the insured as a new policy may not be feasible if the insured is quite elderly or is in poor health.

- **Four-year term policy rider**

Some life insurance policies offer a rider that will allow the purchase of four years of term insurance should the insured die within the first four years of the contract. The rider provides additional term insurance that can help offset estate taxes if the policy is included in the insured's taxable estate due to the three-year look-back rule for a transfer (or gift) of policy ownership.

9. See TAM 9323002. In TAM 9323002, life insurance proceeds were not included in an insured's estate where (1) the insured applied for the policy, (2) the insured then had the policy split into two policies and named her two sons as owners and beneficiaries prior to paying any premiums, (3) the insured's sons paid all premiums, and (4) the insured died within three years of purchase of the policy. The memorandum determined that under the terms of the contract and state law no contract existed prior to the time that the first premium was paid and the life insurance contract was issued and delivered. The memorandum also concluded that although it appeared that the decedent passed something of value to her two sons (i.e., although the insurance company's premium rates had increased between steps 1 and 2, the earlier lower premium rates were obtained by the sons), it was unlikely that such transfer constituted a transfer of incidents of ownership.

# Estate tax considerations continued

- **Sell the policy to an irrevocable grantor trust**

Consider selling the policy to a new ILIT that is a grantor trust for all income tax purposes. Because the transfer is by sale rather than by gift, the three-year rule does not apply. Caution must be exercised with regard to the “transfer for value” rules. Ordinarily, the sale of the policy would violate the “transfer for value” rules.<sup>10</sup> If these rules applied, the death proceeds become income taxable to the beneficiaries. One of the exceptions to the transfer for value rules is the sale of the policy to the insured.<sup>11</sup> The value of the life insurance policy for sale to the ILIT must be for “adequate and full consideration.” Unfortunately, the IRS has provided no formal guidance as to what constitutes adequate and full consideration. There is a Private Letter Ruling (PLR) that may provide some indication of the IRS’s position. In that PLR, the IRS indicated that the interpolated terminal reserve would be adequate and full consideration for that transaction.<sup>12</sup>

## C. IRC Section 2036 – retained interest

After the death of the first spouse, the surviving spouse should not contribute premium to the trust if the surviving spouse is a beneficiary of the ILIT. Any payment by a trust beneficiary (either directly or indirectly) is a transfer with a retained interest that can cause estate inclusion.<sup>13</sup> While not as clear, diverting mandatory distributions of income or principal from the surviving spouse to pay life insurance premiums may cause estate inclusion under the retained interest rules.

10. See IRC §101 (a)(2).

11. IRC §101(a)(2)(B). The Service has taken the position that a transfer from a grantor to a grantor trust is not recognized for federal income tax purposes. See PLR 200247006, Rev. Rul. 85-13, 1985-1 C.B. 184; but see *Rothstein v. U.S.*, 735 F.2d 704 (1984). The IRS has given some indication that it would treat a transfer to a grantor trust as a transfer to the insured (See PLR 9033023) but has declined to rule on the point where the issue was directly before the Service (See PLRs 9511009, 9413045). The Eighth Circuit has also indicated that, at least in the Eighth Circuit, a transfer to a grantor trust is a transfer to the insured. See *Swanson, Jr. Trust v. Comm’r*, 518 F.2d 59 (8th Cir. 1975).

12. See PLR 9413045.

13. See PLR 9748020.

# Gift tax consequences

Because transfers to an ILIT are typically intended to be completed gifts, a primary concern for estate planners is how to avoid gift tax on the transfer of property to the trust. Use of the client's annual gift tax exclusion amount, and potentially the client's spouse's annual gift tax exclusion amount, has the potential, if utilized over a long period of time, to eliminate an enormous amount of gift and estate tax.

## A. Qualifying premium payments as gifts for the annual gift tax exclusion

For gift tax purposes, gifts to the irrevocable trust are treated as gifts to the beneficiaries of the trust. These gifts, however, do not automatically qualify for the annual gift tax exclusion amount because they are not gifts of a present interest.<sup>14</sup> A gift will be deemed to be a future interest gift if the use, possession or enjoyment of the gifted property is delayed to a future date.<sup>15</sup> In order to constitute a present interest, the donee must have the unrestricted right to the immediate use, possession or enjoyment of the gifted property.

Contributions to an ILIT are taxable gifts of a future interest because the beneficiary must survive the insured to receive any benefit. These gifts, however, can be converted into present interests if the beneficiary is given an immediate withdrawal right with respect to contributions to the trust. By creating a present interest, those withdrawal rights allow gifts to the trust to qualify for the annual exclusion. These withdrawal rights are temporary and usually last between 30 to 60 days. This technique was established in the case of *Crummey v. Comm'r*.<sup>16</sup> Because of the usefulness of this case's technique, these rights are referred to as "Crummey Powers."

Since that decision, the IRS has clarified the conditions necessary to create a successful Crummey Power. To qualify as a present interest, the IRS has ruled that competent adult beneficiaries must receive reasonable notice of their rights to withdraw and have a reasonable time in which to exercise their rights.

### 1. What kind of notice is required?

No notice was required or provided to the beneficiaries in *Crummey*. However, subsequent to *Crummey*, the IRS's position has been that the donee must receive prompt notice of a withdrawal right and have a "reasonable" opportunity to exercise the withdrawal right.<sup>17</sup>

**Oral or written?** While oral notice will satisfy the "reasonable" notice requirement, a written notice enables the taxpayer to meet the burden of proof in a future IRS audit more easily.<sup>18</sup> If a beneficiary or the guardian of a minor beneficiary is serving as trustee of the trust, no written notice is required since they would have actual knowledge of the gift.<sup>19</sup>

14. IRC §2503(b).

15. Treas. Reg. §25.2503-3(a).

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

17. Rev. Rul. 83-108; Rev. Rul. 81-7 and PLRs 8229097 and 8143045.

18. See PLRs 8008040, 8020048, 8022058.

19. *Estate of Holland v. Commissioner*, T.C.M. 1997-302.

## Gift tax consequences continued

**Frequency?** The Service stated that a beneficiary must have “current” notice although this doesn’t necessarily require notice each time there is a gift to the trust.<sup>20</sup> Notice that appraises the beneficiary of a schedule of dates on which gifts will be made, that informs the beneficiary of his or her withdrawal right, and which promises additional information only if unscheduled gifts are made should represent “current” notice even if only given once per year.<sup>21</sup>

A withdrawal right must be exercisable for a “reasonable” period of time. Generally, a period of at least 30 days will qualify as a reasonable time within which to exercise withdrawal rights.<sup>22</sup> What is not “reasonable”? The IRS disapproved both a three-day<sup>23</sup> and a four-day notice.<sup>24</sup>

**Timing?** The fact that a calendar year ends between the date of the transfer and the date the beneficiary receives notice does not keep the gift from being considered one of a present interest.<sup>25</sup> It is also not important that the period to exercise withdrawal rights ends after a new calendar year has begun. As long as the right can be exercised in the current calendar year, it will qualify for that year’s annual exclusion. The fact that the period in which it can be used carries over into the next year does not use up the annual exclusion available in that year.

### What happens when premiums are paid directly by the grantor?

In traditional Crummey ILIT funding, clients rely on the annual exclusion from gift tax to make gifts to their ILITs to fund premiums. This gift only qualifies for the annual gift exclusion if the donee has a “present interest” in the gift. To satisfy this requirement, an ILIT often contains Crummey withdrawal powers that allow the ILIT beneficiaries to withdraw funds contributed to the ILIT, up to the annual exclusion amount. The beneficiaries typically receive notice of the transfer and their power to withdraw. If unexercised within the specified time, the withdrawal powers usually lapse, and the trustee uses the funds to pay the annual premium on the ILIT’s policy.

However, in Rev. Rul. 83-108, the grantor of the trust paid the premium payments for the trust policies directly to the life insurance company from his own bank account instead of gifting the payments to trustee of the ILIT. The trust in this case provided withdrawal rights to the beneficiaries of the trust and allowed the trustee to distribute cash or any other trust property or borrow against the cash value of any insurance policy to pay any requested withdrawals.

Please note, that the Internal Revenue Service (IRS) characterized the premium payments as “future interests” (as opposed to a “present interest”) that didn’t qualify for the annual exclusion amount. The IRS’s position was that the premium payments were gifts of “future interests,” because the trust beneficiaries had no meaningful right to withdraw the premium payments, since they were never paid into or held by the trust.

20. TAM 9532001.

21. See PLRs 8233070, 8143045, 8138102, 8133070 and 8121069.

22. Private Letter Rulings 7826050, 7902007, 709031, 7947066, 8007080, 8118051.

23. PLR 7946007, and in Rev. Rul. 81-7 where the contribution to the trust was made on December 28 with power lapsing on last day of calendar year.

24. TAM 9628004.

25. Rev. Rul. 83-108, 1983-2 C.B. 167.



## Gift tax consequences continued

However, the tax court held that the grantor's premium payments made directly to the insurance carrier qualified for the annual gift exclusion, because the ILIT gave each beneficiary the absolute right to demand withdrawals after each "direct or indirect" transfer to the ILIT, and the beneficiaries' knowledge (or lack thereof) of their withdrawal rights did not affect their legal right to demand withdrawals. Even though the funding occurred indirectly, the beneficiaries still had the legal right to make a demand from the trust.

**Comment** – Revenue Ruling 83-108 offers some comfort for clients who have had inadvertent lapses in ILIT administration, but this decision doesn't reflect the current IRS position. The best course of action is to insist grantors transfer cash to the trust and have the trustee use those cash gifts to pay the premiums on the ILIT-owned life insurance. Please note that the IRS will continue to review ILIT contributions and their qualification for the annual gift exclusion during audits. Additionally, if the ILIT administration is questionable in the eyes of the IRS, achieving a favorable outcome on annual gift exclusion issues may require expensive litigation.

### 2. Contingent beneficiaries – Cristofani case

In the past, the IRS ruled that the annual gift tax exclusion was not available for contributions to a trust when the beneficiaries had only remote contingent interests in the trust assets. The IRS's position was overruled by the tax court in *Estate of Cristofani v. Commissioner*.<sup>26</sup> The trust at issue in this case provided that the donor's two adult children were the current income beneficiaries. Upon her death, the trust was to be distributed to those two children in equal shares. The donor transferred property to the trust and gave Crummey withdrawal rights to her two children and five grandchildren. The tax court held that the annual exclusion was available for all seven donees even though the grandchildren had no vested interests in the trust.

More recent cases of the tax court are consistent with the *Cristofani* holding. In one case, the tax court found that Crummey withdrawal powers that were exercisable by 16 contingent remainder beneficiaries qualified for the gift tax annual exclusion even though none of the beneficiaries had actually exercised their withdrawal rights and even though none of them had any present interest in the trust except for the withdrawal rights.<sup>27</sup>

### 3. Grantor's ability to control withdrawal rights

If the grantor would like the ability to change gifts from one year to the next, the trust document could allow the grantor to specify, at the time of the making of the gift to the trust, which, if any, of the named withdrawal right beneficiaries will have the right to withdraw any portion of the gift. Please see drafting note below. The Service has upheld language in trusts that allow the grantor to designate whether specific beneficiaries have a withdrawal right over a particular gift.<sup>28</sup>

26. *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (1991), acq. in result only, 1992-1 C.B. 1, 1996-2 C.B. 1.

27. *Estate of Kholsaat v. Commissioner*, T.C.M. 1997-212 (May 7, 1997).

28. TAM 9532001, PLRs 9030005, 8103074 and 8103069.

# Gift tax consequences continued

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## Drafting note: power to exclude beneficiaries from withdrawal rights

Prior to or concurrent with the making of a contribution to the trust, a donor may, by a written instrument delivered to the trustee, exclude one or more lifetime beneficiaries from having withdrawal rights over the contribution or any future contribution or both. A donor may not, however, limit or alter any rights resulting from prior contributions.

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## 4. Exercising withdrawal rights for minors

If a minor beneficiary is given a withdrawal right, the annual gift tax exclusion is available if a parent of the minor beneficiary is capable of exercising the withdrawal power as natural guardian.<sup>29</sup> The IRS has taken inconsistent positions on whether the donor parent may exercise the withdrawal right for a minor beneficiary. To be safe, the grantor should be specifically prohibited from exercising a demand right on behalf of a minor beneficiary, even if that person is the minor's guardian or legal representative.<sup>30</sup>

For minors and incompetent adults, Crummey Powers may only be exercised by a legal guardian.

If the parent of the minor child is serving as trustee of the trust, no separate notice would need to be given during the minority of the beneficiary since the trustee/parent is deemed to be aware of the withdrawal rights.

## 5. Maintaining available assets to fund the withdrawal

During the period where the right of withdrawal exists, the trustee must hold assets out of which the withdrawal right could be satisfied if it were exercised. This withdrawal right can come from any assets held by the trust not just the cash gift. If there are no other assets in the trust, the trustee may satisfy the withdrawal right by distributing trust property.

## B. The gift-over problem

Most practitioners are aware that donors may transfer their annual exclusion to any number of donees without using any of the donor's lifetime gift tax exemption. However, there is another issue to consider, the exercise or release of a general power of appointment shall be deemed to be a transfer of property by the individual possessing such power.<sup>31</sup> Allowing a Crummey withdrawal right to expire, unexercised, constitutes the release of a general power of appointment to the extent that the lapsed withdrawal right exceeds the greater of \$5,000 or 5 percent of the value of the trust property. Stated simply, when a donee fails to exercise a Crummey withdrawal power, that donee actually makes a gift to the other trust beneficiaries of that amount in excess of \$5,000 or 5 percent of the contributed trust property. For Generation-Skipping Transfer (GST) purposes,

29. Rev. Rul. 73-405; cf. *Naumoff v. Comm'r*, 46 T.C.M. 852 (1983).

30. While there are no clear precedents, such a right could be viewed as a grantor-retained power to use the withdrawn funds for the minor's support, possibly constituting a retained life estate under Section 2036 or retained power to alter, amend, revoke or terminate under Section 2038.

31. See IRC Section 2514. Any transfers after October 21, 1942.

## Gift tax consequences continued

the donee becomes the transferor with respect to that portion of the gift in excess of the “5 and 5” amount. The “5 and 5” rules have never been amended to track the increase in the annual gift tax exclusion amount or the cost-of-living-adjustment. This exemption applies once each year and is not cumulative among several trusts.<sup>32</sup> This means each beneficiary has one “five-and-five power” to exercise annually.

### **Several strategies are used to avoid this “gift over” problem:**

#### **1. Limit the withdrawal right to the greater of the “5 and 5” amount**

This strategy keeps the gift amount within the safe harbor amount. But it limits the amount that can be transferred into the trust without using the client’s lifetime gift tax exemption. It is important to remember the “5 and 5” safe harbor amount is viewed from the point of view of the donee, not the donor. For example, if a married couple contributes to the trust, the total amount the donee can allow to lapse without triggering a gift over to the other beneficiaries under this provision is limited to \$5,000 or 5 percent, not \$10,000.

#### **2. Create separate subtrusts for each beneficiary within the irrevocable trust**

This subtrust strategy creates a separate trust share for each beneficiary within the trust. When the beneficiary allows the Crummey withdrawal period to lapse, this amount is credited to that beneficiary’s separate trust share. In order to prevent the lapse of the withdrawal power from being a completed gift, the beneficiary is given either a general or limited power of appointment to control the disposition of the beneficiary’s trust share. If the beneficiary predeceases the grantor, the beneficiary’s trust share will be included in his or her estate for estate tax purposes.

This strategy is problematic in most planning situations. One issue is that the separate trust shares must be satisfied. If the grantor expected all of the insurance proceeds to be used to support his or her surviving spouse, the satisfaction of the separate trusts will reduce the amount going to provide that support. Another issue with this strategy is that it is not possible to effectively allocate any of the grantor’s GST tax exemption to the amounts contributed to the trust.

<sup>32</sup> Rev. Rul. 85-88.

# Gift tax consequences continued

### 3. “Hanging” powers

Generally, the “hanging” power is used by most estate planning attorneys to solve “gift over” problems. By utilizing “hanging” powers, the grantor should be able to make full use of the entire annual gift tax exclusion amount for each donee. Under the terms of the trust, the amount that lapses is limited to the “5 and 5” safe harbor amount each year. The amount contributed for that donee in excess of the safe harbor amount remains withdrawable by the beneficiary, or “hangs,” until it lapses at some future date. This unused withdrawal right continues forward and is reduced by \$5,000 or 5 percent of the trust assets each year until all additions to the trust have been used up. However, the withdrawal right may still only be exercised during the limited period the trust allows.

At this point, the ability of hanging powers to avoid gift taxes caused by the lapse of a Crummey Power is mostly theoretical. The IRS has issued PLRs that both approve<sup>33</sup> and disapprove<sup>34</sup> of hanging powers. In a disapproving PLR, the IRS ruled a hanging power invalid when it was designed as a savings clause to prevent an adverse tax result that would have arisen had the clause been excluded from the instrument. With careful drafting, it may be possible to use a hanging power, nonetheless. The effect of this PLR should be considered before including a hanging power in the trust document. The specimen agreements contain hanging powers.

However, if the hanging power is structured as a mathematical formula that quantifies the amount that “hangs” in terms that can be ascertained without regard to whether or not tax is incurred, most practitioners believe that the technique is valid.

A hanging power granted to the grantor’s spouse creates an Estate Tax Inclusion Period (ETIP) and precludes the allocation of Generation-Skipping Transfer (GST) until the end of the ETIP period.

Exercise of these hanging powers may be restricted. One potential restriction is to require the beneficiaries to obtain the consent of an independent trustee before being allowed to exercise accumulated withdrawal rights. Of course, no restriction can be made on the right to withdraw trust additions in the current year, since this would prevent the annual exclusion from being available. However, the use of an independent trustee with respect to hanging powers may enable the beneficiary to avoid grantor trust treatment.<sup>35</sup>

A second way to limit the exercise of accumulated withdrawal rights is to give the beneficiary a testamentary special power of appointment over amounts that would have been deemed taxable gifts in the absence of the hanging power provisions. The use of a special power of appointment is superior to the use of a general power, because it avoids having any of the unused power being taxed as a gift or in the beneficiaries’ estates.<sup>36</sup>

33. PLR 8701007.

34. PLR 8901004. The PLR that disapproved of the hanging power was drafted to compute the lapsing amount in terms of whether gift tax was incurred. Courts have long held that formulas such as these, which are tied to whether or not tax is incurred, violate public policy. See *Comm’r v. Procter*, 142 F.2d 824 (4th Cir. 1944), cert. denied, 323 U.S. 756 (1944).

35. See Code Section 678(a).

36. Private Letter Rulings 8517052 and 8229097

## Gift tax consequences continued

The lapse of a Crummey Power in a non-defective trust may have income tax consequences. In a Private Letter Ruling, the IRS determined that the power-holder was an owner of the trust to the extent of his withdrawal right. As a result, the power-holder may be taxed on a portion of trust income or take advantage of trust deductions if he or she fails to exercise the power.<sup>37</sup>

### **4. Fund the trust initially with sufficient assets so that the “5 and 5” amount is immediately equal to annual exclusion per donee**

The grantor gifts assets to the ILIT having a value so that the greater of “5 and 5” is equal to the annual gift tax exclusion amount. For example, a \$300,000 contribution will protect a \$15,000 lapse. With respect to future contributions, the withdrawal right should be exercisable over the entire trust corpus, rather than the addition itself. However, a large initial gift to the trust will use a portion of the grantor’s lifetime gift tax exemption amount. In addition, the gift will remove the contributed assets from the grantor’s immediate control.

