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Model Will, with Explanatory Comments, of the Father of a Closely-Knit Family Group, Designed to Minimize Family Estate and Income Taxes

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MODEL WILL, WITH EXPLANATORY COMMENTS, OF THE FATHER OF A CLOSELY-KNIT FAMILY GROUP, DESIGNED TO MINIMIZE FAMILY ESTATE AND INCOME TAXES

WILLIAM J. BOWE*

LAST WILL AND TESTAMENT OF MARITAL DEDUCTION SPRINKLE, OF SPECIAL POWER, TAXHAVEN

I, Marital Deduction Sprinkle, of Special Power, Taxhaven, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils heretofore made by me.

FIRST

Tangible Personal Property

All of my tangible property of every nature and wheresoever situated, except any such property being used by any business in which I may be interested, I give and bequeath to my wife, Mary, outright, if she survives me; if she fails to survive me, I give and bequeath said personal property to those of my children who are then living in equal shares determined by them or, if they fail to agree within six months after the appointment of my Executors, then in equal shares determined by my Executors.

Comment: The problem of the division of the mass of miscellaneous tangible personal property, *i.e.*, household effects, jewelry, automobiles, etc., among children is always a difficult one. Detailed lists containing gifts of specific items are rarely satisfactory since exchanges and replacements of many items are frequent and the needs of particular beneficiaries may be totally different at the date of distribution than at the date of the will.

Generally fear of disharmony and recriminations as a result of alleged unequal divisions or sales at sacrificed prices is very much less common than testators anticipate. But assuming such probability no solution is likely to obviate it. Sometimes division is made by appraisal of these items and then permitting selections in an order predetermined by either lot, age or sex. It is believed preferable to make the executor final arbiter, though this may at times put him in a difficult position.

Many testators prefer to ignore mention of these items, fearful that it may exaggerate their value in the eyes of the Collector of

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Internal Revenue. Omission of this bequest in cases where children are the primary legatees would represent an equally satisfactory solution under the present will since these items would then fall into the residuary trusts, and being utterly unsuitable trust assets, would be forthwith distributed by the corporate trustee under his power to distribute corpus to and among the beneficiaries, assuming they were not minors. See Item FOURTH, last paragraph. It may be safely assumed he would do it only after consultation as to their particular preferences. But, absent a power to distribute corpus this method should not be used.

SECOND

Residence

I give and devise to my Trustees, hereinafter named, all my right, title and interest in whatever real property, with the improvements thereon, that my wife and I are using as our residence or residences at the time of my death, IN TRUST NEVERTHELESS, to be held by them as a part of the residuary trusts created by Item FOURTH of this my Will. I direct that my wife shall have the right, rent free, to the use and occupancy of the said residential property or properties, or of any other residential property or properties which my Trustees may acquire and hold in lieu thereof as hereinafter provided, at any time and for such periods as she may desire. I further direct that during the life of my said wife neither my Executors nor my Trustees shall exercise in respect of my said residential property, nor any other residential property held in lieu thereof, the powers to sell and to lease which are conferred upon them in Item NINTH hereof without first obtaining the consent in writing of my said wife, unless she should be at the time under some legal disability to give such consent.

Until the death of my said wife and so long as such residential property shall constitute a part of the trust aforesaid and regardless of whether or not my said wife may be actually occupying the same at any particular time, I direct my Executors and Trustees to pay from the income of said trusts all expenses of maintenance and preservation.

In the event of the sale of one or more of the said residential properties pursuant to the consent of my said wife as aforesaid, I authorize and empower my Trustees, if requested by my said wife so to do, to purchase improved or unimproved real estate, and if unimproved to improve the same, and if improved to demolish, alter or enlarge any existing building or buildings on the property so purchased, to build thereon a suitable residence together with such outbuildings as my Trustees shall deem suitable and proper, and generally to improve the grounds in such manner as my Trustees may feel will enhance the value of the property, provided, however, in any event, that the

total amount which my Trustees may invest or expend in the acquisition and improvement of such property shall not exceed the amount of the net proceeds of such sale of my said residential property.

At any time during the life of my wife my CORPORATE TRUSTEE, in the exercise of its sole and absolute discretion, may transfer and convey the said residential property to my said wife, absolutely or for her life, and without regard to whether or not the assets of the trust created by Item THIRD of this my Will shall have been exhausted or not.

