

THE UNEXAMINED TRUST IS NOT WORTH DRAFTING

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SAMPLE PROVISIONS FOR TRUSTS

DISCLAIMER: The following information is intended to provide a general overview of the subject matter but is not intended to be legal advice and has not been written as a formal opinion of counsel.

1. Simultaneous Death and Survivorship

Including a survivorship requirement in both H's and W's revocable trust could unintentionally eliminate or duplicate specific bequests. Consider a situation where H and W have mirror image trusts. On the first death, everything passes to the surviving spouse. On the second death, \$100,000 passes to charity and the residue passes to H's and W's children. If H and W die days apart, a standard 60-day survivorship requirement in both of their documents could result in \$200,000 passing to charity, contrary to the couple's intent.

Possible solutions to avoid unintentionally duplicating the charitable bequest include the following:

- Waive survivorship requirement in *both* spouses' documents (and include reverse simultaneous death presumptions), but only for purposes of the charitable bequest
 - W's document: "For purposes of this Agreement, a beneficiary, including the Grantor's Husband, is deemed to survive the Grantor only if he or she is living on the sixtieth (60th) day following the Grantor's death. Notwithstanding the foregoing, for purposes of Paragraph ____ of Article ____ [reference to charitable bequest] only, Grantor's Husband shall be deemed to survive her if he actually survives her by any length of time, no matter how short. Moreover, if Grantor and her Husband die simultaneously or under such circumstances that the order of their deaths cannot be determined, Grantor's Husband shall be deemed to **survive** her for purposes of said Paragraph ____ of Article ____ only."
 - Include reverse presumption in H's document: "...if Grantor and his Wife die simultaneously or under such circumstances that the order of their deaths cannot be determined, Grantor's Wife shall be deemed to **predecease** him for purposes of said Paragraph ____ of Article ____ only."

- In *both* spouses' documents, halve the bequest in circumstances where spouses die within X days of each other
 - Number of days tied to survivorship requirement elsewhere in document
 - “At Grantor’s death, if Grantor’s Husband does not survive her, Trustee shall distribute \$100,000 to X charity. Notwithstanding the foregoing, if Grantor and her Husband die within sixty (60) days of each other, Trustee shall distribute \$50,000 to X charity.”
- In *both* spouses' documents, qualify the more general survivorship requirement by saying it does not apply to the extent its application to multiple documents would result in unintended duplication of dispositions
 - W’s document: “For purposes of this Agreement, a beneficiary, including Grantor’s Husband, is deemed to survive the Grantor only if he or she is living on the sixtieth (60th) day following the Grantor’s death. The foregoing survivorship requirement shall not apply to the extent it would result in an unintended failure or duplication of identical bequests under this Agreement and Grantor’s Husband’s revocable trust agreement and, if Grantor and her Husband die simultaneously or under such circumstances that the order of their deaths cannot be determined, Grantor’s Husband shall be deemed to **survive** her solely for purposes of such identical bequests.”
 - Include reverse presumption in H’s document: “...if Grantor and his Wife die simultaneously or under such circumstances that the order of their deaths cannot be determined, Grantor’s Wife shall be deemed to **predecease** him solely for purposes of such identical bequests.”

2. Situs and Governing Law

The principal place of administration of the trust shall be [State X] and the courts of such state shall have primary jurisdiction to hear suits on all matters involving the trust. All matters pertaining to the validity, construction and administration of the trust shall be governed by the laws of [State X]. Notwithstanding the foregoing, the Disinterested Trustee may, in his or her sole discretion, transfer the principal place of administration of the trust upon written notice to the income beneficiary. After such transfer, the laws of the new place of administration of the trust shall apply, except to the extent the Disinterested Trustee states otherwise, in writing, at the time of the transfer.

3. Tangible Personal Property

Separate Writing and Naming of Third Party Decision-Maker:

ARTICLE SIXTH
Tangible Personal Property

A. **Memorandum of Wishes.** The Settlor may leave a writing disposing of some or all of the Settlor's tangible personal property. If the Settlor does so and the writing can be incorporated by reference into this Agreement or otherwise be legally binding, the Settlor directs that it be incorporated or followed and prevail over the disposition below in this Article. If the writing is not legally binding, the Settlor requests that the Settlor's wishes be followed. This provision shall apply whether the writing is executed before or after this Agreement.

B. **All Other Tangible Personal Property.** . The Settlor gives all other tangible personal property held in the trust (other than items effectively disposed of above) as follows:

1. To her Spouse, if she survives the Settlor; or

2. If her Spouse does not survive the Settlor, she requests that her spouse's sister, [SISTER'S NAME], distribute her tangible personal property in her discretion among such of the following beneficiaries who survive the Settlor, with the items distributed to each beneficiary being as equal in value as is practicable: the Settlor's nephew, [NAME]; the Settlor's niece, [NAME]; her spouse's siblings, [NAMES]; her spouse's niece, [NAMES]; and her spouse's nephews, [NAMES]. Such distributions shall be made in [SISTER NAME'S] discretion, and she shall have no liability for any decision regarding a distribution made pursuant to this Paragraph B.2.