### **5. Provide loans from the grantor to fund any anticipated expenses**

A loan to the irrevocable trust from the grantor is not treated as a gift to the trust subject to a withdrawal power. In order to prevent the loan from being considered a gift, the debt should be documented with a promissory note, should bear interest, be collateralized, and have a fixed maturity date; payments should be made on the note and a history of payments kept, and the transaction should be properly reported for income tax purposes.<sup>38</sup>

## **C. Gift splitting**

A donor may also want to increase the number of gift tax annual exclusions and applicable exemptions available for each gift to a Crummey trust by gift splitting – having the nondonor spouse agree to be treated as if he or she had made one half of the gift. The election to gift split is made on the gift tax return (IRS Form 709) for the year in which the gift is made, and that return need not be filed until April 15 of the following year.<sup>39</sup> A “spouse” is a person who is married to the other person at the time of the gift and is not remarried during the remainder of the calendar year.<sup>40</sup> Gifts made by persons who subsequently marry may not be split since they weren’t married at the time of the gift. Gift splitting is only available to gifts to third parties.

Gift splitting is allowed only if both spouses consent to split all their gifts for the year.<sup>41</sup> Such consent can only be made on a gift tax return.<sup>42</sup>

37. Private Letter Ruling 8521060.

38. See *Miller v. Com’r*, T.C. Memo 1996-3. 39. IRC §§ 6019, 6075.

39. IRC §§ 6019, 6075.

40. IRC §2513(a)(1).

41. IRC §2513(a)(2).

42. Treas. Reg. §25.2513-2(a)(1)

## Gift tax consequences continued

Merely electing to gift split does not make the consenting spouse a transferor to the trust for purposes of the retained interest rules of §§2036 through 2038. Some practitioners question whether a spouse should gift split when he or she is an income beneficiary or holds some other significant interest in the trust. Their concern is that a spouse who consents to gift split may be deemed to have made a transfer to the trust and that the interest and rights granted the spouse under the trust instrument will cause part of the proceeds to be included in his or her gross estate. However, Section 2513, which authorizes gift splitting, reads as follows:

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A gift made by one spouse to any person other than his or her spouse shall for purposes of this chapter, be considered as made one-half by him or her and one-half by his or her spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

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The reference to “this chapter” limits the impact of gift splitting to the gift tax rules and excludes it from consideration in determining the consenting spouse’s estate tax.<sup>43</sup>

### D. Gift of an existing life insurance policy

When an existing life insurance policy is gifted to an irrevocable trust, a taxable gift takes place.<sup>44</sup> The value of the gift is the fair market value of the policy on the date of transfer. This is the price that the property would bring when changing hands between a willing buyer and a willing seller. The fair market value is determined by reference to all the facts and circumstances relating to the transfer.<sup>45</sup>

Because there are no organized market forces available to determine the fair market value of a life insurance policy, the IRS issued regulations to provide guidance to what constitutes the fair market value of a life insurance policy for estate and gift tax purposes. The fair market value of the policy depends on the type of policy.

- If the policy is a new policy (contracts transferred immediately after purchase or those within the first year), the fair market value is the “cost” of the policy.<sup>46</sup> The “cost” is the gross premiums paid by the transferor. If the policy is an annual premium contract, each premium thereafter is a gift.<sup>47</sup>
- When a cash value policy is transferred with additional premiums being paid, its fair market value is measured by the interpolated terminal reserve value on the date of the gift plus any unearned premium.<sup>48</sup> If there are accrued dividends on the policy, these must also be added. Outstanding policy loans should be subtracted from this value.<sup>49</sup>

43. Rev. Rul. 74-556, 1974-2 CB 300.

44. Regulation 25.2511-1(h)(8).

45. Reg. 25.2512-1.

46. Regulation 25.2512-6(a) Example 1.

47. *Guggenheim v. Rasquin*, 312 U.S. 254 (1941); *Powers v. Commissioner*, 312 U.S. 259 (1940).

48. Regulation 25.2512-6(a).

49. Regulation 20-2031-8(a)(2); Rev. Rul. 78-137, 1978-C.B. 280.

## Gift tax consequences continued

- If the gift is one of a single premium or an existing paid-up policy, the value equals the single premium the insurance company would charge for a comparable contract issued at the insured's attained age at the time of transfer.<sup>50</sup> An employee can assign his or her group term insurance, made available by his or her employer, to an irrevocable trust. The gift is valued annually as the Table I cost of the coverage if the group plan is nondiscriminatory.<sup>51</sup>

These regulations are only guidance and the IRS may review all the facts and circumstances relating to the transfer. Therefore, if an insured is in imminent danger of dying on the transaction date (any time within a year), the IRS may claim the policy to be valued at amounts closer to the death benefit payable.

For gift tax purposes, the value of the policy must be reported on IRS Form 709. Instructions for the form stipulate that if a value of a life insurance policy is being reported, IRS Form 712 should be attached for each policy. Typically, Form 712 is completed by the insurance company. The form comports with the IRS guidance on life insurance valuation and requires that certain values (interpolated terminal reserve and unearned premiums) be reported on the form.

50. Regulation 258.2512-6.

51. Rev. Rul. 76-490, 1976-2 C.B. 300; Rev. Rul. 79-47, 1979-1 C.B. 312; Private Letter Ruling 7751080.

# Generation-Skipping Transfer (GST) tax

## A. What is the GST tax?

The federal estate tax taxes wealth when it is transferred from each generation to the next generation and is based on the value of the decedent's estate. It makes no difference for estate tax purposes to whom the wealth is transferred. Therefore, assets passed from a parent to a child and then from a child to a grandchild will be subject to the estate tax twice at each generation. Estate planners soon realized that if the assets were transferred directly to the grandchild (i.e., skip a child), one level of taxation could be avoided. Congress has imposed the Generation-Skipping Transfer (GST) tax to close this estate tax loophole.

A generation-skipping transfer is any transfer of property by gift or at death, to any person who, under federal law, is assigned to a generation that is two or more generations below that of the transferor.<sup>52</sup> The GST tax applies to these transfers.

A transferor has a GST exemption (\$13.99 million in 2025, indexed for inflation) that can be allocated to generation-skipping transfers. An inclusion ratio is calculated based on allocations of GST exemption to generation-skipping transfers. The GST tax is calculated by multiplying the GST tax rate (40 percent in 2025) by the amount of the GST transfer property and the inclusion ratio for such property.

## B. How to compute the tax

The GST tax is calculated as the taxable amount times the "applicable rate."<sup>53</sup> The applicable rate is defined as the maximum federal estate tax rate times the "inclusion ratio." The inclusion ratio is defined as the excess, if any, of one (1) over the "applicable fraction." The applicable fraction is defined as the amount of generation-skipping tax exemption allocated to the trust or the transferred property over the value of the transferred property. The basic formula is:

$$\text{GST tax} = \frac{\text{Allocation of GST exemption}}{\text{Taxable amount multiplied by} [\text{max estate tax rate} \times (1 - \text{value for property transferred})]}$$

## C. What is a skip person?

For purposes of the GST tax, persons two or more generations younger than the transferor are called skip persons.<sup>54</sup> The transferor and the transferor's spouse are always treated as members of the same generation, regardless of the difference in their ages. A transfer to a skip person may be: (1) a direct skip, (2) a taxable distribution or (3) a taxable termination.

52. IRC Section 2601.

53. IRC Section 2602.

54. .§2613(a)(1).



# Generation-Skipping Transfer (GST) tax continued

## 1. Direct skip

A direct skip is a transfer directly to a skip person, a transfer to a trust if all the beneficiaries of the trust are skip persons or a GST trust. A direct skip is also a transfer subject to the estate or gift tax.

There is an important exception for direct skips: “the predeceased parent” exception. Under this exception, a grandchild will not be considered a skip person, or a person two or more generations below the transferor, if the child of the grantor – i.e., the grandchild’s parent – is dead. In that case, the grandchild steps into the shoes of the deceased child and is considered to be just one generation below the transferor.

How about trusts? A trust will be considered a skip person if all beneficiaries holding a present interest in the trust are skip persons. In determining whether a distribution may be made to a non-skip person from a trust, the possibility that a distribution may be made will be ignored if the actuarial possibility of such distribution is less than 5 percent. A person will be deemed not to have an interest in a trust if such person’s interest is validly disclaimed.<sup>55</sup>

How about non-relatives? Non-relatives are subject to generation assignment rules based on a comparison of the birth date of the transferee to that of the transferor.<sup>56</sup> Under these rules, the transferor’s generation will include transferees born up to 12½ years after the transferor. Non-relatives who were born between 12½ and 37½ years after the transferor will be treated as belonging to the first generation below that of the transferor and will therefore be non-skip persons. Non-relatives who were born between 37½ and 62½ years after the transferor will be treated as belonging to the second generation below the transferor and will therefore be treated as skip persons.

## 2. Taxable distribution

A taxable distribution is a distribution from a trust to a skip person (i.e., skip beneficiary) that is not subject to the gift or estate tax. The distribution may be made directly to the skip person or may be made to another trust where all beneficiaries are skip persons.

## 3. Taxable termination

A taxable termination is the termination of an interest in a trust by a non-skip person as a result of death, the release of a power, the mere lapse of time or some other event that leaves only skip persons as beneficiaries of the trust. However, it is not a taxable termination if an estate or gift tax is imposed on the non-skip person because of the termination of his or her interest.

For example, if Father creates a trust with an income to be paid to Son for life with the remainder to Grandson, there is a taxable termination at Son’s death because now there is no longer a non-skip beneficiary of the trust. However, if Son had been given a general power of appointment over the trust, causing it to be included in Son’s estate subject to the estate tax, then Son’s death would not be a taxable termination subject to the GST tax.

55. See IRC §2518.

56. See IRC §2651(d).†

# Generation-Skipping Transfer (GST) tax continued

## D. GST annual exclusion exceptions

As discussed in the Gift Tax section, the annual gift tax exclusion provides that the transfer of a present interest is excluded from an individual's taxable gifts to the extent of \$19,000 per donee per year (2025).<sup>57</sup> For GST purposes, there are two very significant limitations on the GST annual exclusion that are not applicable to annual exclusion gifts.

### 1. Direct skips

The first limitation is that the GST annual exclusion is available only for direct skips.

### 2. Trusts with one current beneficiary who qualifies for the GST annual exclusion

The second limitation on the GST annual exclusion is that certain trusts with one current beneficiary qualify for the GST annual exclusion. If the trust does not satisfy the GST annual exclusion requirements (such as a common trust for the grantor's children and grandchildren or a typical Dynasty Trust), transfers to the trust will require the allocation of the grantor's GST exemption to ensure a GST inclusion ratio of zero, even though the transfers to the trust qualify for the annual gift tax exclusion.

IRC §2642(c) provides that a gift in trust that qualifies for the \$19,000 annual gift tax exclusion also qualifies for the GST annual exclusion and therefore has an inclusion ratio of zero without any allocation of the transferor's GST exemption *only if*:

- The transfer is a direct-skip transfer; and
- To a trust that has only one beneficiary during the beneficiary's life; and
- The assets of the trust will be fully includable in the beneficiary's gross estate if the trust does not terminate prior to the beneficiary's death.

## E. GST trust planning

If you are drafting a trust in a situation where there are generation-skipping possibilities, i.e., where the first generation of children may not need the entire trust corpus, you should consider adding generation-skipping trust language. The attached trust documents do not contain such language. Therefore, to avoid unintended GST tax skips, you must either (1) allocate a portion of the grantor's GST tax exemption to each and every transfer to the trust or (2) insert language giving the first-generation beneficiaries a general power of appointment over their share of the trust corpus.

<sup>57</sup> Section 2503(b).

# Income tax considerations

## A. Income taxation of life insurance

Life insurance death benefit proceeds are excluded from the definition of income under the Code.<sup>58</sup> There is one exception to that rule: transfer for value. If a life insurance policy is transferred for value, i.e., for consideration, then the death proceeds to the recipient are income taxable.<sup>59</sup> However, the transfer for value rule does not apply when:

- The transferee determines his or her basis in the policy in whole or in part with reference to the basis of the policy in the hands of the transferor, such as when there is carryover basis.<sup>60</sup>
- The sale of the policy is to the insured, a partner of the insured, a partnership in which the insured is a partner, or a corporation in which the insured is a shareholder or officer.<sup>61</sup>

Transfer for value questions do not typically arise in ILIT planning because the trust is usually defective for transfer tax purposes and the transfer to the insured exception is used. However, a Revenue Ruling confirming the holdings of its many Private Letter Rulings to the effect that a sale of a life insurance policy to a grantor trust, of which the insured is treated as the owner for federal income tax purposes, will either not be treated as a “transfer for a valuable consideration,” or, if so treated, will be deemed to be a transfer of the policy to the insured that is eligible for an exception to the transfer for value rules.<sup>62</sup>

## B. Grantor trust rules

ILITs generally violate at least one of the grantor trust rules. For example, if the income generated may be used to pay premiums on life insurance on either the grantor or the grantor’s spouse without the approval or consent of an adverse party, the income will be taxed to the grantor even though he or she never receives it.<sup>63</sup> In determining whether a trust is in violation of grantor trust rules,<sup>64</sup> it is immaterial whether the insurance is taken out by the grantor before the trust is created or is purchased by the trustee after the trust comes into existence.

58. IRC §101(a)(1).

59. IRC §101(a)(2).

60. IRC §101(a)(2)(A).

61. IRC §101(a)(2)(B).

62. Rev. Rul. 2007-13.

63. IRC § 677.

64. See Code Sections 671-677.

# Income tax considerations continued

If the grantor has a power that would result in trust income being taxed under the grantor trust rules, he or she is treated as the owner of the trust for income tax purposes. The Code provides that the owner of a trust is entitled to use the trust's deductions and credits against tax as well as being forced to recognize its income.<sup>65</sup> These trusts are called "defective" because the taxation of income to the grantor is generally undesirable. However, a defective trust may be useful if a tax deduction can be passed through to the grantor. The IRS has issued some Private Letter Rulings in which grantors of defective trusts have been allowed to take the trust deductions.<sup>66</sup>

The death proceeds of life insurance policies typically are paid income tax-free to the trustee.<sup>67</sup> When the proceeds are distributed to the trust beneficiaries, they retain their tax-free nature. However, when the proceeds are retained in the trust, earnings on the proceeds are taxed in the same manner as other trust income.

The benefit of this income taxation is that the income and principal remain untouched to pay this tax and therefore the trust experiences greater growth than if the assets were reduced by the income taxation. This defect in the trust does not mean that the trust assets will be included in the grantors' estate.

65. IRC Section 671.

66. See Private Letter Rulings 8007080, 8118051 and 7909031. 67. IRC § 101(a)(1).

67. IRC § 101(a)(1).

# Flexible trust provisions

The primary disadvantage to the ILIT is that it is irrevocable.<sup>68</sup> Most clients prefer to maintain some control over their estate, or at the very least, use techniques to preserve planning options for the future. When drafted properly, an ILIT may provide flexibility.

## A. ILIT policy exchange

A recent Revenue Ruling adds significant flexibility to arrangements involving ILITS designed as grantor trusts. The core of this ruling is that in certain circumstances, a life insurance policy in an ILIT will not be included in the grantor's estate for estate tax purposes despite the fact the grantor retains the right to substitute the policy with assets of equivalent value. It is important to note the ruling specifies three further requirements that must be met to prevent estate inclusion.

### 1. Power must be held in a non-fiduciary capacity

The insured grantor's power to substitute assets must be held in a non-fiduciary capacity. Under the ruling, this duty remains with the trustee at all times and may not be shifted to the insured grantor. The actual or implicit exercise of any fiduciary power by the grantor may cause immediate inclusion of trust assets in the gross taxable estate upon death.

### 2. Must be substituted of the same value

The trustee must have a fiduciary obligation to ensure the grantor's compliance with the terms of the power by satisfying itself that the properties acquired and substituted by the grantor are of equivalent value. The assets need not be of the same type, but rather of the same value, meaning real estate, financial instruments or cash may be exchanged for trust assets so long as this equivalency test is met.

### 3. Can't shift benefits among beneficiaries

The substitution power may not shift benefits among trust beneficiaries. The ruling indicates that a substitution power cannot be exercised in a manner that can shift benefits if: (a) the trustee has both the power to reinvest the trust corpus and a duty of impartiality with respect to the trust beneficiaries; or (b) the nature of the trust's investments or the level of income produced by any or all of the trust's investments does not impact the respective interests of the beneficiaries.

## B. Merger trust clauses

One concept is the ability for this trust to merge with another trust. Often it becomes desirable that two or more trusts combine assets and be administered as one. This may be the result of multiple trusts established for tax, succession or planning reasons that may no longer exist, or it could result from the need to gain economics of scale after debts, taxes, expenses and principal distributions have been paid. While trusts with identical terms and beneficiaries can usually be merged with the permission of a court, it more often is desirable to specifically give the trustee the discretionary power to merge without prior court approval. Such a clause would usually require identical beneficiaries in the merging trusts.

68. Rev. Rul. 2011-28.

# Flexible trust provisions continued

The grantor can also specify other terms that must be identical or give the trustee the broad discretion to merge with a trust that is merely similar. If it is assumed that the trusts would not be identical, the merger power should specify which trust document would control after the merger.

## C. Trust protector clauses

A common approach for adding flexibility to a trust is to give the trustee or an independent third party the power to amend the trust. Oftentimes it is favorable to give the power to a third party because the reason for amendment involves a dispute over interpretation of a trust provision between the trustee and beneficiaries.

But even if an amendment is necessary to realign the trust with the grantor's original intent due to a change in laws or unforeseen circumstances, an independent third party can add objectivity in determining the type and extent of changes while minimizing potential conflicts between the trustee and the beneficiaries or among beneficiaries.

Commonly referred to as a trust protector, the independent third party has been used extensively outside the United States in English common law and tax haven jurisdictions. The grantor can give this power of amendment to one of the trustees or to a separately appointed fiduciary, or committee of fiduciaries, who will act independently of the trustees. The trust protector is appointed by the grantor in the trust agreement and, like a trustee, there is usually a method for appointing successor trust protectors. The trust protector may serve as needed to periodically adjust trust terms to the grantor's intent, or may be called into service at the occurrence of specified events, such as major estate tax law changes.

The trust protector's role may be limited to such things as removing and replacing trustees or changing the situs of the trust. Alternatively, the trust protector's power of amendment may be extremely broad, encompassing an ability to change the dispositive terms of the trust or transfer the property to an entirely new trust. A power of amendment is a powerful tool, and it can be misused in the wrong hands. It must be carefully defined, and the person or persons designated to exercise it must be carefully selected.

At a minimum, the trust protector should be allowed to address tax or other legal changes that affect administration of the trust and to correct ambiguities that might otherwise require court construction. Regardless of the scope of powers, the trust agreement would usually prevent the trust protector from obtaining personal benefit from the changes because of the possibility that the trust would be characterized as a grantor trust.

However, such characterization may not be important unless the trust recognizes current income, which might be taxed back to the grantor.

## D. Trust Decanting

Trust decanting is an estate planning strategy that involves moving assets from one trust to another with different terms. The process is similar to decanting a bottle of wine, where the wine is poured from its original bottle into a new container. Decanting a trust can improve the management of assets and the terms of the trust, which can be difficult

for irrevocable trusts. In most cases, decanting is not considered a taxable event for income tax or estate, gift, and generations skipping tax purposes. Trust decanting can be used for a variety of reasons, including avoiding state income taxes, correcting drafting errors, modifying powers of appointment, and changing trustee provisions. The following states permit trust decanting:

Alabama	Iowa
Colorado	Kentucky
Illinois	Michigan
Indiana	Michigan
Maine	Minnesota
Massachusetts	Missouri
Montana	Nevada
Nebraska	New Hampshire
New Mexico	New York
North Carolina	North Dakota
Virginia	Ohio
Washington	Rhode Island
West Virginia	South Carolina
Alaska	South Dakota
Arizona	Tennessee
California	Texas
Delaware	Wisconsin
Florida	Wyoming
Georgia	

# Choice of trustee

Most ILITs give the trustee broad discretion in managing the trust assets and making distributions. The trust's ability to help the grantor provide for family and estate liquidity needs will, in large measure, depend upon the trustee's decisions. For these reasons, the choice of the trustee is an extremely important one. The grantor should generally avoid assuming the role of trustee. When the trust document gives the trustee broad discretion, a grantor acting as trustee is likely to have the trust assets included in his or her estate under Section 2038 because the grantor reserved the power to alter, amend, revoke or terminate the trust.