Comment: Putting the residence in trust with the right in the wife to occupy rent-free and providing that trust income shall be used to maintain the property has the advantage of causing the income so used to be taxed to the trust, which presumably will be in much lower income tax brackets than the wife. The wife's occupancy rent free is not a taxable benefit. Commissioner v. Plant, 76 F.2d 8 (2d Cir. 1935). Mannheimer and Friedman, *Income Tax Aspects of Various Will and Trust Arrangements,* 30 TAXES 362, 370 (1953). The expenses must be limited to those incurred in the preservation of the property, *i.e.,* insurance, repairs, mortgage interest, etc. Expenses incurred for the wife's personal enjoyment, *i.e.,* light, heat, telephone, etc. would be taxable to the wife on the theory that the trust paid them for her benefit.

To provide an escape in the event of any change in the law the CORPORATE TRUSTEE is authorized to distribute the residence to the wife, either in fee or for life. The latter may be preferable, and is therefore authorized, since if distribution becomes desirable, a life interest would avoid inclusion of the value of the property in her gross estate at her death.

THIRD

Marital Deduction Trust

If my wife, Mary, survives me, I direct my Executors to set aside a portion of my estate equal in value to (a) one-half of the value of my adjusted gross estate (gross taxable estate less funeral and administration expenses and debts but before the deduction of estate and inheritance taxes) as finally determined for federal estate tax purposes, less (b) the value of all interests in property, if any, which pass or have passed to my wife under other items of this my Will or otherwise than under this Will but only to the extent that such interests are for the purposes of the federal estate tax law included in determining my gross taxable estate and allowed as a marital deduction. All values shall be those finally determined for federal estate tax purposes.

I give, devise and bequeath the said portion of my estate to my

Trustees, hereinafter named, IN TRUST NEVERTHELESS, to hold, manage, invest and reinvest, to collect the income and to pay over the income in equal quarterly installments to my wife, Mary, during her life. My Trustees shall also pay over to my said wife, Mary, such amount or amounts of principal as she may from time to time demand in writing delivered to the Trustees except that such principal payments shall not in any one year exceed the sum of $25,000. My Trustees may pay over to my said wife such additional amounts of principal as they may from time to time in their sole and absolute discretion determine. In the event my wife shall at any time become ill or if for any reason my Trustees shall consider her unable to manage her own affairs, they shall have power in their sole and absolute discretion, in lieu of making payments direct to her, to use, apply or expend for her benefit the entire income and whatever amount or amounts of principal they may determine.

Upon the death of my wife, my Trustees shall transfer, convey and pay over any remaining principal of this trust to or for the benefit of any person or persons or corporation or corporations or the estate of my wife, in such amounts and proportions and in such lawful interests and estates, whether absolute or in trust, as my wife may by specific reference to the power appoint by her Last Will and Testament. If this power of appointment is for any reason not validly exercised by my wife in whole or in part, then upon her death such portion or all of the principal of the trust or such interests or estates therein as shall not have been validly appointed by her shall fall into and become a part of the residuary trusts established by Item FOURTH of this my Will.

Notwithstanding anything to the contrary contained in this my Will I direct (a) that in establishing this trust for my wife there shall not be allocated to the trust any property or the proceeds of any property which would not qualify for the marital deduction allowable in determining the federal estate tax on my estate and (b) that the Trustees of this trust shall not retain beyond a reasonable time any property which may be or become unproductive property nor shall they invest in unproductive property.

In the event of any uncertainty regarding the interpretation of the provisions of the trust established by this Item THIRD of this my Will, it is my intention that its provisions shall be interpreted in a manner which would permit the assets of this trust to qualify for the marital deduction authorized by the Internal Revenue Code, as now or hereafter amended.

My wife, Mary, may disclaim, in whole or in part, the devise and legacy given to the Trustees by this Item THIRD of this my Will, in which event so much of the said devise and legacy as may be dis-

claimed shall fall into and become a part of the residuary trusts established by Item FOURTH of this my Will. In addition to any other method of disclaimer recognized by law my wife may disclaim this devise and legacy by an instrument in writing delivered to the Trustees declaring her intention to disclaim in whole or in some designated part.