Gift of Tangible Personal Property Gift When Item No Longer Part of Estate:

My Trustee shall distribute the Georgia O'Keefe painting, "Autumn Leaves" to my sister, [NAME OF SISTER], if she shall survive me. If my said sister shall not survive me, this gift shall lapse. Notwithstanding any other provision of this Agreement, at the time of my death, I shall not own such painting due to (i) a prior disposition made by me to any person other than my sister, (ii) its destruction, theft or other loss regardless of whether such loss occurs during a period in which I am under a disability (as hereinafter defined), or (iii) its sale by my agent under a durable power of attorney or by my conservator or guardian during a period in which I am under a disability (as hereinafter defined), *[I direct that my Trustee shall distribute to my said sister an amount equal to the value of such painting on the date of my prior disposition, or the insurance proceeds or net sale price, as the case may be.]* **[OR]** *[such gift of the painting shall adeem.]*

4. Disability of Settlor or Trustee

Definition of Disability derived from VA Code Ann. § 64.2-415:

The term “incapacitated” as used in this Agreement shall mean impairment by reason of mental illness, intellectual disability, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

Trustee Resignation on Reaching Certain Age:

Resignation of Trustee. After Trustor’s death, any Trustee serving from time to time with respect to any trust created hereunder may resign as Trustee without the need for court approval by written notice delivered to Trustor’s Wife or, if she is not then living, the then serving co-Trustee(s), if any. Each Trustee, including Trustor’s Wife, shall resign as a Trustee upon reaching the age of eighty (80).

Deemed Resignation of Trustee on Failure to Provide Medical Information:

a. Deemed Resignation. Each individual named herein or appointed pursuant to the provisions of this Agreement as Trustee shall be deemed to resign, effective upon the earlier of the failure (i) to undergo a medical examination and cause the results of such examination to be made available within a reasonable time, or (ii) to provide a Valid Medical Information Authorization, within thirty (30) days of a written request for such examination or information by a Co-Trustee, Distribution Advisor, Investment Advisor, or Protector acting hereunder, or if no such fiduciary is then serving, a beneficiary then eligible to receive distributions of income. The sole purpose of such a request shall be to determine if the individual lacks the required capacity to continue to so serve hereunder, *provided, however*, that there must be a reasonable basis to request such medical examination or information, and *provided further*, that no such request may be made more than once every thirty-six (36) months. The cost of the medical examination shall be borne by the trust with respect to which such individual is acting as Trustee.

b. Definition of Valid Medical Information Authorization. The term “Valid Medical Information Authorization” means a written authorization (satisfying the requirements of the Health Insurance Portability and Accountability Act of 1996 or, if applicable, any more restrictive state law) necessary or helpful for a physician or other health care professional to disclose patient information concerning such individual’s ability to handle his or her personal financial affairs due to a mental disability or physical infirmity.

Standards for Determining Trustee or Settlor Disability:

F. A Trustee, other than Settlor, is “*disabled*” (and while disabled shall not serve as Trustee) when a written certification is in effect that the examined Trustee is physically or mentally incapable of managing the affairs of the trust, whether or not there is an adjudication of the Trustee’s incompetence.

1. This certification shall be valid only if it is signed by at least two (2) physicians, each of whom has personally examined the Trustee and at least one (1) of whom is board-certified in the specialty most closely associated with the alleged disability.

2. This certification need not indicate any cause for the Trustee’s disability.

3. A certification of disability shall be rescinded when a serving Trustee receives a certification that the former Trustee is capable of managing the trust’s affairs. This certification, too, shall be valid only if it is signed by at least two (2) physicians, each of whom has personally examined the Trustee and at least one (1) of whom is board certified in the specialty most closely associated with the former disability.

4. No person is liable to anyone for actions taken in reliance on the certifications under this Paragraph, or for dealing with a Trustee other than the one removed for disability based on these certifications.

G. Settlor is “*disabled*” (and while disabled shall not serve as Trustee) if (i) he has been adjudged incompetent by any judicial determination, or (ii) if such of the then serving individual Trustees, other than Settlor (or, if there are no other individual Trustees then serving, [NAME OF WIFE], if she and Settlor are then living together or are living separately solely for medical reasons), who are able and willing to participate unanimously agree that Settlor suffers from a physical, mental, psychological and/or emotional condition that renders him unable to manage property effectively and Settlor does not object, in writing, to such a non-judicial determination.

5. Liability of Directed Trustee

No Duty of Trustee to Monitor Fiduciaries or Notify Beneficiaries. The Trustee need not inquire into the performance by the Investment Advisor, Distribution Advisor, or the Protector of his, her or its duties and shall not be held liable for any loss whatsoever to any trust hereunder, unless such loss results from actions taken by the Trustee in bad faith. The Trustee shall not be held liable for any matter with respect to which the Trustee is not authorized to participate, which includes the duty to review or monitor trust investments for any loss whatsoever to any trust hereunder. Furthermore, to the extent that the common law, any fiduciary powers act, or other statute of any jurisdiction whose law applies to the trust imposes a general duty upon the Trustee to keep a beneficiary reasonably informed about the administration of the trust and material facts necessary to protect the interests of such beneficiary, (i) no duty is imposed upon the Trustee to communicate with any beneficiary about the actions of the Investment Advisor, Distribution Advisor, or Protector, and (ii) the Trustee is hereby relieved of any liability for the failure to communicate with any beneficiary about the actions of the Investment Advisor, Distribution Advisor, or the Protector.

No Duty of Investment Advisor to Monitor Fiduciaries or Notify Beneficiaries. The Investment Advisor need not inquire into the performance by the Trustee, Distribution Advisor, or the Protector of his, her or its duties and shall not be held liable for any loss whatsoever to any trust hereunder, unless such loss results from actions taken by the Investment Advisor in bad faith. Furthermore, no duty is imposed upon the Investment Advisor to communicate with any beneficiary about the actions of a Trustee, Distribution Advisor, or Protector.