If the grantor reserves the right to be appointed trustee, the IRS treats this as the equivalent of the reservation by the grantor of the trustee's powers. Thus, even if the grantor does assume the role of trustee, the trust property will be taxed in his or her estate. In Revenue Ruling 79-353, the IRS ruled that trust property will also be included in the gross estate if the grantor retains the right to replace a corporate trustee without cause with another corporate trustee. In Revenue Ruling 95-58, however, the IRS reversed Revenue Ruling 79-353 and held that a grantor may reserve the right to remove a trustee and appoint an individual or corporate successor trustee without causing the trust principal to be included in the grantors' estate under Sections 2036 and 2038, provided the successor is not related or subordinate to the grantor as defined under Section 672(c).<sup>30</sup>

Revenue Ruling 95-58 did not, however, specifically address whether the grantor's retention of such a right constitutes an incident of ownership over an insurance policy held by the trust on the grantor's life under Section 2042. TAM 8922003 concluded that it does. To the extent that Revenue Ruling 79-353, discussed above, provided the legal underpinnings of TAM 8922003, its conclusions are now in doubt. Until the IRS specifically applies the reasoning of Revenue Ruling 95-58 in the context of Section 2042, it may be advisable not to grant such a power to the grantor of a life insurance trust. If it is granted, care should be taken to ensure that the grantor is not given the power to appoint a successor who is related or subordinate to the grantor.

In some instances the grantor may become trustee by accident and not have the trust assets included in his or her estate. In Revenue Ruling 84-179, the IRS outlined its requirements in which a grantor could become trustee without having the trust assets taxed in the estate. These requirements are:

1. That the trustee cannot exercise the trustee powers for the insured's personal benefit, and
2. That the insured must not become trustee under some prearranged plan.

Since it is generally not good practice for the grantor to serve as trustee, other candidates might be the grantor's spouse as long as the policy is not a second-to-die policy, other family members, professionals (such as attorneys and accountants) and corporations licensed to and in the business of delivering trust services. If the trustee is given broad discretionary powers, the grantor's spouse should not be named trustee. The discretionary powers could easily cause the trust principal to be taxed in the spouse's estate and thereby frustrate the trust's primary objective.



# Choice of trustee continued

There are many benefits to using a corporate trustee, but there can be drawbacks such as an annual administration fee and occasional inability to relate to the needs of trust beneficiaries.

Sometimes a professional or a family member is appointed trustee when the trust is created but is charged with transferring the assets to a corporate trustee for investment after the grantor's death when the policy proceeds are paid. This successor trustee arrangement helps the trust avoid paying unnecessary annual administration fees until a substantial trust estate exists.

It is important that the trust contain a procedure to name alternative or successor trustees. It is probable that at some point an individual trustee may choose to resign or a corporate trustee needs to be replaced. After the grantor's death, the only leverage the family may have with the corporate trustee is the power to replace the corporate trustee. Counsel should consider drafting such a procedure into the document.

When deciding whom you will choose as a trustee, consider the following benefits of using a corporate trustee:

- Your trust is managed by professionals with experience, certification and training.
- Corporate trustees are regulated and regularly examined.
- Corporate trustees have access to other professionals for special asset management and access to lower cost investment products.
- Corporate trustees must provide complete and detailed accounts of all trust activities.
- A corporate trustee is always available to handle urgent trust needs.
- A corporate trustee acts impartially to fulfill trust purposes without family pressure or bias.

# Community property

The laws of community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) pose special considerations for the ILIT. Without careful drafting and planning, a surviving spouse with an income interest in the trust could have the trust included in his or her estate under Section 2036. These special considerations involve both the initial and all future contributions to the trust.

In community property states, marital property that is considered community property is treated as owned one-half by each spouse. This treatment supersedes the titling of the property. As a result, even property titled in the name of one spouse may still be community property and, therefore, owned one-half by each spouse. This treatment can cause potential problems with an irrevocable trust if contributions to the trust are made with community property.

Contributions of community property to an ILIT can create two problems. The first problem occurs if both spouses do not agree to the gift of community property, the gift is voidable by the non-consenting spouse. In order to void the gift, the non-consenting spouse will have to bring legal action asserting his/her right to a proportionate share of the property in the trust. This property would become part of the surviving spouse's estate, thereby allowing only a portion of the assets of the trust to escape estate taxes.

This potential pitfall can easily be corrected in one of two ways:

1. An agreement signed by the non-owner spouse releasing their community property rights could be signed. (A sample of such an agreement is included in this specimen agreement); or
2. Only separate property of the contributing spouse should be used to fund the ILIT.

The second problem created by contributing community property to an ILIT is the potential inclusion of the trust in the surviving spouse's estate. Since community property is treated as owned one-half by each spouse, contributing community property to an ILIT means that both spouses are grantors of the trust. As a result of both spouses being grantors of the trust, any life income interest to the surviving spouse could result in a portion of the trust assets being included in the estate of the surviving spouse under Section 2036. Section 2036 would consider the income interest as a retained income interest and, therefore, includable in the surviving spouse's estate.

This problem can be corrected in one of several ways:

1. Avoid giving the surviving spouse any income rights in the trust (see second Specimen Trust Agreement); or
2. Fund the trust only with the separate property of the non-surviving spouse.

In order to ensure the trust is funded only with separate property, any existing policy contributed to the trust should be affirmatively converted to separate property. The specimen "Release of Community Property Interest" can help accomplish this. Each policy contributed to the trust should be accompanied by its own release.

## Community property continued

In addition, any future contributions to the trust should be made out of the grantor spouse's separate property. Because of the diversity of community property laws in each state, careful consideration to the specific community property laws should be made so that the specimen agreements can be modified accordingly. Consideration should also be given to entering into a marital property agreement in which spouses determine the character of the property they currently own and future property they will acquire.

# Conclusion

The ILIT is one of the most effective estate planning techniques. It avoids federal estate taxes, provides asset management expertise, and helps the estates of the grantor and spouse access liquidity to meet their expenses and costs without increasing them. It can be drafted with much flexibility to help the grantor accomplish his or her objectives even though it is irrevocable.

The specimen agreements are provided only for illustrative purposes. The client's attorney must draft documents that provide planning for the client's specific needs and circumstances.

This foreword to counsel contains three sample ILIT agreements. The first sample trust agreement is generally used for trusts holding traditional life insurance products. The second sample trust agreement is generally used for trusts holding survivorship life insurance products. The third specimen is for spousal limited access trusts for holding a single life policy. All agreements are designed for use in common law states. Many of the provisions might also be used in community property states without the need for revision. These sample agreements assume that a corporate trustee is appointed to manage the assets. This assumption is made for consistency only and in no way suggests a corporate trustee is required. If an individual trustee or co-trustees are appointed, minor changes will be necessary.

# Specimen Agreement 1

## **Single grantor - single insured life insurance policy**

This specimen ILIT agreement illustrates a basic example for a single Grantor. When deciding whom you will choose as trustee, consider the benefits of using the professional services of a corporate trustee.

**This specimen agreement should be used only as a guide. It outlines some basic provisions typically included in such trusts. It is not intended as a final draft. Counsel must draft a document that meets the client's needs and circumstances.**

Counsel alone is responsible for the actual wording of the final trust agreement.

**Neither Securian Financial nor its agents are engaged in the practice of law; these specimen agreements are intended only for illustrative purposes and counsel must draft an ILIT appropriate for his or her client.**

## **Specimen ILIT agreement (single grantor - single insured life insurance policy)**

This Trust Agreement is made on \_\_\_\_\_, 20\_\_\_\_, between [NAME OF GRANTOR] ("Grantor") and [NAME OF TRUSTEE] ("Trustee").

### **Recitals**

I have transferred certain property to the Trustee contemporaneously with signing this Agreement, the receipt of which property the Trustee acknowledges; and

The party agrees that all property transferred to the Trustee is to be administered and distributed as provided in this agreement. References in the singular to a trustee include all trustees empowered to act.

# Specimen Agreement 1 continued

## **Option 1 – The Trustee purchases new insurance**

### **Article 1. Trust Estate**

The Grantor, desiring to establish an irrevocable Trust, has transferred cash gifts to the Trustee as itemized on Schedule A attached hereto and made a part of this agreement. The Grantor irrevocably relinquishes all rights to those amounts transferred to the Trustee. The Trustee hereby acknowledges receipt of these amounts listed on Schedule A and accepts all transfers, assignments and designations in Trust for the uses and purposes and under the terms and conditions set forth in this Agreement. The entire Trust Estate shall be managed and administered by the Trustee and the principal thereof and the income therefrom shall be held and distributed in accordance with the following provisions and for the following purposes.

### **Article 2. Rights to Trust corpus**

The Trustee is hereby vested with all right, title and interest in and to such property transferred to this Trust. The Trustee is authorized and empowered to purchase life insurance policies on the life of the Grantor, and is authorized and empowered to exercise and enjoy, for the purposes of the Trust herein created and as absolute owner of such insurance policies, all the options, benefits, rights and privileges under such insurance policies, including the right to borrow upon such insurance policies and to pledge them for a loan or loans. The insurance company that has issued such insurance policies is hereby authorized and directed to recognize the Trustee as absolute owner of such insurance policies and any receipts, releases and other instruments executed by the Trustee in connection with such insurance policies shall be binding and conclusive upon all persons interested in the Trust.

### **Article 3. Additions to the Trust**

The Grantor or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add any real or personal property of this Trust by transferring such property to the Trustee a deed, assignment, bequest or devise. The Grantor or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add insurance policies to this Trust by designating the Trustee as irrevocable beneficiary, by assigning ownership of the insurance policies to the Trustee, or by naming the Trustee owner of the policy. If so added, the proceeds of such insurance policies or the additional property shall be held and managed according to the provision of this Agreement. The Trustee agrees, if it accepts such additions in Trust for the uses and in the manner set forth herein.

# Specimen Agreement 1 continued

## **Option 2 – The Grantor transfers existing life insurance to the trust**

### **Article 1. Trust Estate**

The Grantor, desiring to establish an ILIT, has transferred and assigned to the Trustee all of the Grantor's right, title and interest in the policies, which are itemized on Schedule A attached hereto and made a part of this Agreement. The Grantor has caused or will cause the Trustee to be designated the owner of all said policies.

The Grantor hereby relinquished all rights, power and ownership interests in such insurance policies and will, at the request of the Trustee, execute all other instruments reasonably required to effectuate these transfers.

In addition, the Grantor has or may transfer additional properties to the Trustee, and agrees to do all things necessary to complete the transfer of such properties. The Trustee hereby acknowledges receipt of the policies listed on Schedule A and accepts all transfers, assignments and designations in Trust for the uses and purposes and under the terms and conditions set forth in this Agreement. The entire Trust Estate shall be managed and administered by the Trustee and the principal thereof and the income therefrom shall be held and distributed in accordance with the following provisions and for the following purposes.

### **Article 2. Rights in insurance policies**

As to any insurance policies absolutely assigned to the Trustee, or as to which ownership has been changed to the Trustee, the Trustee is hereby vested with all right, title and interest in and to such insurance policies as is authorized and empowered to exercise and enjoy, for the purposes of the Trust herein created and as absolute owner of such insurance policies, all the options, benefits, rights and privileges under such insurance policies, including the right to borrow upon such insurance policies and to pledge them for a loan or loans. The insurance company that has issued such insurance policies is hereby authorized and directed to recognize the Trustee as absolute owner of such insurance policies and any receipts, releases and other instruments executed by the Trustee in connection with such insurance policies shall be binding and conclusive upon all persons interested in the Trust.

### **Article 3. Additions to the Trust**

The Grantor or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add other insurance policies, interests owned in insurance policies or any real or personal property to this Trust by designating the Trustee as irrevocable beneficiary, by assigning ownership of the insurance policies to the Trustee by deed, assignment, bequest or devise. If so added, the proceeds of such additional insurance policies or the additional property shall be held and managed according to the provisions of this Agreement. The Trustee agrees, if it accepts such additions, to hold and manage such additions in Trust for the uses and in the manner set forth herein.

# Specimen Agreement 1 continued

## Article 4. Special power of appointment

During the lifetime of the Grantor, [Name of Powerholder], if living, otherwise [Name of Successor Powerholder] shall have the power at any time to appoint the principal of the Trust Estate in whole or in part and in any manner and in such proportions as he or she deems advisable, to anyone other than himself/herself, his/her creditors, his/her estate, or the creditors of his/her estate provided no such distribution shall be made for the health, education, maintenance or support of any descendant of the Grantor or Grantor's spouse whom the Grantor or Grantor's spouse is legally obligated to support by so directing in writing to the Trustee. In no event may property be appointed to a creditor of the Grantor.

## Article 5. Beneficiaries' rights to withdrawal

- A. Each living child of the Grantors, or during any period that such child is under disability, the Guardian of such child or the Conservator of his or her estate, may at any time up to and including thirty (30) days after receiving notice of any transfer of assets to the Trust Estate make one written demand upon the Trustee for an amount equal to a fraction, the numerator of which is one, and the denominator of which equals the number of the Grantors' then living children, of the fair market value of the transferred property for federal gift tax purposes at the time of its transfer to the Trust Estate.
- B. The amount so demanded under Paragraph A during any calendar year shall not exceed the greater of \$5,000 or 5 percent of the Trust corpus. The right to make each such demand under this section shall be non-cumulative and shall lapse, if not exercised, at the end of the thirty-(30) day period described herein.

### Optional – Hanging power language

- B. At the expiration of the 30-day period from the date of notification, the beneficiary's demand right shall terminate to the extent it does not exceed the greater of \$5,000 or 5 percent of the then value of the Trust corpus or such greater amount which constitutes the lapse of a nontaxable power of appointment under Internal Revenue Code Section 2041 and 2514 as in effect for that year. To the extent that such power exceeds those amounts and does not terminate, the beneficiary's demand right shall continue in existence and shall terminate in future years to the extent that, when coupled with all other gifts deemed to be made by a beneficiary to the Trust in any calendar year, the total gifts by a beneficiary to the Trust in any calendar year do not exceed the greater of \$5,000 or 5 percent of the then value of the Trust corpus (or such greater amount as may be allowed by IRC Sections 2041 and 2514). The determination by the Trustee of the amount subject to any power in existence under this section shall be final and conclusive on the beneficiaries of this Trust. The Trustee shall not incur any liability to any such beneficiary as a result of the determination.*



# Specimen Agreement 1 continued

- C. Any amounts demanded under this section shall be payable, at the discretion of the person making such demand, with the assets transferred to the Trust Estate with respect to which the withdrawal power arose, in cash, and/or in liquid assets by the Trustee to the person making such demand. The Trustee shall maintain as part of the Trust Estate, or make provisions for, sufficient liquid assets to make the payment described in this section.
- D. Each person having a right to make each such demand under this section shall be given written notice by the Trustee of a transfer of assets to the Trust Estate within 15 days after such transfer. The notice of a transfer of assets to the Trust Estate shall specify: (1) the value of the transferred assets for federal gift tax purposes, in the opinion of the transferor, (2) the person's right to make one written demand upon the Trustee for an amount equal to the amount specified in Paragraph A of this section, (3) that such right will lapse at the end of the 30-day period described herein, and (4) the person's right to demand that such amount be paid in the manner described in Paragraph C of this section. The Trustee shall mail notice of such transfer of assets to the Trust Estate by certified mail, return receipt requested, to the last known address of each person having the right to make such demand under this section.
- E. The Trustee may satisfy the exercise of any right of withdrawal by distributing to the beneficiary making the withdrawal cash or other assets. As the date a request for withdrawal is made pursuant to the provisions of this section, the beneficiary's right to receive the amount requested shall be vested and shall not be terminated by the subsequent death or disability of the beneficiary or any administrative delay resulting from actions taken by the Trustee to effect distribution of principal pursuant to this section.
- F. For purposes of this section, the term "contribution" or "contribution to the Trust Estate" shall mean any cash or other assets, including life insurance policies (or any interests therein), which are transferred to the Trustee to be held as part of the Trust Estate and shall also include any premiums on insurance policies owned by or payable to the Trustee, which premiums are paid by the Grantor, or by any other person, directly to the insurance companies issuing the insurance policies, rather than first being paid to the Trustee. In the case of any such premium which is paid directly to an insurance company, the date of the contribution shall be deemed to be the date on which such premium payment is transmitted to the insurance company issuing the policy. The amount of any contribution to the Trust Estate shall be the value of such contribution for federal gift tax purposes.
- (Despite this broad language, it is usually wise to funnel contributions through the Trustee and have it pay the premiums to the insurance company. If the Grantor pays premiums directly to the insurer, the Crummey withdrawal rights may not be able to qualify the premium payments for the gift tax annual exclusion.)*
- G. If a beneficiary is a minor at the time a contribution is made to the Trust Estate, or fails in legal capacity for any reason, the beneficiary's guardian or conservator (other than the Grantor) or the beneficiary's parent (other than the Grantor) as natural guardian acting on behalf of the beneficiary, may exercise the right of withdrawal on behalf of the beneficiary. The property received pursuant to the demand shall be held by the guardian or conservator for the benefit and use of the beneficiary.

# Specimen Agreement 1 continued

## Article 6. Payment of premiums

The premiums or other charges on unmaturred insurance policies constituting part of the Trust Estate shall be paid as follows:

- A. Unless the Trustee receives written notice from the Grantor prior to the premium due date of any insurance policy that the premium for such insurance policy has been paid, the Trustee may pay the premiums as they become due. Any Trust income may first be applied to pay such premiums and any balance not paid by Trust income shall be paid from Trust principal.
- B. If at any time the Trust Estate shall be insufficient to pay such premiums and other charges, the Trustee may, in its discretion, notify either the Grantor, or the person insured by any such insurance policy, or the beneficiaries named in this Agreement, of the amount necessary to pay such premiums or other charges. The Trustee is under no obligation to pay insurance premiums. However, any funds furnished to the Trustee, as a result of such notice, may be applied to such premiums and other charges, and any excess amounts may be regarded as voluntary additions to the principal of the Trust Estate. Nothing herein shall be construed as a covenant by the Grantor to pay the premiums or other charges on any policy at any time constituting part of the Trust Estate.
- C. If at any time the Trust Estate and the funds furnished to the Trustee are insufficient to pay such premiums and other charges, the Trustee shall be under no obligation to make such payments and shall not be liable to any extent whatsoever for non-payment. The Trustee is authorized, however, to borrow upon any insurance policy in the Trust Estate an amount sufficient to pay such premiums and other charges and is authorized to sell at public or private sale, without notice to the Grantor or any other person, such part of the property of the Trust Estate, other than insurance policies, as may be necessary to furnish the amount required to pay such premiums and other charges and to apply the same to such payment. The Trustee is authorized also, but is not obligated, to borrow against the cash value of any insurance policies, to surrender any Insurance Policy for its cash surrender value, or to convert any insurance policy into a paid-up status or elect extended term insurance whenever it is unable by reason of insufficient funds to pay the premium or other charges.

The Trustee accepts this Trust without any responsibility for the validity or enforceability of any insurance policies now or hereafter in this Trust or for the legality or effectiveness of any assignment, designation or change of beneficiary of any policy in this Trust.

## Article 7. Collection of proceeds

As soon as practicable after the death of any person insured by any policies in the Trust Estate, the Trustee shall prepare, serve and file notices and proof of death and shall collect all moneys due under the insurance policies then within the operation of this Agreement and payable to the Trustee. The Trustee shall have full authority to take any action in regard to collection that it deems best and to pay the expenses thereof out of the Trust Estate, but it shall not be required to enter into or maintain any litigation to enforce payment of such insurance policies until it shall have been indemnified to its satisfaction against all expenses and liabilities to which it might, in its judgment, be subjected by any such action on its parts.

# Specimen Agreement 1 continued

The Trustee shall have full authority to make any compromise or settlement with respect to such insurance policies, or any of them, that they may deem expedient, and to give to the insurance companies all the necessary and proper releases, acquittances and full discharges of all their liabilities under such policies. No insurance company whose insurance policies shall be deposited hereunder and who shall make payment of the proceeds thereof the Trustee shall be required to inquire into or take notice of any of the provisions of this Agreement or to see to the application or disposition of the proceeds of such Policies, and the receipt of the Trustee to any insurance company shall be effectual to release and discharge it for any payment so made and shall be binding upon every beneficiary of the Trust.

## **Article 8. Management of the Trust Estate**

The Trust Estate shall be managed and administered as follows:

A. During the lifetime of the Grantor's spouse:

1. The Trustee shall, during the lifetime of the Grantor, apply all of the net income derived from the Trust Estate to pay premiums or other charges on insurance policies constituting part of the Trust Estate. Any net income not so applied shall be added to the Trust Estate.
2. Following the Grantor's death, the Trustee may pay to the Grantor's spouse such sums from the income and principal of this Trust as in its sole discretion shall be necessary or advisable from time to time to provide his/her proper health, education, support and maintenance, taking into consideration all other income available to the Grantor's spouse for such purposes from all sources known to the Trustee.

B. Notwithstanding anything to the contrary herein contained, in the event that the Grantor's spouse survives the Grantor for six (6) months and in the further event that any part of the principal of this Trust is includable in the Grantor's gross estate for federal estate tax purposes, then the Trustee is directed to pay the entire principal of the Trust to the Trust created for the Grantor's spouse under the terms of his or her last will and testament, provided that it qualifies for the estate tax marital deduction. If it does not so qualify, the Trustee is directed to pay the Trust principal to the surviving spouse directly. *(This optional paragraph is a savings clause designed to qualify the Trust principal for the marital deduction if the policies are taxed in decedent's estate. A qualified terminable interest property [QTIP] provision could be inserted instead if the Grantor desired to control the ultimate disposition of the proceeds after the spouse's death.)*

C. Upon the death of the Grantor's spouse, or upon the death of the Grantor if his or her spouse shall not survive the Grantor, the Trustee shall divide this Trust, as then constituted, into equal shares so as to provide one share for each then-living child of the Grantor, and one share for the then-living children, collectively, of each deceased child of the Grantor.

# Specimen Agreement 1 continued

The income and principal of each share shall be held and distributed as follows:

1. With respect to the share provided for a child of the Grantor then living:
  - a. The Trustee shall pay to or apply for his or her benefit, from time to time, such sums from the income and principal of that child's share as the Trustee in the exercise of its sole discretion deems necessary or advisable, to provide for his or her proper health, education, support and maintenance.
  - b. As each child of the Grantor attains the age of \_\_\_ years, or upon division of this Trust into shares if a child has then reached such age, the Trustee shall distribute to him or her outright absolutely one-half (1/2) in value of the principal and accumulated income of his or her share then being held in Trust; and when a child of the Grantor reaches the age of \_\_\_\_ years, or upon division of the Trust into shares if a child has then reached such age, the Trustee shall distribute to him or her outright absolutely the balance of principal and accumulated income then being held in his or her share and the Trust as to that share then be terminated.
  - c. If a child of the Grantor should die before receiving full distribution of his or her share, the remainder of that child's share shall be distributed per stirpes to his or her then living children, if any, or if none, then per stirpes to the Grantor's then living children and, collectively to any children of any deceased child of the Grantor, subject, however, to the provisions of Paragraph C (3) of this Article 8 relating to distribution of shares to persons then under age \_\_\_\_ and except that each portion otherwise distributable to a child or grandchild of the Grantor for whom a share of this Trust is then being held hereunder shall be added to that share.
2. With respect to each share, if there be any for the then living children, collectively, of a deceased child of the Grantor, that share shall be paid over and distributed outright absolutely in equal shares to such children of the deceased child: subject, however, to the provisions of Paragraph C (3) of this Article 8 relating to the distribution of shares of persons then under age \_\_\_ and except that each portion otherwise distributable to a child or grandchild of the Grantor for whom a share of this Trust is then being held hereunder shall be added to that share.
3. If at any time a share becomes distributable to a beneficiary who has not attained the age of \_\_\_\_ years, then and in each such case, the Trustee shall retain possession of such share for the period during which that beneficiary is under the age of \_\_\_ years and in the meantime the Trustee shall use and expend so much of the income and principal of such share as it in its sole discretion deems necessary or advisable for the health, support, maintenance and education of that beneficiary, and any income not so expended shall be added to principal. When the beneficiary attains the age of \_\_\_ years, any balance held for his or her benefit shall be paid over and distributed outright to him or her. If a beneficiary for whom a share is held shall die before attaining the age of \_\_\_\_ years, then any remaining portion of his or her share shall be paid to his or her estate; provided, however, that any portion otherwise distributable to an heir pursuant to this instrument, shall be paid over to the Trustee of such share and become a part thereof.

# Specimen Agreement 1 continued

4. In case the income or any discretionary payments of principal from this Trust or any share thereof become payable to a minor, or to a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability is, in the opinion of the Trustee, unable properly to administer such amounts, then such amounts shall be paid out by the Trustee in such of the following ways as it deems best: (a) directly to such beneficiary; (b) to the legally appointed guardian or conservator of such beneficiary; (c) to some relative or friend for the care, support and education of such beneficiary; (d) by the Trustee, using such amounts directly for such beneficiary's health, support, maintenance and education.
5. No part of the Trust Estate of the Trusts created in this Agreement or in any property at any time becoming a part of any such Trust, or in the income therefrom, shall vest in any beneficiary, and neither the principal nor the income of any such Trust Estate shall be liable to be reached in any manner by the creditors of any beneficiary, and no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in such Trust Estate, or the income produced thereby, prior to the actual distribution by the Trustee to the beneficiary; provided, however, that this provision shall not be construed to prevent any beneficiary from exercising withdrawal rights in accordance with Article 5 of this Agreement.
6. If at any time before final distribution there shall not be in existence anyone who is, or who might become, entitled to receive benefits under the foregoing provisions of this Agreement, any portion remaining shall be distributed as though the Grantor had then died intestate domiciled in the state of \_\_\_\_\_ (name of state).
7. If the Trustee determines that a Trust has become reduced in size to the point that the continued administration of it has become unduly expensive and not in the best interests of the beneficiaries, the Trustee shall distribute the balance of the principal and accumulated income per stirpes of the beneficiaries who are then entitled to receive the income or to have the income accumulated for their benefit.

## **Article 9. Duration of Trust**

Each Trust or share of a Trust created under this Agreement shall in any event terminate 21 years after the death of the last surviving member of the group consisting of the Grantor's spouse, his or her children and his or her grandchildren who shall be living at the date of execution of this Agreement and thereupon the property held in that Trust shall be distributed outright to the persons then entitled to the income or to have it accumulated for their benefit.

*(The following are optional clauses, creating trust protectors. Select one of the following, depending on the degree of discretion allowed the trust protector.)*

# Specimen Agreement 1 continued

## Article 10. Trust Protector

### Option 1 - Broad powers

- A. I appoint \_\_\_\_\_ as Trust Protector of each trust created hereunder. If a Trust Protector fails or ceases to act as Trust Protector, that individual who would have acted as Trust Protector may (but is not required to) appoint any one or more successor Trust Protectors as provided in the following paragraph. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust.
- B. The Trust Protector acting from time-to-time, if any, may appoint any one or more individuals (other than the Grantor, the Grantor's spouse, a descendant of the Grantor or the spouse of a descendant of the Grantor) as successor Trust Protector. Any appointment of a successor Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protector may revoke any such appointment before it is accepted by the appointee and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust Protector. In the event that two or more instruments of appointment or revocation by the same Trust Protector exist and are inconsistent, the latest by date shall control.
- C. Any Trust Protector may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee. All trusts created under this instrument need not have or continue to have the same Trust Protector. The provisions of this instrument that relate to the Trust Protector shall be separately applicable to each trust held hereunder.
- D. The Trust Protector, with respect to any trust as to which the Trust Protector is acting, may modify or amend:
1. The trust administrative provisions of Article \_\_ (input Article Number when using individual Trustees and successor Trustees) relating to the identity and qualifications of a Trustee, and Article 14 of this instrument relating to the succession, removal and appointment of the Trustee (but not to allow the Grantor's spouse or the Grantor to act as a Trustee);
  2. The financial powers of the Trustee enumerated in the provisions of Articles 8 and 11 of this Agreement;
  3. The provisions of Article 8 of this Agreement relating to the identity of the contingent beneficiary of trust property;
  4. The withdrawal rights granted Article 5 of this Agreement (except a withdrawal right already in existence at the time the Trust Protector seeks to exercise the power conferred under this subparagraph); and

# Specimen Agreement 1 continued

5. The terms of any trust created under Article 8 of this Agreement with respect to:

- (i) the purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors the Trustee may take into account in making such distributions,
- (ii) the termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period), and
- (iii) the identity of the permissible appointees under the testamentary power of appointment granted to the beneficiary for whom the trust is named.

E. The rights and powers conferred on the Trust Protector under this Agreement, including, without limitation, the power to remove Trustees and all rights and powers granted the Trust Protector under Paragraph D of this Article, shall be exercisable only in a fiduciary capacity.

F. Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument that would cause any portion of the trust to be included in the Grantor's estate or the Grantor's spouse's estate for federal tax purposes or the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code.

G. The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Article should be exercised, and the Trust Protector is not required to exercise any power or discretion granted under this Article. While it is my wish that the Trust Protector shall consult with the Grantor's estate planning financial professionals known to the Trust Protector in determining whether and to what extent to exercise his or her powers under this Article, any exercise or nonexercise of the powers and discretions granted to the Trust Protector shall be in sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons.

Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this Article.

H. Trust Protector acting from time-to-time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred under this Article by a written instrument delivered to the Trustee.

## Option 2 – Limited scope

A. The Grantor appoints \_\_\_\_\_ as Trust Protector of each trust created hereunder. In the event \_\_\_\_\_ is unable or unwilling to act as Trust Protector, the Grantor appoints \_\_\_\_\_ as successor Trust Protector.

# Specimen Agreement 1 continued

- B. Any Trust Protector appointed under Paragraph A of this section may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee. If a vacancy occurs in the office of Trust Protector, the incumbent Trustee may, but need not, appoint by written instrument any one or more individuals (other than the Grantor, the Grantor's spouse, a descendant of the Grantor or the spouse of a descendant of the Grantor) as successor Trust Protector. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust.
- C. The Trust Protector, with respect to any trust as to which the Trust Protector is acting, may modify or amend the terms of that trust in any respect believed by the Trust Protector to be necessary or desirable:
1. In order to achieve tax advantages or as a result of changes in the Code and the rulings and regulations thereunder which may adversely affect the tax benefits otherwise intended by the Grantor;
  2. To modify the financial powers of the Trustee; or
  3. To modify the provisions that relate to the identity, qualifications, succession, removal and appointment of the Trustee (but not to allow the Grantor or the Grantor's spouse to act as Trustee).
- D. The rights and powers conferred on the Trust Protector under this instrument, including, without limitation, the power to remove Trustees and all rights and powers granted the Trust Protector under Paragraph C of this Article, shall be exercisable only in a fiduciary capacity.
- E. Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument that would cause any portion of the trust to be included in the Grantor's estate or the Grantor's spouse's estate for federal tax purposes or the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code.
- F. The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Article should be exercised, and the Trust Protector is not required to exercise any power or discretion granted under this Article. While it is the Grantor's wish that the Trust Protector shall consult with the Grantor's estate planning advisers known to the Trust Protector in determining whether and to what extent to exercise his or her powers under this Article, any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or nonexercise of the powers and discretions conferred under this Article.
- G. The Trust Protector acting from time-to-time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred under this Article by a written instrument delivered to the Trustee.



# Specimen Agreement 1 continued

## Article 11. Powers of Trustee

The Trustee is hereby authorized to and shall perform all acts necessary in fulfilling the purpose and intent of this Agreement. In addition, the Trustee shall have, without the necessity of notice of approval of any court or person, the following powers:

- A. To retain, without liability, any investment that may become part of the principal created hereunder and to make such investments (including bona fide loans to the Grantors' spouse's estate or the Grantor's estate upon such terms and security as the Trustee may determine) and reinvestments and in such proportions, without limitation to what are known as legal investments, as the Trustee shall, in its discretion, consider beneficial to the Trusts created hereunder.
- B. Consent to or participate in any plan for the liquidation, consolidation, merger or reorganization of any corporation of any security that is held in this Trust.
- C. To manage, operate, repair, alter or improve real estate or other property, and to lease real estate and other property upon such terms and for such periods as the Trustee deems advisable.
- D. To sell, exchange or otherwise dispose of realty and personalty, publicly or privately, wholly or partly on credit for any consideration, including stocks, bonds or other corporate obligations, and grant options for the purchase, exchange or other disposition of any such property.
- E. To borrow money for any purpose, from any source, and secure the repayment of any amount so borrowed by mortgage or pledge of any property.
- F. To register securities and other property held by the Trustee in the name of a nominee or in bearer form.
- G. To vote by proxy, discretionary or otherwise, or to give its consent for any purpose in respect to any stocks or other securities, or to exercise or sell any rights.
- H. To cause any distribution share to be composed of cash, property and undivided fractional shares in property different in kind from any other share.
- I. To compromise claims by or against the Trust, without order of Court or consent of any beneficiary.
- J. To employ and pay the compensation of legal counsel, investment advisers, accountants, custodians and other agents.
- K. To purchase assets from the estate of the Grantor (or the Grantor's spouse's estate) at their fair market value (as of the date of such purchase) and loan money to said estate.
- L. To execute and deliver all instruments of writing for the exercise of any of the Trustee's powers.

# Specimen Agreement 1 continued

M. *(Select one of the following powers for merger of trusts. Determination of which power to select depends on the degree of discretion the Trustee will have.)*

Merger of Trusts (broad). The Trustee may merge the assets of any trust with those of any other trust, by whomever created, having the same beneficiaries and substantially the same terms, and if there is disparity in the maximum duration of the trusts so merged, the shortest maximum duration shall control.

Merger of Trusts (limited). In the exercise of sole and absolute discretion, to merge all or any part of the assets of any trust created hereunder with the assets of any other trust created by the Grantor, the Grantor's spouse or any other person (whether during life or by Will) and held by the same Trustee for the benefit of the same beneficiaries and upon substantially the same terms and conditions as those set forth herein, and at the Trustee's discretion, either (i) administer the merged assets as a single trust hereunder, or (ii) transfer the trust assets to that other trust, to be administered under the instrument governing that other trust, and thereafter terminate the trust hereunder as a separate entity; if the Trustee elects to administer the merged assets as a single trust under this Agreement, then the Trustee, in the exercise of sole and absolute discretion, may later divide that trust as provided above in his Article; without in any way limiting the discretion of the Trustee granted by this subparagraph, it is envisioned that the Trustee will not elect to combine two or more trusts with different inclusion ratios for generation-skipping transfer tax purposes.

N. To enter into any legal agreement necessary to effectuate the purposes of this Trust including, but not limited to, entering into split-dollar agreements with any corporation or business enterprise.

# Specimen Agreement 1 continued

## **Article 12. Compensation of Trustee**

The Trustee may be compensated for its services from income or principal, or both, in accordance with its regularly established fee schedule as in existence from time to time.

## **Article 13. Merger of Trustee**

If a corporate Trustee merges with or is succeeded by another corporation, the new corporation, if it has Trust powers, shall become the Trustee without any action by any person or court.

## **Article 14. Resignation of Trustee and successor Trustees**

[Insert Successor Trustee appointments]

Any Trustee may resign by giving written notice, specifying the effective date of the resignation, to the Grantor or after the Grantor's death to the beneficiaries to whom the Trustee is to or may distribute the income at the time of giving notice. If any Trustee at any time resigns or is unable or refuses to act, the Grantor, if then living, or the Trust beneficiaries if he or she is not, shall appoint a successor Trustee by an instrument in writing, signed and acknowledged by the Trustee, appointing such successor Trustee. Any successor Trustee may be, but is not required to be, a corporate Trustee. The Grantor may not name his or her spouse as successor Trustees.

No successor Trustee shall be personally liable for any act or omission of any predecessor Trustee. Any successor Trustee may accept with examination or review the accounts rendered and the property delivered by or for a predecessor Trustee without incurring any liability or responsibility. Any successor Trustee shall have all the title, powers and discretion of the Trustee succeeded, without the necessity of any conveyance or transfer.

Notwithstanding any other provision herein, the Grantor may remove a Trustee and appoint an individual or corporate Trustee so long as the new Trustee is not related or subordinate to the Grantor within the meaning of Section 672(c) of the Internal Revenue Code.

## **Article 15. Accounting by Trustee**

The Trustee shall not be required to file accountings or reports with any court. The Trustee shall, at least once each year, make an accounting to all adult beneficiaries of the Trust or Trusts created by this Agreement and the approval of such adult beneficiaries shall release and relieve the Trustee from any liability for its actions occurring during the period covered by the accounting. The Trustee or any beneficiary may invoke the jurisdiction of the court at any time.

## **Article 16. Bond**

Neither the Trustee, nor any successor Trustee, shall be required to furnish any bond for the faithful performance of its duties hereunder.

# Specimen Agreement 1 continued

## Article 17. Irrevocability

This Agreement and the Trusts herein created are irrevocable. The Grantor shall have no power to alter, amend or modify this Agreement in any way.

## Article 18. Jurisdiction

This Agreement has been executed in the State of \_\_\_\_\_  
(Name of State) and all questions of law arising under this Agreement shall be determined under and according to the laws of the State of \_\_\_\_\_ (Name of State).

IN WITNESS WHEREOF, the parties hereto have set their hand and seals the day and year above written.

*(Formalities of execution will be governed by local law and should be in accordance therewith.)*

\_\_\_\_\_  
*(Signature of Grantor)*  
*(Grantor)*

\_\_\_\_\_  
*(Authorized Representative of the Trust Company)*  
*(Trustee)*

## Schedule A

List of Policies Transferred to Trust:

(Insurance Company)  
\_\_\_\_\_

Policy No. \_\_\_\_\_ Face Amount \$ \_\_\_\_\_

(Insurance Company)  
\_\_\_\_\_

Policy No. \_\_\_\_\_ Face Amount \$ \_\_\_\_\_

\_\_\_\_\_  
Grantor

\_\_\_\_\_  
Trustee

# Specimen Agreement 2

## Spousal grantors - second-to-die life insurance policy

This specimen ILIT agreement is an example of how counsel might draft such a trust if both spouses are Grantors. The significant difference between the first and second specimen agreements is that the second specimen agreement does not give the surviving spouse an income interest in the trust. By not giving the surviving spouse an income interest, the trust likely would not be brought into the surviving spouse's estate through Code Section 2036.

When deciding whom you will choose as trustee, consider the benefits of using the professional services of a corporate trustee.

**This specimen agreement should be used only as a guide. It outlines some basic provisions typically included in such trusts. This specimen agreement is not intended as a final draft. Counsel must draft a document that meets the client's needs and circumstances.**

Counsel alone is responsible for the actual wording of the final trust agreement.

**Neither Securian Financial nor its agents are engaged in the practice of law; these specimen agreements are intended only for illustrative purposes and counsel must draft an ILIT appropriate for his or her client.**

This Trust Agreement is made on \_\_\_\_\_, 20\_\_\_\_, between [NAME OF SPOUSE 1] and [NAME OF SPOUSE 2], husband and wife, and hereafter called the "Grantors", and [NAME OF TRUSTEE] (Trust Company/and/or Individual), hereafter called the "Trustee."

### Recitals

I have transferred certain property to the Trustee contemporaneously with signing this Agreement, the receipt of which property the Trustee acknowledges; and

The party agrees that all property transferred to the Trustee is to be administered and distributed as provided in this agreement. References in the singular to a trustee include all trustees empowered to act.

# Specimen Agreement 2 continued

## **Option 1 – The trustee purchases new insurance**

### **Article 1. Trust Estate**

The Grantors desiring to establish an irrevocable Trust, have transferred cash gifts to the Trustee as itemized on Schedule A attached hereto and made a part of this agreement. The Grantors irrevocably relinquish all rights to those amounts transferred to the Trustee. The Trustee hereby acknowledges receipt of these amounts listed on Schedule A and accepts all transfers, assignments and designations in Trust for the uses and purposes and under the terms and conditions set forth in this Agreement. The entire Trust Estate shall be managed and administered by the Trustee and the principal thereof and the income therefrom shall be held and distributed in accordance with the following provisions and for the following purposes.

### **Article 2. Rights to Trust Corpus**

The Trustee is hereby vested with all right, title and interest in and to such property transferred to this Trust. The Trustee is authorized and empowered to purchase life insurance policies on the life of the Grantors, and is authorized and empowered to exercise and enjoy, for the purposes of the Trust herein created and as absolute owner of such insurance policies, all the options, benefits, rights and privileges under such insurance policies, including the right to borrow upon such insurance policies and to pledge them for a loan or loans. The insurance company that has issued such insurance policies is hereby authorized and directed to recognize the Trustee as absolute owner of such insurance policies and any receipts, releases and other instruments executed by the Trustee in connection with such insurance policies shall be binding and conclusive upon all persons interested in the Trust.

### **Article 3. Additions to the Trust**

The Grantors or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add any real or personal property to this Trust by transferring such property to the Trustee by deed, assignment, bequest or devise. The Grantors or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add insurance policies to this Trust by designating the Trustee as irrevocable beneficiary, by assigning ownership of the insurance policies to the Trustee, or by naming the Trustee owner of the policy. If so added, the proceeds of such insurance policies or the additional property shall be held and managed according to the provisions of this Agreement. The Trustee agrees, if it accepts such additions, to hold and manage such additions in Trust for the uses and in the manner set forth herein.

# Specimen Agreement 2 continued

## **Option 2 – The Grantors transfer existing life insurance to the Trust**

### **Article 1. Trust Estate**

The Grantors, desiring to establish an ILIT, have transferred and assigned to the Trustee all the Grantors' right, title and interest in the policies, which are itemized on Schedule A attached hereto and made a part of this Agreement. The Grantors have caused or will cause the Trustee to be designated the owner of all said policies. The Grantors also relinquish all rights, power and ownership interest in such insurance policies and will, at the request of the Trustee execute all other instruments reasonably required to effectuate these transfers.

In addition, the Grantors have or may transfer additional properties to the Trustee, and agree to do all things necessary to complete the transfer of such properties. The Trustee hereby acknowledges receipt of all the policies listed on Schedule A and accepts all transfers, assignments and designations in Trust for the uses and purposes and under the terms and conditions set forth in the Agreement. The entire Trust Estate shall be managed and administered by the Trustee and the principal thereof and the income therefrom shall be held and distributed in accordance with the following provisions and for the following purposes.

### **Article 2. Rights in insurance policies**

As to any insurance policies absolutely assigned to the Trustee, or as to which ownership has been changed to the Trustee, the Trustee is hereby vested with all right, title and interest in and to such insurance policies as to authorized and empowered to exercise and enjoy, for the purposes of the Trust herein created and as absolute owner of such insurance policies, all the options, benefits, rights and privileges under such insurance policies, including the right to borrow upon such insurance policies and to pledge them for a loan or loans. The insurance company which has issued such insurance policies is hereby authorized and directed to recognize the Trustee as absolute owner of such insurance policies and any receipts, releases and other instruments executed by the Trustee in connection with such insurance policies shall be binding and conclusive upon all persons interested in the Trust.

### **Article 3. Additions to the Trust**

The Grantors or any other person, persons, corporation or other legal entity, with the consent of the Trustee, may add other insurance policies, interests owned in insurance policies or any real or personal property to this Trust by designating the Trustee as irrevocable beneficiary, by assigning ownership of the insurance policies to the Trustee or by transferring such property to the Trustee by deed, assignment, bequest or devise. If so added, the proceeds of such additional insurance policies or the additional property shall be held and managed according to the provisions of this Agreement. The Trustee agrees, if it accepts such additions, to hold and manage such additions in Trust for the uses and the manner set forth herein.

# Specimen Agreement 2 continued

## Article 4. Beneficiaries' Rights of Withdrawal

- A. Each living child of the Grantors, or during any period that such child is under disability, the Guardian of such child or the Conservator of his or her estate, may at any time up to and including 30 days after receiving notice of any transfer of assets of the Trust Estate make one written demand upon the Trustee for an amount equal to a fraction, the numerator of which is one, and the denominator of which equals the number of the Grantors' then-living children, of the fair market value of the transferred property for federal gift tax purposes at the time of its transfer to the Trust Estate.
- B. The amount so demanded under Paragraph A during any calendar year shall not exceed the greater of \$5,000 or 5 percent of the Trust corpus. The right to make each such demand under this section shall be non-cumulative and shall lapse, if not exercised, at the end of the 30-day period described herein.

### Optional – Hanging power language

- A. At the expiration of the 30-day period from the date of notification, the beneficiary's demand right shall terminate to the extent it does not exceed the greater of \$5,000 or 5 percent of the then value of the Trust corpus or such greater amount which constitutes the lapse of a nontaxable power of appointment under IRC Sections 2041 and 2514 as in effect for that year. To the extent that such power exceeds those amounts and does not terminate, the beneficiary's demand right shall continue in existence and shall terminate in future years to the extent that, when coupled with all other gifts deemed to be made by a beneficiary to the Trust in any calendar year, the total gifts by a beneficiary to the Trust in any calendar do not exceed the greater of \$5,000 or 5 percent of the then value of
- B. the Trust corpus (or such greater amount as may be allowed by IRC Sections 2041 and 2514). The determination by the Trustee of the amount subject to any power in existence under this section shall be final and conclusive on the beneficiaries of this Trust. The Trustee shall not incur any liability to any such beneficiary as a result of the determination.
- C. Any amounts demanded under this section shall be payable, at the discretion of the person making such demand, with the assets transferred to the Trust Estate with respect to which the power to withdraw arose, in cash, and/or in liquid assets by the Trustee to the person making such demand. The Trustee shall maintain as part of the Trust Estate, or make provisions for, sufficient liquid assets to make the payment described in this section.



## Specimen Agreement 2 continued

- D. Each person having a right to make each such demand under this section shall be given written notice by the Trustee of a transfer of assets to the Trust Estate within 15 days after such transfer. The notice of a transfer of assets of the Trust Estate shall specify: (1) the value of the transferred assets for federal gift tax purposes, in the opinion of the transferor, (2) the person's right to make one written demand upon the Trustee for any amount equal to the amount specified in Paragraph A of this section, (3) that such right will lapse at the end of the 30-day period described herein, and (4) the person's right to demand that such amount be paid in the manner described in Paragraph C of this section. The Trustee shall mail notice of such transfer of assets to the Trust Estate by certified mail, return receipt requested, to the last known address of each person having the right to make such demand under this section.
- E. The Trustee may satisfy the exercise of any right of withdrawal by distributing to the beneficiary making the withdrawal cash or other assets. As of the date a request for withdrawal is made pursuant to the provisions of this section, the beneficiary's right to receive the amount requested shall be vested and shall not be terminated by the subsequent death or disability of the beneficiary or any administrative delay resulting from actions taken by the Trustee to effect distribution of principal pursuant to this section.
- F. For purposes of this section, the term "contribution" or "contribution of the Trust Estate" shall mean any cash or other assets, including life insurance policies (or any interests therein), which are transferred to the Trustee to be held as part of the Trust Estate and shall also include any premiums on insurance policies, rather than first being paid to the Trustee. In the case of any such premium which is paid directly to an insurance company, the date of the contribution shall be deemed to be the date on which such premium payment is transmitted to the insurance company issuing the policy. The amount of any contribution of the Trust Estate shall be the value of such contribution for federal gift tax purposes.
- G. If a beneficiary is a minor at the time a contribution is made to the Trust Estate, or fails in legal capacity for any reason, the beneficiary's guardian or conservator (other than the Grantor) or the beneficiary's parent (other than the Grantor) as natural guardian acting on behalf of the beneficiary, may exercise the right of withdrawal on behalf of the beneficiary. The property received pursuant to the demand shall be held by the guardian or conservator for the benefit and use of the beneficiary.

### **Article 5. Payment of premiums**

The premiums or other charges on unmatured insurance policies constituting part of the Trust Estate shall be paid as follows.

- A. Unless the Trustee receives written notice from either Grantor prior to the premium due date of any insurance policy that the premium for such insurance policy has been paid, the Trustee may pay the premiums as they become due. Any Trust income may first be applied to pay such premium and any balance not paid by Trust income shall be paid from Trust principal.

# Specimen Agreement 2 continued

- B. If any time the Trust Estate shall be insufficient to pay such premiums and other charges, the Trustee may, in its discretion, notify either the Grantors, or the beneficiaries hereunder, of the amount necessary to pay such premiums or other charges. The Trustee is under no obligation to pay insurance premiums. However, any funds furnished to the Trustee, as a result of such notice, may be applied to such premiums and other charges, and any excess amounts may be regarded as voluntary additions to the principal of the Trust Estate. Nothing herein shall be construed as a covenant by the Grantors to pay the premiums or other charges on any policy at any time constituting part of the Trust Estate.
- C. If at any time the Trust Estate and the funds furnished to the Trustee are insufficient to pay such premiums and other charges, the Trustee shall be under no obligation to make such payments and shall not be liable to any extent whatsoever for such non-payments. The Trustee is authorized, however, to borrow upon any insurance policy in the Trust Estate an amount sufficient to pay such premiums and other charges and is authorized to sell at public or private sale, without notice to the Grantors or any other person, such part of the property of the Trust Estate, other than insurance policies, as may be necessary to furnish the amount required to pay such premiums and other charges and to apply the same to such payment.

The Trustee is authorized also, but is not obligated, to borrow against the cash value of any insurance policies, to surrender value, or to convert any insurance policy into a paid-up status or elect extended term insurance whenever it is unable by reason of insufficient funds to pay the premium or other charges. The Trustee accepts this Trust without any responsibility for the validity or enforceability of any insurance policies now or hereafter in this Trust or for the legality or effectiveness of any assignment, designation or change of beneficiary of any policy in this Trust.

## **Article 6. Collection of proceeds**

As soon as practicable after the second death of the persons insured by any joint survivor insurance policy in the Trust Estate, or after the first death of the person insured by a single life insurance policy, the Trustee shall prepare, serve and file notices and proof of death and shall collect all moneys due under the insurance policies then within the operation of this Agreement and payable to the Trustee. All or part of any proceeds collected from a policy on the life of one of the Grantors may be deposited directly into the life insurance policy of the surviving Grantor.

The Trustee shall have full authority to take any action in regard to the collection that it deems best and to pay the expenses thereof out of the Trust Estate, but it shall not be required to enter into or maintain any litigation to enforce payment of such insurance policies until it shall have been indemnified to its satisfaction against all expenses and liabilities to which it might, in its judgment, be subjected by any such action on its part. The Trustee shall have full authority to make any compromise or settlement with respect to such insurance policies, or any of them, that they may deem expedient, and to give to the insurance companies all the necessary and proper releases, acquittances, and full discharges of all their liabilities under such policies.

# Specimen Agreement 2 continued

No insurance company whose insurance policies shall be deposited hereunder and who shall make payment of the proceeds thereof to the Trustee shall be required to inquire into or take notice of any of the provisions of this Agreement or to see to the application or disposition of the proceeds of such policies, and the receipt of the Trustee to any insurance company shall be effectual to release and discharge it for any payment so made and shall be binding upon every beneficiary of the Trust.

## **Article 7. Management of the Trust Estate**

The Trust Estate shall be managed and administered as follows:

During the lifetime of the Grantors:

- A. The Trustee shall apply all of the net income derived from the Trust Estate to pay premiums or other charges on insurance policies constituting part of the Trust Estate. Any net income not so applied shall be added to the Trust Estate. Under no circumstances is either Grantor entitled to any income interest during the duration of this Trust.
- B. Notwithstanding anything to the contrary herein contained, in the event that the Grantor's spouse survives the Grantor for six (6) months and in the further event that any part of the principal of this Trust is includable in the Grantor's gross estate for federal estate tax purposes, then the Trustee is directed to pay the entire principal of the Trust to the Trust created for the Grantor's spouse under the terms of decedent's last will and testament, provided that it qualifies for the estate tax marital deduction. If it does not so qualify, the Trustee is directed to pay the Trust principal to the surviving spouse directly. *(This optional paragraph is a savings clause designed to qualify the Trust principal for the marital deduction if the policies are taxed in decedent's estate. A qualified terminable interest property [QTIP] provision could be inserted instead if the Grantor desired to control the ultimate disposition of the proceeds after the spouse's death.)*

Upon the death of the surviving Grantor:

- C. The Trustee shall divide this Trust, as then constituted, into equal shares so as to provide one share for each living child of the Grantors and one share for the then living children, collectively, of each deceased child of the Grantors. The income and principal of each share shall be distributed as follows.
  - 1. With respect to the share provided for a child of the Grantors then living:
    - a. The Trustee shall pay to or apply for his or her benefit, from time to time, such sums from the income and principal of that child's share as the Trustee in the exercise of its sole discretion deems necessary or advisable, to provide for his or her proper health, education, support and maintenance.

## Specimen Agreement 2 continued

- b. As each child of the Grantors attains the age of years, or upon division of this Trust into shares if a child has then reached such age, the Trustee shall distribute to him or her outright absolutely one-half (1/2) in value of the principal and accumulated income of his or her share then being held in Trust; and when a child of the Grantors or either Grantor reaches the age of years, or upon division of the Trust into shares if a child has then reached such age, the Trustee shall distribute to him or her outright absolutely the balance of principal and accumulated income then being held in his or her share and the Trust as to that share then be terminated.
    - c. If a child of the Grantors should die before receiving full distribution of his or her share, the remainder of that child's share shall be distributed per stirpes to his or her then living children, if any, or if none, then per stirpes to the Grantors' then-living children and, collectively to any children of any deceased child of the Grantors subject, however, to the provisions of Paragraph C (3) of this Article 7 relating to distribution of shares to persons then under age and except that each portion otherwise distributable to a child or grandchild of the Grantors or either Grantor for whom a share of this Trust is then being held hereunder shall be added to that share.
2. With respect to each share, if there be any for the then-living children, collectively, of a deceased child of the Grantor, that share shall be paid over and distributed outright absolutely in equal shares to such children of the deceased child; subject, however, to the provisions of Paragraph C (3) of this Article 7 relating to the distribution of shares of persons then under age \_\_\_\_ and except that each portion otherwise distributable to a child or grandchild of the Grantor for whom a share of this Trust is then being held hereunder shall be added to that share.
3. If at any time a share becomes distributable to a beneficiary who has not attained the age of \_\_\_\_ years, then and in each case, the Trustee shall retain possession of such share for the period during which that beneficiary is under the age of \_\_\_\_ years, and in the meantime the Trustee shall use and expend so much of the income and principal of such share as the Trustee in its sole discretion deems necessary or advisable for the health, support, maintenance and education of that beneficiary, and any income not so expended shall be added to principal. When the beneficiary attains the age of \_\_\_\_ years, any balance held for his or her benefit shall be paid over and distributed outright to him or her. If a beneficiary for whom a share is held shall die before attaining the age of \_\_\_\_ years, then any remaining portion of his or her share shall be paid to his or her estate; provided, however, that any portion otherwise distributable to an heir pursuant to this instrument, shall be paid over to the Trustee of such share and become a part thereof.

# Specimen Agreement 2 continued

4. In case the income or any discretionary payments of principal from this Trust or any share thereof become payable to a minor, or to a person under legal disability, or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability is, in the opinion of the Trustee, unable properly to administer such amounts, then such amounts shall be paid out by the Trustee in such of the following ways as it deems best: (a) directly to such beneficiary; (b) to the legally appointed guardian or conservator of such beneficiary; (c) to some relative or friend for the care, support and education of such beneficiary; (d) by the Trustee, using such amounts directly for such beneficiary's health, support, maintenance and education.
5. No part of the Trust Estate of the Trusts created in this Agreement or in any property at any time becoming a part of any such Trust, or in the income therefrom, shall vest in any beneficiary, and neither the principal nor the income of any such Trust Estate shall be liable to be reached in any manner by the creditors of any beneficiary, and no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in such Trust Estate, or the income produced thereby, prior to the actual distribution by the Trustee to the beneficiary; provided, however, that this provision shall not be construed to prevent any beneficiary from exercising withdrawal rights in accordance with Section 4 of this Agreement.
6. If at any time before final distribution there shall not be in existence anyone who is, or might become, entitled to receive benefits under the foregoing provisions of this Agreement, any portion remaining shall be distributed one half (1/2) each to those persons who would then be the heirs of the Grantor spouses, their identities and respective shares to be determined as though both Grantors had then died intestate in the state of \_\_\_\_\_ (Name of State).
7. If the Trustee determines that a Trust has become reduced in size to the point that the continued administration of it has become unduly expensive and not in the best interests of the beneficiaries, the Trustee shall distribute the balance of the principal and accumulated income per stirpes to the beneficiaries who are then entitled to receive the income or to have the income accumulated for their benefit.

## Article 8. Duration of Trust

Each Trust or share of a Trust created under this Agreement shall in any event terminate 21 years after the death of the last surviving member of the group consisting of the Grantors, their children and their grandchildren, who shall be living at the date of execution of this Agreement and thereupon the property held in that Trust shall be distributed outright to the persons then entitled to the income or to have it accumulated for their benefit and in the proportions in which they are entitled to the income.

*(The following are optional clauses, creating trust protectors. Select one of the following, depending on the degree of discretion allowed the trust protector.)*

# Specimen Agreement 2 continued

## Article 9. Trust Protector

### Option 1 - Broad powers

- A. I appoint \_\_\_\_\_ as Trust Protector of each trust created hereunder. If a Trust Protector fails or ceases to act as Trust Protector, that individual who would have acted as Trust Protector may (but is not required to) appoint any one or more successor Trust Protectors as provided in the following paragraph. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust.
- B. The Trust Protector may, from time to time, appoint any one or more individuals (other than the Grantor, the Grantor's spouse, a descendant of the Grantor, or the spouse of a descendant of the Grantor) as successor Trust Protector. Any appointment of a successor Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protector may revoke any such appointment before it is accepted by the appointee and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust Protector. In the event that two or more instruments of appointment or revocation by the same Trust Protector exist and are inconsistent, the latest by date shall control.
- C. Any Trust Protector may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee. All trusts created under this instrument need not have or continue to have the same Trust Protector. The provisions of this instrument that relate to the Trust Protector shall be separately applicable to each trust held hereunder.
- D. The Trust Protector, with respect to any trust as to which the Trust Protector is acting, may modify or amend:
1. The trust administrative provisions of Article \_ (input Article Number when using individual Trustees and successor Trustees) relating to the identity and qualifications of a Trustee, and Article 14 of this instrument relating to the succession, removal and appointment of the Trustee (but not to allow the Grantor's spouse or the Grantor to act as a Trustee);
  2. The financial powers of the Trustee enumerated in the provisions of Articles 8 and 11 of this Agreement;
  3. The provisions of Article 8 of this Agreement relating to the identity of the contingent beneficiary of trust property;
  4. The withdrawal rights granted under Article 5 of this Agreement (except a withdrawal right already in existence at the time the Trust Protector seeks to exercise the power conferred under this subparagraph); and

## Specimen Agreement 2 continued

5. The terms of any trust created under Article 8 of this Agreement with respect to:

- (i) the purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors the Trustee may take into account in making such distributions,
- (ii) the termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period), and
- (iii) the identity of the permissible appointees under the testamentary power of appointment granted to the beneficiary for whom the trust is named.

E. The rights and powers conferred on the Trust Protector under this Agreement, including, without limitation, the power to remove Trustees and all rights and powers granted the Trust Protector under Paragraph D of this Article, shall be exercisable only in a fiduciary capacity.

F. Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument that would cause any portion of the trust to be included in the Grantor's estate or the Grantor's spouse's estate for federal tax purposes or the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code.

G. The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Article should be exercised, and the Trust Protector is not required to exercise any power or discretion granted under this Article. While it is my wish that the Trust Protector shall consult with the Grantor's estate planning financial professionals known to the Trust Protector in determining whether and to what extent to exercise his or her powers under this Article, any exercise or nonexercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector and shall be binding and conclusive on all persons. Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this Article.

H. The Trust Protector acting from time-to-time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred under this Article by a written instrument delivered to the Trustee.

# Specimen Agreement 2 continued

## Option 2 – Limited scope

- A. The Grantor appoints \_\_\_\_\_ as Trust Protector of each trust created hereunder. In the event \_\_\_\_\_ is unable or unwilling to act as Trust Protector, the Grantor appoints \_\_\_\_\_ as successor Trust Protector.
- B. Any Trust Protector appointed under Paragraph A of this section may resign from one or more trusts held hereunder by giving prior written notice of such resignation to the Trustee. If a vacancy occurs in the office of Trust Protector, the incumbent Trustee may, but need not, appoint by written instrument any one or more individuals (other than the Grantor, the Grantor's spouse, a descendant of the Grantor or the spouse of a descendant of the Grantor) as successor Trust Protector. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust.
- C. The Trust Protector, with respect to any trust as to which the Trust Protector is acting, may modify or amend the terms of that trust in any respect believed by the Trust Protector to be necessary or desirable:
1. In order to achieve tax advantages or as a result of changes in the Code and the rulings and regulations thereunder that may adversely affect the tax benefits otherwise intended by the Grantor;
  2. To modify the financial powers of the Trustee; or
  3. To modify the provisions that relate to the identity, qualifications, succession, removal and appointment of the Trustee (but not to allow the Grantor or the Grantor's spouse to act as Trustee).



## Specimen Agreement 2 continued

- D. The rights and powers conferred on the Trust Protector under this instrument, including, without limitation, the power to remove Trustees and all rights and powers granted the Trust Protector under Paragraph C of this Article, shall be exercisable only in a fiduciary capacity.
- E. Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument that would cause any portion of the trust to be included in the Grantors' estate or the Grantor's spouse's estate for federal tax purposes or the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code.
- F. The Trust Protector, in that capacity, shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Article should be exercised, and the Trust Protector is not required to exercise any power or discretion granted under this Article. While it is the Grantor's wish that the Trust Protector shall consult with the Grantors' estate planning advisers known to the Trust Protector in determining whether and to what extent to exercise his or her powers under this Article, any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. Further, the Trust Protector, in that capacity, shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Absent bad faith, the Trust Protector, in that capacity, is hereby exonerated from any and all liability for the acts or omissions of any fiduciary or any beneficiary hereunder or arising from any exercise or nonexercise of the powers and discretions conferred under this Article.
- G. The Trust Protector acting from time-to-time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred under this Article by a written instrument delivered to the Trustee.

### **Article 10. Powers of Trustee**

The Trustee is hereby authorized to and shall perform all acts necessary in fulfilling the purpose and intent of this Agreement. In addition, the Trustee shall have, without the necessity of notice to or approval of any court or person, the following powers:

- A. To retain, without liability, any investment that may become part of the principal created hereunder and to make such investments (including bona fide loans to the Grantors' estate or the surviving Grantor spouse's estate upon such terms and security as the Trustee may determine) and reinvestments and in such proportions, as the Trustee shall, in its discretion, consider beneficial to the Trusts created hereunder.
- B. Consent to or participate in any plan for the liquidation, consolidation, merger or reorganization of any corporation of any security that is held in this Trust.
- C. To manage, operate, repair, alter or improve real estate or other property, and to lease real estate and other property upon such terms and for such periods as the Trustee deems advisable.

## Specimen Agreement 2 continued

- D. To sell, exchange or otherwise dispose of realty and personal, public or privately, wholly or partly on credit or for any consideration, including stocks, bonds or other corporate obligations and grant options for the purchase, exchange or other disposition of any such property.
- E. To borrow money for any purpose, from any source, and secure the repayment of any amount so borrowed by mortgage or pledge of any property.
- F. To register securities and other property held by the Trustee in the name of a nominee or in bearer form.
- G. To vote by proxy, discretionary or otherwise, or to give its consent for any purpose in respect to any stocks or other securities, or to exercise or sell any rights of subscription or other rights.
- H. To cause any distribution share to be composed of cash, property and undivided fractional shares in property different in kind from any other share.
- I. To compromise claims by or against the Trust, without order of Court or consent of any beneficiary.
- J. To employ and pay the compensation of legal counsel, investment advisers, accountants, custodians or other agents.
- K. To purchase assets from the estate of the Grantors at their fair market value (as of the date of such purchase) and loan money to said estate.
- L. To execute and deliver all instruments of writing for the exercise of any of the Trustee's Powers.
- M. *(Select one of the following powers for merger of trusts. Determination of which power to select depends on the degree of discretion the Trustee will have.)*

Merger of Trusts (broad). The Trustee may merge the assets of any trust with those of any other trust, by whomever created, having the same beneficiaries and substantially the same terms, and if there is disparity in the maximum duration of the trusts so merged, the shortest maximum duration shall control.

Merger of Trusts (limited). In the exercise of sole and absolute discretion, to merge all or any part of the assets of any trust created hereunder with the assets of any other trust created by the Grantor, the Grantor's spouse or any other person (whether during life or by Will) and held by the same Trustee for the benefit of the same beneficiaries and upon substantially the same terms and conditions as those set forth herein, and at the Trustee's discretion, either (i) administer the merged assets as a single trust hereunder, or (ii) transfer the trust assets to that other trust, to be administered under the instrument governing that other trust, and thereafter terminate the trust hereunder as a separate entity; if the Trustee elects to administer the merged assets as a single trust under this Agreement, then the Trustee, in the exercise of sole and absolute discretion, may later divide that trust as provided above in this Article; without in any way limiting the discretion of the Trustee granted by this subparagraph, it is envisioned that the Trustee will not elect to combine two or more trusts with different inclusion ratios for generation-skipping transfer tax purposes.

- N. To enter into any legal agreement necessary to effectuate the purposes of this Trust including, but not limited to, entering into split-dollar agreements with any corporation or business enterprise.

# Specimen Agreement 2 continued

- O. No power given to the Trustee hereunder shall be construed to enable either of the Grantors or any other person to purchase, exchange, or otherwise deal with, or dispose of, the principal or income therefrom for less than adequate consideration in money or money's worth, or borrow income or principal, directly or indirectly, without adequate interest or adequate security.

## **Article 11. Compensation of Trustee**

The Trustee may be compensated for its services from income or principal, or both, in accordance with its regularly established fee schedule as in existence from time to time.

## **Article 12. Merger of Trustee**

If the corporate Trustee merges with or is succeeded by another corporation, the new corporation, if it has Trust powers, shall become the Trustee without any action by any person or court.

## **Article 13. Resignation of Trustee and Successor Trustees**

[Insert Successor Trustee appointments]

Any Trustee may resign by giving written notice, specifying the effective date of the resignation, to the Grantors or either Grantor or after either or both Grantors' death, to the beneficiaries to whom the Trustee is to or may distribute the income at the time of giving notice.

If any Trustee at any time resigns or is unable or refuses to act, either or both of the Grantors, if then living, or the Trust beneficiaries if both Grantors are deceased, shall appoint a successor Trustee by an instrument in writing, signed and acknowledged by the Trustee, appointing such successor Trustee. Any successor Trustee may be, but is not required to be, a corporate Trustee. The Grantors may not name himself or herself as successor Trustees.

No successor Trustee shall be personally liable for any act or omission of any predecessor Trustee. Any successor Trustee may accept without examination or review the accounts rendered and the property delivered by or for a predecessor Trustee without incurring any liability or responsibility. Any successor Trustee shall have all the title, powers and discretion of the Trustee succeeded, without the necessity of any conveyance or transfer.

Notwithstanding any other provision herein, the Grantor may remove a Trustee and appoint an individual or corporate Trustee so long as the new Trustee is not related or subordinate to either of the Grantors within the meaning of Section 672(c) of the Internal Revenue Code.

## **Article 14. Accounting by Trustee**

The Trustee shall not be required to file accountings or reports with any court. The Trustee shall, at least once each year, make an accounting to all adult beneficiaries of the Trust or Trusts created by this Agreement and the approval of such adult beneficiaries shall release and relieve the Trustee from any liability for its actions occurring during the period covered by the accounting. The Trustee or any beneficiary may invoke the jurisdiction of the court at any time.

# Specimen Agreement 2 continued

## Article 15. Bond

Neither the Trustee, nor any successor Trustee, shall be required to furnish any bond for the faithful performance of its duties hereunder.

## Article 16. Irrevocability

This Agreement and the Trusts herein created are irrevocable. The Grantors shall have no power to alter, amend or modify this Agreement in any way.

## Article 17. Jurisdiction

This Agreement has been executed in the State of \_\_\_\_\_  
(Name of State) and all questions of law arising under this Agreement shall be determined under and according to the laws of the State of \_\_\_\_\_ (Name of State).

IN WITNESS WHEREOF, the parties hereto have set their hand and seals the day and year above written.

*(Formalities of execution will be governed by local law and should be in accordance therewith.)*

\_\_\_\_\_  
*(Signature of Grantor)*  
*(Grantor)*

\_\_\_\_\_  
*(Authorized Representative of the Trust Company)*  
*(Trustee)*

## Schedule A

List of Policies Transferred to Trust:

(Insurance Company)  
\_\_\_\_\_

Policy No. \_\_\_\_\_ Face Amount \$ \_\_\_\_\_

(Insurance Company)  
\_\_\_\_\_

Policy No. \_\_\_\_\_ Face Amount \$ \_\_\_\_\_

\_\_\_\_\_  
Grantor

\_\_\_\_\_  
Trustee

# Specimen Agreement 3

## Spousal Limited Access Trust – single life insurance policy

This Specimen ILIT agreement is an example of how counsel might draft a Spousal Limited Access Trust. This trust permits but does not require the trustee to hold one or more life insurance policies. As drafted, this trust will typically own one or more policies on the life of the Grantor, and the beneficiaries are the non-insured spouse and the Grantor’s descendants. **This trust is not intended to hold and should not be used to hold a second-to-die policy.**

When deciding whom you will choose as trustee, consider the benefits of using the professional services of a corporate trustee.

**This specimen agreement should be used only as a guide. It outlines some basic provisions typically included in such trusts. This specimen agreement is not intended as a final draft. Counsel must draft a document that meets the client’s needs and circumstances.**

Counsel alone is responsible for the actual wording of the final trust agreement.

**Neither Securian Financial nor its agents are engaged in the practice of law; these specimen agreements are intended only for illustrative purposes and counsel.**

This Trust Agreement is made on \_\_\_\_\_, 20 \_\_\_\_, between [NAME OF GRANTOR] (“Grantor”) and [NAME OF TRUSTEE] (“Trustee”).

### Recitals

I have transferred certain property to the Trustee contemporaneously with signing this Agreement, the receipt of which property the Trustee acknowledge; and

The party agrees that all property transferred to the Trustee is to be administered and distributed as provided in this agreement. References in the singular to a trustee include all trustees empowered to act.

### Article 1. Irrevocability

This Agreement is not subject to revocation or amendment. However, I or any other person, other than my spouse, shall have the right to make contributions from time to time to the Trust. In no event shall I or my estate have any reversionary or similar type interest in this Trust or in the property contained in the Trust.

### Article 2. Trust administration during my lifetime

A. Trustee shall pay to such one or more or all or none of my spouse, and my descendants living on each quarterly or more frequent distribution date so much of the net income in such proportions, equal or unequal, as Trustee, in Trustee’s absolute discretion, deems advisable after considering funds available from other sources. The distribution on any distribution date shall not establish a pattern for any other distribution date. All net income not so paid shall be accumulated and added to principal. Notwithstanding anything herein to the contrary, no distribution made hereunder shall be made that would have the effect of discharging any legal obligation of mine.

# Specimen Agreement 3 continued

B. Trustee shall pay to or apply for the benefit of my said spouse or any descendant of mine so much of the principal as Trustee deems advisable for maintenance, education or health after considering funds available to him or her from other sources. Payments so made shall be charged against the trust generally.

Notwithstanding anything herein to the contrary, no distribution made hereunder shall be made that would have the effect of discharging any legal obligation of mine.

C. The principal of the Trust shall be disposed of as follows:

1. In any calendar year during which one or more contributions are made to the Trust, the following provisions shall apply:

a. The contributor may direct in writing and at or before the time the contribution is made that all or any part of the contribution either shall not be subject to any rights of withdrawal or shall be allocated for withdrawal right purposes to or among any one or more of my spouse and my descendants who are then living and are identified in such writing, and in such amounts or proportions, as the contributor shall specify. Any such direction by a contributor shall be irrevocable once the contribution is made.

b. If no such direction is made by the contributor, then the contribution shall be allocated as follows:

1) The contribution shall be allocated to my spouse if my spouse is then living, but only to the extent that the allocation would not cause the aggregate contributions allocated to my spouse from contributions made during any one calendar year to exceed \$5,000.

2) Any contribution (or portion thereof) not allocated to my spouse (or all contributions, if my spouse is not then living) shall be allocated equally among my children who are then living, but only to the extent that the allocation would not cause the aggregate contributions allocated to any child of mine from contributions made during any one calendar year by any one contributor and the spouse of that contributor to exceed that child's annual exclusion limit for that year.

3) Any contribution (or portion thereof) not allocated to either my spouse or any child of mine (or all contributions, if neither my spouse nor any child of mine is then living) shall be allocated equally among my descendants, other than my children, who are then living, but only to the extent that the allocation would not cause the aggregate contributions allocated to any such descendant from contributions made during any one calendar year by any one contributor and the spouse of that contributor to exceed such descendant's annual exclusion limit for that year.

c. Each Beneficiary may withdraw an amount from the principal of the Trust equal to the amount of any contribution (or portion thereof) allocated to that Beneficiary. The following provisions shall govern such rights of withdrawal:

# Specimen Agreement 3 continued

- 1) Each right of withdrawal with respect to a particular contribution shall arise on the date that contribution is made to the Trust.
  - 2) Any right of withdrawal may be exercised before or after it arises by delivery to the Trustee of a written statement requesting that the Trustee distribute all or a specified portion of the assets to which the Beneficiary who exercises the right is or may become entitled for the calendar year in which the written request is made. A right of withdrawal is not deemed to have been exercised until the written request is actually received by a Trustee.
  - 3) A Beneficiary who is an adult [a natural guardian acting on behalf of a beneficiary who is a minor (other than any contributor acting in such capacity)] or a legally appointed guardian or conservator acting on behalf of a beneficiary (other than any contributor acting in such capacity) may exercise the Beneficiary's rights of withdrawal.
  - 4) Exercised rights of withdrawal may be satisfied with cash or any other assets, including any contribution. Trust Assets used to satisfy a right of withdrawal shall be valued as of the date or dates on which they are distributed. If there are insufficient assets of the Trust to permit all Beneficiaries who exercise their rights of withdrawal to satisfy such rights in full, the Trust Assets shall be distributed pro rata among the Beneficiaries who exercise such rights.
  - 5) The amount of any contribution for withdrawal right purposes shall be the value of such contribution for federal gift tax purposes.
- d. Any rights of withdrawal of my spouse shall lapse on the earlier of December 31 of the year in which the contribution is made to the Trust or 60 days after the date on which the contribution is made to the Trust. On December 31 of each year, the then aggregate rights of withdrawal of each Beneficiary other than my spouse shall be reduced (but not below zero) by that Beneficiary's general power amount for that year. Unless so reduced, all rights of withdrawal held by a beneficiary other than my spouse shall be cumulative and continue from year to year. Despite the above provisions, when a beneficiary dies, all unexercised rights of withdrawal held by such Beneficiary shall lapse immediately.
- e. For purposes of this Agreement:
- 1) "Contribution" means any direct or indirect transfer constituting a gift to the Trust for federal gift tax purposes (without regard to section 2503(b) of the Internal Revenue Code) and includes the payment by any person or entity directly to the insurer of any premium on a life insurance policy owned by the Trust or of interest accrued on any loan outstanding against such a policy.
  - 2) A Beneficiary's "annual exclusion limit" for a particular calendar year means the annual exclusion amount, if the contributor whose contribution is being allocated is unmarried on the date the contributor first made a contribution to the Trust during that calendar year, or twice the annual exclusion amount, if the contributor whose contribution is being allocated is married on the date the contributor first made a contribution to the Trust during that calendar year.

# Specimen Agreement 3 continued

3) "Annual exclusion amount" means the maximum amount of gifts to any one donee during one calendar year that can be excluded, under section 2503(b) of the Internal Revenue Code, from the total amount of gifts that a donor is considered to have made in that calendar year for federal gift tax purposes.

4) A beneficiary's "general power amount" for a particular calendar year means the maximum amount with respect to which a lapse of any right of withdrawal for that calendar year would not be considered a release by that person of a general power of appointment for federal gift or estate tax purposes under sections 2041 and 2514 of the Internal Revenue Code after taking account of the lapse of all other general powers of appointment (including rights of withdrawal) possessed by that person for that calendar year.

If general powers of appointment (including rights of withdrawal), the lapses of which are to any extent measured by a person's general power amount, are conferred on the same person under this Agreement and one or more other Trust Agreements and such powers would otherwise appear to lapse in whole or in part at the same time, then, for purposes of taking such other lapses into account under this Agreement, the lapses under all such Trust Agreements shall be deemed to occur in the same order as the dates of execution of the Trust Agreements under which such powers were conferred, beginning with the earliest. The maximum general power amount is now the larger of \$5,000 or 5 percent of the aggregate value of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could be satisfied. If this statutory formula or amount is changed, the new statutory formula or amount shall be applicable to this definition.

2. The Independent Trustee may pay to any one or more of my spouse and my [children] [descendants] as much of the principal of the Trust as the Independent Trustee, in the Independent Trustee's sole discretion, deems advisable for any purpose for each of them.
  - a. If no Independent Trustee is then serving, the Trustee shall pay to any one or more of my spouse and my [children] [descendants] as much of the principal as the Trustee from time to time determine necessary for the health, education, support or maintenance of each of them. The Trustee may make such payments in equal or unequal shares, taking into account the present and prospective needs of those persons, and giving priority to the needs of my spouse [and children under the age of 21].
  - b. Any discretionary payments to any [child] [descendant] of mine shall be made from the Trust as a whole, and shall not affect the proportionate share of income or principal to which the recipient (or those succeeding to the recipient's share) is or may become entitled. The Trustee shall not distribute any principal capable of being withdrawn pursuant to any right of withdrawal to any beneficiary other than the Beneficiary possessing the right of withdrawal.



# Specimen Agreement 3 continued

*Optional provision to ensure grantor trust treatment if assets other than insurance may be held in the trust.*

- c. [The Independent Trustee] [ ] shall have the power to add as current Beneficiaries of the Trust one or more charitable organizations transfers to which are deductible under each of sections 2055, 2522, 642(c) and 170(c) of the Internal Revenue Code. The Trustee shall distribute to or among such added Beneficiaries such sums of net income or principal, and in such amounts and proportions, as the Independent Trustee shall determine; provided that the interests of any such added beneficiaries shall terminate at my death.]

## **Article 3. Allocation of remaining Trust Assets**

At my death, the Trust Assets, including all property that becomes distributable to the Trustee at my death, not effectively distributed under the preceding provisions of this Agreement shall be allocated and distributed as follows:

### **Option 1 – Allocation method**

If my spouse survives me, the remaining Trust Assets (the “residue of the Trust”) shall be allocated between the Marital Share and the Family Share as follows:

1. If my spouse survives me, I give all assets of the Trust Estate that are includible in my gross estate for federal estate tax purposes at my death to the Marital Share.
2. I give the balance, if any, of the residue of the Trust to the Family Share.
3. The Marital Share shall be entitled to a pro rata share of the income earned on the residue of the Trust from the date of my death, including a share of income earned on assets used to discharge liabilities.

# Specimen Agreement 3 continued

## Option 2 – Fractional method

If my spouse survives me, the remaining Trust Assets (the “residue of the Trust”) shall be allocated between the Marital Share and the Family Share as follows:

1. The Trustee shall allocate to the Marital Share a fractional share of the residue of the Trust calculated as follows: The numerator of the fraction shall be the value, as finally determined for federal estate tax purposes, of those Trust Assets includible in my gross estate for federal estate tax purposes. The denominator of the fraction shall be the value of the residue of the Trust, as finally determined for federal estate tax purposes. The Marital Share shall be entitled to a pro rata share of the income earned on the residue of the Trust from the date of my death, including a share of income earned on assets used to discharge liabilities. For all purposes of this Paragraph 3.1.1, if the federal estate tax is not applicable on the date of my death, then the references to the federal estate tax shall be deemed to be references to any applicable state estate tax, and, if no federal or state estate tax is then applicable, the residue of the Trust shall be allocated solely to the Family Share.
2. The Trustee shall allocate the balance, if any, of the residue of the Trust to the Family Share.
3. The Trustee shall have complete authority and discretion to satisfy the fractional gift of the Marital Share in cash or in kind, or partly in cash and partly in kind, or in undivided interests in property. To the extent that there are insufficient assets qualifying for the federal estate tax or state death tax marital deduction to fully fund the Marital Share, the amount of the funding to the Marital Share shall be reduced accordingly, and I acknowledge that the amount of funding may be affected by actions of the Trustee and the personal representative of my probate estate in making certain tax elections. The fraction, once calculated as set forth above, shall be fixed and shall not vary with changes in the value of the property subsequent to the valuation date used for federal estate tax purposes. Since the fractional gift is not intended to be a gift of a specified dollar amount or pecuniary in nature, the Trustee shall apply the fraction to the assets of the trust at their actual value on the effective date or dates of allocation so that the actual value of the fractional share of the Trust Assets resulting from the application of such fraction will reflect fluctuations in the value of the Trust Assets. Allocations of assets by the Trustee shall be limited as set forth below:
  - a. The Trustee shall not allocate any asset or the proceeds of any asset to the Marital Share that does not qualify for the federal estate tax marital deduction.
  - b. I request that the trustees always consider the tax consequences of allocating or distributing to the Marital Share any policy of insurance that insures the life of my spouse, property subject to the foreign death credit, property on which a tax credit is available or property that is income in respect of a decedent under the IRC.
4. The Marital Share shall be administered and distributed as provided in Section 4.
5. The Family Share shall be administered and distributed as provided in Section 5.

# Specimen Agreement 3 continued

If my spouse does not survive me, the remaining Trust Assets shall constitute the Family Share, which shall be administered and distributed as provided in Section Five.

## Article 4. Marital Share

### Option 1 – Outright gift

The Trustee shall distribute the Marital Share to my spouse.

### Option 2 – General power trust

The Marital Share shall be administered and distributed as follows:

1. The interests in the Marital Share that are not disclaimed shall constitute the Marital Trust to be administered and distributed as follows:
  - a. The Trustee shall, from the date of my death, distribute the income to my spouse.
  - b. The Trustee shall distribute to my spouse such portions of the principal as the Independent Trustee deems advisable [to provide for my spouse's health, education, support and maintenance if other funds known to the Trustee to be readily available to my spouse are insufficient to meet such needs].
  - c. My spouse may withdraw all or any portion of the Trust Assets at any time by written request filed with the Trustee.
  - d. Upon my spouse's death, the Trustee shall distribute the assets of the Marital Trust, including accrued and undistributed income, as my spouse may appoint in a will or revocable trust that refers specifically to this general power of appointment. My spouse may appoint to my spouse's estate or otherwise. This power of appointment shall be exercisable by my spouse alone and in all events.
  - e. Unless my spouse's Will or Revocable Trust otherwise directs, the Trustee shall pay from any unappointed assets, either directly or to the Personal Representative of my spouse's estate:
    - 1) The expenses of my spouse's last illness and funeral, valid debts and expenses of administering my spouse's estate including my spouse's non-probate assets.
    - 2) Any estate taxes that become due because of my spouse's death, including any interest and penalties, with no apportionment to or assessment of any person.
    - 3) "Estate taxes" means any estate, transfer or other death taxes that become due because of my spouse's death (including any interest and penalties imposed with respect thereto), but excluding generation-skipping taxes imposed under Chapter 13 of the IRC or any similar state statute (including any interest and penalties imposed with respect thereto).
  - f. Any remaining assets of the Marital Trust shall be added to the Family Share and distributed as if such assets had originally been a part of the Family Share.
2. The Disclaimer Trust shall be funded with any interests in the Marital Share that my spouse disclaims. The Disclaimer Trust shall be administered and distributed in the same manner as the Family Trust [except that my spouse shall not have any power of appointment or withdrawal over such Trust other than those powers permitted by IRC Section 2518 and the regulations under that section.]

# Specimen Agreement 3 continued

## **Option 3 – Qualified Terminable Interest Property (QTIP) marital share**

The Marital Share shall be administered and distributed as follows:

1. The interests in the Marital Share that are not disclaimed shall constitute the Marital Trust to be administered and distributed as follows:
  - a. The Trustee shall, from the date of my death, distribute the income to my spouse.
  - b. Principal distributions may be made by the Trustee only after the Trustee determines that other funds known to the Trustee to be readily available to my spouse are insufficient to provide for my spouse 's health, education, maintenance and support.
  - c. Upon my spouse's death:
    - 1) If my spouse's Will or Revocable Trust directs that no estate taxes occasioned by my spouse's death that are paid from this Trust shall be recovered by my spouse's estate from any person under section 2207A of the IRC or otherwise, and if, or to the extent that, my spouse does not otherwise direct in my spouse's Will or Revocable Trust, the Trustee shall pay from the remaining trust principal that portion of the estate taxes occasioned by my spouse's death equal to the excess of (a) the total of all such taxes so payable over (b) the total of all such taxes that would have been so payable if the assets of this trust had not been taxable in my spouse's estate. Such taxes shall not be apportioned to or recovered from any person. The Trustee shall pay expenses incurred in determining and paying such taxes.
    - 2) "Estate taxes" means any estate, transfer or other death taxes that become due because of my spouse's death (including any interest and penalties imposed with respect thereto), but excluding generation-skipping taxes imposed under Chapter 13 of the IRC or any similar state statute (including any interest and penalties imposed with respect thereto).
    - 3) Any remaining Trust Principal [shall be distributed in accordance with the exercise by my spouse of a special power of appointment which I hereby give to my spouse to appoint by my spouse's will to any one or more of my descendants who survive my spouse. Any unappointed principal] shall be added to the Family Share and thereafter distributed as if such assets had originally been a part of the Family Share.
2. The Disclaimer Trust shall be funded with any interests in the Marital Share that my spouse disclaims. The Disclaimer Trust shall be administered and distributed in the same manner as the Family Trust [except that my spouse shall not have any power of appointment or withdrawal over such Trust other than those powers permitted by IRC Section 2518 and the regulations under that Section.]

## **Article 5. Family Share**

The Family Share shall be administered and distributed as follows:

1. If my spouse survives me, the Family Share shall constitute the Family Trust to be administered and distributed as follows:
  - a. The Trustee shall distribute the income to my spouse [provided that to the extent the Independent Trustee determines that my spouse has adequate other income, such Trustee may distribute all or any part of the net income to one or more of my [children] [descendants] in any proportions deemed advisable by such Trustee and may accumulate all or any part of the income and shall add it to principal].

# Specimen Agreement 3 continued

- b. The Independent Trustee, if there is an Independent Trustee then serving, may pay to my spouse as much of the principal of the Trust as the Independent Trustee, in the Independent Trustee's sole discretion, deems advisable for any purpose. If no Independent Trustee is then serving, the Trustee shall pay to my spouse as much of the principal as the Trustee from time to time deem necessary for the health, education, support or maintenance of my spouse.
  - c. Upon my spouse's death, the Trustee shall distribute the assets of the Family Trust in accordance [with the exercise by my spouse of a special power of appointment, which I hereby give to my spouse to appoint by my spouse's Will or Revocable Trust, to any one or more of my descendants who survive my spouse, and shall distribute any asset not so appointed in accordance] with this article as if I had died immediately after my spouse's death.
2. If my spouse does not survive me and any descendant of mine survives me, the Family Share shall be distributed to my descendants who survive me, per stirpes.
  3. If my spouse does not survive me and no descendant of mine survives me, the Family Share shall be distributed, one-half to my heirs-at-law and one-half to my spouse's heirs-at-law. The heirs of each of us shall be determined under and take the shares prescribed by the relevant state statutes of intestate succession in force at the execution of this Agreement, and shall be determined as of the date of death of the survivor of my spouse and me as if each of us had then died intestate.
  4. Any portion of the Family Share that my spouse disclaims shall be administered and distributed in accordance with this article as if my spouse did not survive me.

## **Article 6. Resignation of Trustee and Successor Trustee**

[Insert Successor Trustee appointments]

Any Trustee may resign by giving written notice, specifying the effective date of the resignation, to the Grantor or after the Grantor's death to the beneficiaries to whom the Trustee is to or may distribute the income at the time of giving notice. If any Trustee at any time resigns or is unable or refuses to act, the Grantor, if then living, or the Trust beneficiaries if he or she is not, shall appoint a successor Trustee by an instrument in writing, signed and acknowledged by the Trustee, appointing such successor Trustee. Any successor Trustee may be, but is not required to be, a corporate Trustee. The Grantor may not name himself or herself or his or her spouse as successor Trustees.

No successor Trustee shall be personally liable for any act or omission of any predecessor Trustee. Any successor Trustee may accept with examination or review the accounts rendered and the property delivered by or for a predecessor Trustee without incurring any liability or responsibility. Any successor Trustee shall have all the title, powers and discretion of the Trustee succeeded, without the necessity of any conveyance or transfer.

Notwithstanding any other provision herein, the Grantor may remove a Trustee and appoint an individual or corporate Trustee so long as the new Trustee is not related or subordinate to the Grantor within the meaning of Section 672(c) of the IRC.

# Specimen Agreement 3 continued

## Article 7. Fiduciary provisions

The Trustee may exercise the powers given to the Trustee during the term of any trust, and during such time after the termination of any trust as is reasonably necessary to distribute the Trust Assets.

### A. Dispositive powers

I give to the Trustee the following dispositive powers:

1. Disposition of certain assets. If any assets of any trust become distributable to a person who has not attained age 21, such assets, in the sole discretion of the Trustee, may be: (i) distributed to such person; or (ii) distributed to a Custodian for such person; or (iii) may be retained in a separate Trust for such person's benefit. Any assets retained in Trust shall be administered as follows:
  - a. The Trustee shall pay to the person the portion of the income and principal as the Trustee deems advisable for the person's health, education, support or maintenance.
  - b. When the person attains age 21, the Trustee shall distribute the remaining Trust Assets to the person.
  - c. If the person dies before receiving final distribution, the Trustee shall distribute the remaining Trust Assets to the person's estate.
2. Merger of trusts. The Trustee may merge the assets of any Trust with those of any other Trust, by whomever created, having the same Beneficiaries and substantially the same terms, and if there is disparity in the maximum duration of the Trusts so merged, the shortest maximum duration shall control.
3. Discretionary termination. The Independent Trustee may, without prior or subsequent court approval, terminate any trust, whenever such termination is deemed advisable by such Trustee, by distributing the assets to my spouse, if my spouse is then a beneficiary of the Trust, or if my spouse is not a beneficiary, to the Beneficiary to whom income may then be distributed.
4. Outright distribution. If income or principal of any trust is, by the terms of this Agreement, to become part of any trust or trust share and would be immediately distributable, such income or principal may be distributed by the Trustee in exactly the same manner as provided in such trust or trust share without requiring such Trust to be established.

### B. Administrative powers

I give to the Trustee the following:

1. To retain any assets, however acquired, for as long as they deem the Trustee deems advisable, even if [the Trustee is personally interested in the assets or] their retention results in a lack of diversification.
2. To sell, exchange, mortgage, lease, convey, encumber, pledge or otherwise distribute any real, personal or other property for any period, upon any terms and conditions, to any person, entity, Beneficiary [fiduciary] or agent or to a Trust or estate of which any Trustee is also a fiduciary, including my estate.

# Specimen Agreement 3 continued

3. To purchase as an investment of the Trust Estate any asset of my probate estate or my spouse's probate estate or which belongs to any other trust created by me or my spouse; or to lend money to my estate or my spouse's estate or to any other such Trust without personal liability of the fiduciaries thereof for repayment of such loans, such investments or loans to be made at such prices, upon such security, if any, and upon such terms as may be satisfactory to the Trustee. Any Trustee may make any such investments or loans even if a trustee may also be a Personal Representative of my estate or my spouse's estate or a Trustee of such other Trust.
4. To invest and reinvest in any assets the Trustee deems advisable, without limitation by any statute, rule of law, or regulation limiting the investment of funds by corporate or individual fiduciaries in or to certain kinds of investments, requiring diversification or prohibiting fiduciaries from [being interested in sales or purchases,] delegating investment functions or commingling assets.
5. To hold securities or other assets in their own names, with [or without] disclosure of fiduciary capacity, or in the name of a nominee, or in bearer form.
6. To deposit cash in the commercial or savings departments of any corporate fiduciary or of any other bank or trust company or in any other depository.
7. To borrow money for any purpose they deem advisable from any source [even if the Trustee is personally interested in the source].
8. To allocate between principal and income, in their discretion, all receipts and disbursements, in any manner that will not result in the loss of the marital [or charitable] deduction otherwise available to my estate. The Trustee shall have discretion to determine whether expenses of administering the Trust are "transmission" expenses or "management" expenses under applicable law, and to allocate such expenses to such Beneficiary or Trust share as the Trustee deems appropriate, and to pay the same from income or principal in a manner consistent with obtaining any marital [or charitable] deduction available to my estate. The Trustee may, but need not, create reserves out of income for depreciation, obsolescence, amortization, or for depletion of mineral or timber properties.
9. To divide the Trust at any time into separate shares whether pro rata or non pro rata, as the Trustee deems advisable, to determine values, to distribute like or unlike assets to different Beneficiaries or Trusts and to make distributions in cash or in kind, in divided or undivided interests; provided that any assets with respect to which a death tax is paid to a foreign country or subdivision thereof shall be allocated to the Family Share to the extent possible.
10. To make all payments of income or principal directly to the Beneficiary or for the Beneficiary's benefit. In the case of a beneficiary who is a minor or under other legal disability, all such payments and all distributions of tangible personal property may be made directly to the Beneficiary despite the disability.

# Specimen Agreement 3 continued

11. To make any distribution to a person who is under the age of [21] to a Custodian for the benefit of such person under the Uniform Transfers to Minors Act or a similar law, such Custodian to be designated by the Trustee if a Custodian is not named in this document or if the Custodian named fails or declines to serve.
12. To settle, contest, compromise, submit to arbitration or litigate claims in favor of or against the Trust and all tax matters.
13. To make any tax elections without reimbursement or adjustment between principal and income or in favor of any Beneficiary, even if the election directly affects the value of any Beneficiary's share.
14. To employ agents, lawyers, investment counsel, accountants and others [even if they are associated with a Trustee] to delegate both ministerial and discretionary powers and duties to such persons with liability only for reasonable care in their selection, to place assets in an account with a trust department of a bank which the Trustee selects, under any agency or such other type of Agreement, to rely on information and advice furnished by them without duty of independent investigations, and to pay them reasonable compensation from the Trust.
15. To exercise every other power not specifically granted by this Agreement that may be necessary to enable them to create, continue, operate, expand and change the form of any individual proprietorship, partnership, joint venture, corporation, limited liability company or other business.
16. To accept additions to the Trust from any source except my spouse.
17. To execute and deliver all instruments that will accomplish or facilitate the exercise of the above powers and duties and to perform all other acts necessary or advisable to administer the Trust.

## C. Additional provisions

1. Waiver of Bonds. No bond or other indemnity shall be required of any Trustee nominated or appointed hereunder.
2. Waiver of Court Jurisdiction. I expressly waive any requirement that any trust be submitted to the jurisdiction of any court, that the Trustee's actions be authorized or accounts be allowed by any court. This waiver shall not prevent any trustee or beneficiary from requesting any of those procedures.
3. Trustee Succession, Appointment and Removal Procedures. The following provisions shall apply to the appointment, removal and succession of a Trustee:
  - a. Exercise of Power to Appoint. Any power to appoint a co-Trustee or successor Trustee under this Agreement shall be exercised by written Agreement delivered to the person or entity appointed.
  - b. Removal of Trustee. To effect the removal of a Trustee, the person entitled to remove the Trustee shall either deliver to such Trustee a written Agreement stating that such removal is made, or mail such Agreement to such Trustee's last known business address by registered or certified mail, return receipt requested. After such delivery or mailing, a removed Trustee shall have no further duties, other than to account, and shall not be liable or responsible for the acts of any successor Trustee.



# Specimen Agreement 3 continued

- c. Acceptance of Trusteeship. The appointment of any person or entity eligible to act as a co-Trustee or successor Trustee shall become effective only if the appointee's written acceptance of the appointment and trusteeship is delivered to the then-acting Trustee, or if no Trustee is then acting, to (i) the person or persons who exercised the power to make the appointment, or (ii) if the appointee was named in this Agreement, to the adult Beneficiaries then eligible to receive income or principal from the Trust and to the parent, guardian or conservator of each minor Beneficiary so eligible. A successor Trustee shall, upon acceptance, succeed to the preceding Trustee's title to the Trust Assets.
4. Resignation Right. Any Trustee may resign at any time by delivering a written resignation to those entitled to appoint a Trustee. The resignation shall be effective 60 days after the date of delivery of the resignation, or upon the earlier appointment of a successor Trustee. After the resignation becomes effective, the Trustee shall have no further duties, other than to account, and shall not be liable for the acts of any successor Trustee.
5. Approval of Trustee's Accounts. The Trustee (or the Personal Representative of any deceased Trustee) may render accounts to the persons who are currently eligible to receive distributions [and to persons who would have been entitled to receive distribution had the death of my spouse then occurred]. The approval of these accounts or the failure to object to the accounts within 90 days after receipt of the accounts by those persons (or by those authorized to act on behalf of any such person), in writings delivered to any Trustee, shall constitute a valid and effective release of the Trustee with respect to all transactions disclosed by the accounts, and shall be binding and conclusive as to all persons. Nothing contained in this paragraph shall give any person the power or right to enlarge or shift the beneficial interest of any beneficiary of the Trust.
6. Majority Vote and Delegation. If more than one Trustee is authorized to exercise a power, such power shall be exercisable by a majority of the Trustees authorized to act. A nonconsenting Trustee who has acted in good faith shall not be liable for the acts of the majority. I authorize any Trustee to delegate for any period of time to any other Trustee authorized to exercise such power, the power to act on behalf of the delegating Trustee.
7. Custody of Assets. If a corporate Trustee is acting, it shall have custody of all assets, handle receipts and disbursements, and prepare accountings.
8. Change of Trust Situs. The Independent Trustee may transfer the situs of the administration of any Trust from the state which is then its situs to another state, and the Independent Trustee may elect to have the governing law of this Agreement be the law of such new state.
9. Income at Termination. Except to the extent that such income is expressly made subject to a sole income Beneficiary's general power of appointment [or is held by a Trust to which an election under Internal Revenue Code Section 2056(b)(7) applies], any accrued or undistributed income at the termination of a Trust with a sole income Beneficiary shall be distributed to such Beneficiary, or if the beneficiary has died, to the Beneficiary's estate; in all other cases such income shall be added to principal.

# Specimen Agreement 3 continued

10. **Income Required to be Distributed.** Income required to be distributed from a Trust shall be distributed at least annually or in such more frequent installments as are convenient. Income earned prior to the funding of the Trust that is distributable to such a Trust and required to be distributed from the Trust, including income from property used to discharge liabilities, shall be distributed to the income Beneficiary.

## **Article 8. General governing provisions**

In applying the provisions of this Trust Agreement, the following shall govern:

### A. Definitions

1. **"My Spouse."** My spouse's name is [NAME], and all references in this Agreement to {"my husband"}{"my wife"} or "my spouse" are to {him} {her} only.
2. **"Descendants"** means all persons who are lineally descended from the person whose descendants are referred to (including legally adopted lineal descendants) but excludes illegitimate descendants and their descendants. For the purposes of this Agreement, an illegitimate descendant is a person (other than an adopted descendant) whose biological parents were not married at the time of such person's conception or any time after such conception and prior to the Grantor's death.
3. **"Child"** means a descendant of the first generation. References to "my children" mean only the children listed below and each other child of mine born or adopted after the date of this Agreement. My children's names and dates of birth are: [NAME-DATE OF BIRTH, NAME-DATE OF BIRTH]. The Trustee may accept these dates as conclusive in making any determination for which they are pertinent. All references to "my children" shall include any children of mine who are born or adopted after the date of this Agreement.
4. **"Per stirpes"** means is equal shares among living children of the person whose descendants are referred to and the descendants (taken collectively) of each deceased child of such person, with such deceased child's descendants taking by right of representation the share of such deceased child.
5. **"Surviving,"** with reference to my spouse, means that if my spouse and I die under such circumstances that it cannot be established by sufficient evidence that we died other than simultaneously [or if my spouse did survive me but died within 120 hours after my death], my spouse shall be deemed [not] to have survived me. All references to any other person's surviving me mean that if such person dies within 120 hours after my death, such person shall be deemed not to have survived me. A person in gestation at the time of an event, who is later born alive and survives for 120 hours is "living" or "surviving" at the time of such event.
6. **"Trustee"** means an original or successor Trustee of any Trust whether an individual or a corporation.
7. **"Corporate trustee"** means a trust company or national or state banking institution having Trust or fiduciary powers.

# Specimen Agreement 3 continued

8. "Independent Trustee" means any Trustee other than: (1) a transferor of property to the Trust; or (2) a Beneficiary of the Trust who is, or in the future may be eligible to receive income or principal pursuant to the terms of the Trust; or (3) a person who is a related or subordinate party under Internal Revenue Code section 672(c) as to any person described under (1) or (2) above. A person is described in (2) of this section even if he or she has a remote contingent interest in the Trust, but is not described in (2) of this Internal Revenue Code section if the person's only interest is as a potential appointee under a non-fiduciary power of appointment held by another person, the exercise of which will take effect only in the future, such as a testamentary power held by a living person.

## B. Termination of marriage

If my marriage to my spouse is terminated other than by reason of death at any time after the date of execution of this Agreement, my spouse's death for all purposes of this Agreement shall be deemed to have occurred on the date of such termination. In that event, the appointment of my spouse as Trustee also shall terminate.

## C. Tax effects

This Agreement shall in all respects be construed in such a manner that (1) all contributions shall be capable of qualifying for the federal gift tax annual exclusion to the extent the contributions are allocated for purposes of withdrawal rights and (2) no Trust principal shall be includible for death tax purposes in the estate of any contributor or of any Trustee (except to the extent that (i) my spouse is a Trustee of the Marital Trust and an election is made to qualify any part of that Trust for the marital deduction in my estate, or (ii) any Trustee who is a Beneficiary possesses a right of withdrawal at that Beneficiary's death). Any provision of this Agreement incapable of being so construed or applied shall be inapplicable.

## D. Rules of construction

1. Governing law. Except as altered by this Agreement, and except as provided in this Agreement regarding a change in the situs of administration of each Trust, the law of [STATE] shall govern the meaning of this Agreement and the validity, legal effect and administration of each Trust. Except as otherwise provided, all references to applicable law and [STATE] Statutes mean those in force on the date of this Agreement and shall incorporate any amendments and successor provisions. References to the IRC are to the IRC of 1986 as amended, and references to a particular section of the IRC shall incorporate any amendments and successor provisions.
2. Marital deduction. All provisions of this Agreement shall be construed and applied so that the Marital Share qualifies for the federal estate tax marital deduction, and any provision of this Agreement incapable of being so construed or applied shall not apply to the Marital Share. My spouse shall have the power to require the Trustee of the Marital Trust to render any asset of the Trust productive of income or convert it within a reasonable time.

# Specimen Agreement 3 continued

3. Captions. Captions are for convenience only and are not intended to alter any of the provisions of this Agreement.
4. Gender. Where appropriate, the masculine includes the feminine, the singular includes the plural, and vice versa.
5. Writing. The requirement that a person act in "writing" requires a dated written document signed by such person.

## E. Protective provisions

1. Intentional Omissions. I have intentionally limited gifts to my descendants to those provided in this Agreement. Any omission is intentional and not occasioned by accident or mistake.
2. Insurance or Other Death Benefits. If any policy of insurance on the life of any person or any annuity contract, retirement plan or other death benefit becomes a Trust Asset, the following provisions shall apply:
  - a. Incidents of Insurance Ownership. Any and all incidents of ownership in any life insurance policy shall be vested solely in the Trustee other than the insured, and the insured person shall possess none of the incidents of ownership therein either individually or as a Trustee. If the sole Trustee acting is the insured person, such Trustee shall have the duty to appoint an individual or corporate Trustee whose sole responsibility may be to possess such incidents of ownership.
  - b. Powers. The Trustee (except as may be limited by other provisions of this agreement) shall possess all rights, options and other incidents of ownership respecting any policies of insurance, annuities, retirement plans or other death benefits that are assets of the Trust, including, but not limited to, the right to surrender such assets for cash; to obtain loans on such assets; to receive or apply dividends or distributions from such assets; to assign or pledge such assets; to select optional modes of settlement on such assets; to enter into split-dollar or other premium sharing arrangements with any appropriate corporation or other entity; to convert any policy, contract or benefit to any other form of policy, contract or benefit; to designate the Trustee as Beneficiary of any policy, contract or benefit; and to exercise in any manner all options relating to such assets (including any option to reduce the premiums and insurance coverage, to use assets of the policy to pay premiums, to purchase reduced paid-up insurance, to purchase additional insurance coverage or to surrender the policy). With respect to any group life insurance coverage that I assign to the Trustee, I also now assign to the Trustee all my contractual rights as an employee to be provided group or individual life insurance coverage, specifically including, but without limiting the generality hereof, all future increases in the amount of such coverage and all new or substituted coverage resulting from a change in life insurance carriers or otherwise.

# Specimen Agreement 3 continued

- c. Premium payments. The Trustee shall pay from the net income of the Trust all premiums on insurance policies that are assets of the Trust to the extent that such premiums are not paid by me, by any other contributor to the Trust, by any employer or from other sources. The net income distributable to any beneficiary under this Agreement shall be the net income remaining after payment of those premiums. The Trustee may also pay from principal all premiums on insurance policies that are assets of the Trust to the extent that such premiums are not paid from the net income of the Trust or from other sources.
- d. Proceeds. The receipt of any Trustee covering the proceeds of any insurance or other death benefit payable to the Trustee under this Agreement shall fully discharge the insurer or other payor, and such insurer or payor shall not be responsible for the application or disposition of such proceeds by the Trustee.
- e. Limitations on duties of Trustee
  - 1) If I have contributed any policy of life insurance to the Trust, the Trustee may retain the policy without any liability for failing to exercise any options under the policy (including any option to reduce the premiums and insurance coverage, to use assets of the policy to pay premiums, to purchase reduced paid-up insurance, to purchase additional insurance coverage or to surrender the policy).
  - 2) If the Trustee purchases a policy of life insurance during my lifetime, the Trustee may rely on the recommendation of my insurance agent or any Beneficiary's insurance agent as to the type of insurance product and the insurance company (without any duty or obligation to make further inquiry or investigation concerning the policy or the insurance company issuing the policy), and the Trustee shall be fully exonerated from any liability for actions taken in good faith in reliance on such agent's recommendation. Thereafter, the Trustee may retain the policy without any liability for failing to exercise any options under that policy (including any option to reduce the premiums and insurance coverage, to use assets of the policy to pay premiums, to purchase reduced paid-up insurance, to purchase additional insurance coverage or to surrender the policy).
  - 3) While I am living and legally competent, the Trustee shall have no duty to borrow against the cash value of any policy of insurance for the purpose of paying premiums or to make use of the cash or other asset value of the policy for other investment purposes and shall have no liability for the lapse of any policy of insurance due to nonpayment of premiums if there are insufficient assets in the Trust (other than the asset values of insurance policies) with which to pay the premiums.
  - 4) The Trustee shall have no obligation to institute any litigation concerning any policy of insurance until the Trustee shall first have been indemnified to its satisfaction by one or more of the Beneficiaries (or other interested parties) against all expenses of the litigation to the extent Trust Assets are insufficient to pay such expenses.

# Specimen Agreement 3 continued

3. [Individual] Trustee Liability Limited. No [individual] Trustee who has acted in good faith shall be liable for the acts of any co-Trustee or for failure to assert breaches of trust by any former Trustee.
4. Spendthrift Provisions. Neither principal nor income of any trust nor any beneficiary's interest in the Trust shall be subject to alienation, assignment, encumbrance, appointment or anticipation by the Beneficiary, to garnishment, attachment, execution or bankruptcy proceedings, to claims for alimony, support, spousal election, maintenance, or payment of other obligations by any person against the Beneficiary or to any other transfer, voluntary or involuntary, by or from any beneficiary, provided that the foregoing shall not restrict the exercise of any general testamentary power of appointment and that any principal distributable to any beneficiary by reason of having attained a specified age shall be fully alienable by such Beneficiary after attaining such age.
5. Rule Against Perpetuities. Each Trust, if not sooner terminated pursuant to other provisions, shall terminate 21 years after the death of the survivor of my spouse and all my descendants who are living on the date of this Agreement. In the event of termination of a Trust under this provision, the assets shall be distributed per stirpes to my descendants who were permissible recipients of the Trust income immediately prior to such termination.
6. Special Powers of Appointment. Any special power of appointment may be exercised by appointment, outright or in Trust, in favor of one or more of the permissible appointees [or their estates] in such portions as the donee of the power may appoint; provided, the power (a) shall not be exercisable in favor of the donee, the donee's estate, the donee's creditors or the creditors of the donee's estate, (b) shall not include the power to create another power of appointment that, under the applicable local law, can be exercised so as to postpone the vesting of any estate or interest in the Trust Property or suspend the absolute ownership of power of alienation of such Trust Property for a period ascertainable without regard to the date of creation of this power, and (c) must be specifically referred to in the donee's valid will or revocable trust for the appointment to be effective.
7. Non-exercise of Discretion by Interested Trustees. Despite any other provision of this Agreement to the contrary, (a) no Beneficiary who is also a Trustee may participate, as a Trustee, in any discretionary decision to withhold or distribute income or principal to such Beneficiary that is not limited by a standard relating to the Beneficiary's health, education, support or maintenance, and (b) no Trustee may participate, as a Trustee, in any discretionary decision to distribute income or principal in a manner that would satisfy a legal obligation of that Trustee.

# Specimen Agreement 3 continued

F. Disclaimers. Any Trustee, Beneficiary or other person (or an agent, guardian or personal representative on such person's behalf) shall have the power to disclaim, in whole or in any part, any interest in property under this Agreement (including any right, power or discretion), by written Agreement filed with any Trustee. The following provisions shall govern such disclaimers:

1. Fiduciary interest. If a Trustee disclaims a right, power or discretion, the right or discretion so disclaimed shall be extinguished as to the disclaiming Trustee only.
2. Interests in Marital Share. If my spouse disclaims an interest in the Marital Share, the property of the Marital Share in which the disclaimed interest existed shall be administered and distributed in the same manner and having the same Trustee as the Family Trust, except that my spouse shall not have any power of withdrawal or appointment over the property, or the proceeds of such property, in which the disclaimed interest existed, other than those powers permitted by Internal Revenue Code Section 2518 and the regulations under that section. Any estate taxes that become payable by reason of the disclaimer shall be paid from the property in which the disclaimed interest existed.
3. Other interests. If an interest in property under this Agreement other than an interest described in the preceding provisions of this paragraph is disclaimed, the disclaimed interest in property shall be disposed of in the manner provided by this Agreement as though the person disclaiming had not survived me.

The Grantor and the Trustee have signed this Agreement on or as of the date appearing at the beginning of this Agreement and such Trustee accepts their appointment by signing this Agreement.

IN WITNESS WHEREOF, the parties hereto have set their hand and seals the day and year above written.

*(Formalities of execution will be governed by local law and should be in accordance therewith.)*

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*(Signature of Grantor)*  
*(Grantor)*

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*(Authorized Representative of the Trust Company)*  
*(Trustee)*

# Specimen Document 4

## Community property release

The following specimen Release of Community Property Interest is an example of how Counsel might draft such a release. This specimen should be used only as a guide and is not intended as a final draft. Counsel should revise it as necessary to comply with the state law so the community interest can be served and the property transferred to the Grantor spouse.

**Counsel alone is responsible for the actual wording of the final trust agreement.**

## Specimen release of community property interest

I, \_\_\_\_\_, do hereby release, transfer and assign all my rights in [Minnesota Life] Insurance Company Policy # \_\_\_\_\_ of my spouse, \_\_\_\_\_. Any interest in this policy which is deemed to pass to my spouse as a result of this release, transfer or assignment is intended as a gift and no value has been received for such release, transfer or assignment. The release of my rights in this policy specifically includes all community property rights created under the laws of this state. Such release of community interest includes the rights in the policy so transferred and any income or deemed income which may be produced from said life insurance policy.

I specifically authorize the use of community income and assets for the payments of premiums on said policy and do hereby release all community rights, which I hold in said assets or income. To the extent that any assets or income are used for such payment of premiums, I hereby declare that my interest transferred for such purposes is a gift to my spouse and I hereby assign, transfer, waive and release irrevocably any community property interest I have in such assets or income.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
State of \_\_\_\_\_

Social Security number: \_\_\_\_\_

County of \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

before me, \_\_\_\_\_ a Notary Public, personally appeared \_\_\_\_\_ to me known and known to me to be the person whose name is subscribed to the within instrument and acknowledged that (s)he executed the same.

\_\_\_\_\_  
(Notary Public in and for the state and county stated above.)

My commission expires \_\_\_\_\_

Seal



# Specimen Document 5

## Sample Crummey beneficiary letter

*The following specimen Crummey beneficiary letter is an example of how Counsel might draft such a letter. The example includes a sample withdrawal waiver, which is optional. The sample letter is meant only as a guide and should be revised by Counsel to conform to the Trust document drafted by Counsel.*

Date: \_\_\_\_\_

Trustee Name: \_\_\_\_\_

Trustee Address: \_\_\_\_\_

\_\_\_\_\_

RE: THE \_\_\_\_\_ IRREVOCABLE TRUST AGREEMENT AMOUNT OF CONTRIBUTION \$ \_\_\_\_\_ WITHDRAWAL PERIOD: 30 DAYS

Dear Beneficiary:

[Client] has made a contribution to his or her Irrevocable Life Insurance Trust to provide for the payment of premiums, interest or other fees for life insurance policies held by me as Trustee. Pursuant to the terms of the [Client] Irrevocable Trust Agreement, you now have the right to withdraw from the Trust your proportionate share of the contribution or \$ \_\_\_\_\_. If you wish to exercise your right to withdraw, please notify me in writing, at the address above, at once. Your right to withdraw will expire at the end of the withdrawal period stated above.

In order to expedite payment of the premium, the Trustee requests that if you do not intend to withdraw from the Trust, you waive the withdrawal period. If this is agreeable to you, please sign and date the waiver below and return this letter to me in the stamped, return envelope provided.

Please do not hesitate to contact [Client] or me if you have any questions about this letter or your rights under this Trust.

Thank you.

Very truly yours,

# Specimen Document 5 continued

**RE: The [Client] irrevocable trust agreement**

Waiver, the undersigned hereby waives the 30-day notice of withdrawal.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Beneficiary

Date: \_\_\_\_\_

Trustee Name: \_\_\_\_\_

Trustee Address: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

# Specimen Document 5 continued

**RE: The \_\_\_\_\_ Irrevocable Trust Contributions**

Dear Beneficiary:

A contribution has been made on your behalf to the \_\_\_\_\_ Irrevocable Trust. Pursuant to the terms of the \_\_\_\_\_ Irrevocable Trust, you now have the right to withdraw \$ \_\_\_\_\_ in cash or other liquid asset by making one written demand upon me as Trustee within 30 days of your receiving this notice. If you do not exercise your right by notifying me as Trustee in writing, some or all of your right to withdraw will expire at the end of the 30-day period.

In order to expedite the purposes of the Trust, the Trustee requests that if you do not intend to withdraw from the Trust, you check the box on the bottom of this letter stating you waive your right to this specific withdrawal.

Sign your name and date as indicated and return this letter to me as Trustee.

If you have any questions about this letter or your rights under this Trust, please do not hesitate to contact me.

Sincerely,

*Signed*

---

Trustee

I hereby waive my right to make a withdrawal from the \_\_\_\_\_ Irrevocable Trust but this waiver is only for the amount that would expire if not exercised within the 30-day period referred to in the above letter.

*Signed*

---

Beneficiary

Please keep in mind that the primary reason to purchase a life insurance product is the death benefit.

Product features and availability may vary by state.

Life insurance products contain charges, such as Cost of Insurance Charge, Cash Extra Charge, and Additional Agreements Charge (which we refer to as mortality charges), and Premium Charge, Monthly Policy Charge, Policy Issue Charge, Transaction Charge, Index Segment Charge, and Surrender Charge (which we refer to as expense charges). These charges may increase over time, and these policies may contain restrictions, such as surrender periods. Policyholders could lose money in these products.

Additional agreements may be available. Agreements may be subject to additional costs and restrictions. Agreements may not be available in all states or may exist under a different name in various states and may not be available in combination with other agreements.

Policy loans and withdrawals may create an adverse tax result in the event of lapse or policy surrender, and will reduce both the surrender value and death benefit. Withdrawals may be subject to taxation within the first fifteen years of the contract. You should consult your tax financial professional when considering taking a policy loan or withdrawal.

This information is a general discussion of the relevant federal tax laws provided to promote ideas that may benefit a taxpayer. It is not intended for, nor can it be used by any taxpayer for the purpose of avoiding federal tax penalties. Taxpayers should seek the advice of their own financial professionals regarding any tax and legal issues specific to their situation.

These are general marketing materials and, accordingly, should not be viewed as a recommendation that any particular product or feature is appropriate or suitable for any particular individual. These materials are based on hypothetical scenarios and are not designed for any particular individual or group of individuals (for example, any demographic group by age or occupation). It should not be considered investment advice, nor does it constitute a recommendation that anyone engage in (or refrain from) a particular course of action. If you are looking for investment advice or recommendations, you should contact your financial professional.

Insurance products are issued by Minnesota Life Insurance Company in all states except New York. In New York, products are issued by Securian Life Insurance Company, a New York authorized insurer. Minnesota Life is not an authorized New York insurer and does not do insurance business in New York. Both companies are headquartered in St. Paul, MN. Product availability and features may vary by state. Each insurer is solely responsible for the financial obligations under the policies or contracts it issues.

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