Comment: This bequest qualifies for the marital deduction since the income is required to be paid to the wife at least annually and she is given a general power of appointment over the corpus. The fourth paragraph is necessary to qualify the gift under § 2056(b), INT. REV. CODE OF 1954 (non-qualifying assets) and U. S. Treas. Reg. 105, § 81.47a(p)—1305 (1939), as amended, T.D. 6082, 1954—1 CUM. BULL. 195 (unproductive productive property).

It will always be difficult to estimate in advance the probable amount of the marital deduction and the percentage thereof that may be advantageously provided for by the terms of the will. The values of the estates of each of the spouses as of the uncertain dates of their respective deaths must be estimated. Allowances must be made for expected changes. Possible inheritances must be considered. Only the roughest kind of an approximation is possible. To avoid this type of guesswork the deduction may be keyed to the will with a provision defining the gift to the spouse as fifty per cent of the decedent's adjusted gross estate minus the value of any other property interests which are included in his gross estate and which pass or have passed to the other spouse in a form which qualifies them for the marital deduction. This would seem to be preferable to an attempted estimate wherever full use of the deduction may possibly be desirable.

An immediate reduction in taxes will often be preferred even though this results in a somewhat heavier tax burden upon the subsequent death of the other spouse. This is so because the survivor will have the use of the money resulting from the temporary postponement of the tax during the period of his life, and the substantial reduction in the cash immediately needed for taxes may eliminate any necessity for selling estate property at sacrifice prices since a longer period is available for an orderly liquidation of frozen assets.

It will generally be found advisable whenever doubts exist to provide for full use of the deduction with an accompanying provision authorizing the survivor to renounce the legacy in whole or in part. In the absence of such a provision there may be some question under state law as to the right to renounce partially. The Internal Revenue Code specifically provides that where a spouse renounces, the property is treated as passing

from the decedent to the person who then becomes entitled to it. INT. REV. CODE OF 1954, § 2056(d). Thus a gift qualifying for the full marital deduction and authorizing partial renunciation enables the survivor to decide to what extent the deduction may profitably be availed of, and this decision has been postponed until most of the uncertainties upon which the earlier guess would have had to be predicated have been resolved.

Any gift of a fixed amount to the wife is so likely to be wide of the mark as to make gifts of lump sums highly unsatisfactory. Nor will a bequest of "one-half my estate absolutely to my wife and one-half in trust" achieve the objective since in very few cases will the estate passing under the will equal the tax estate. Jointly owned property, life insurance, interests in deferred compensation arrangements may form part of the tax estate but not of the probate estate. Indeed the largest portions of many estates pass outside the will. Assume that X has the following assets:

Cash in bank (individual account)	$ 5,000
Residence, owned jointly with wife	30,000
Life insurance (payable to wife)	60,000
U.S. "E" Bonds, payable on death to wife	10,000
Business interest	80,000
Miscellaneous	5,000
	$190,000

His tax estate will total $190,000. His probate estate will only total $90,000 (Cash, Business Interests, and Miscellaneous).

If his will leaves one-half of his estate to his wife in such a way as to qualify for the marital deduction, this bequest will amount to $45,000, if we ignore administration expenses. How much property qualifies for the marital deduction will depend on the nonprobate items. If the wife is lump sum beneficiary of the insurance, then the residence, the insurance, the bonds and the legacy all qualify. Here $145,000 qualifies for the deduction but the maximum deduction will be only $95,000. Such a clause unnecessarily qualifies an additional $50,000 and exposes it to tax upon his wife's death.

On the facts assumed, nothing should have been left to the wife under the will in such a way as to qualify for the deduction. But the difficulty with so drafting the will is that assets do not remain static. Assume X sells the residence on retirement and cashes the bonds on maturity. He then invests the proceeds in securities in his own name. Further assume that because of the income tax saving involved (INT. REV. CODE OF 1954, § 101(d)(1)

(B)), he elects one of the installment options under his insurance as the method of payment to his wife. Now nothing outside the will qualifies and, if the will qualified nothing, the deduction would be wholly lost.

What is needed is a flexible clause keyed to the deduction such as provided in this Item. Under such a clause the maximum deduction, no more, no less, will generally be obtained in spite of future changes in the way in which assets are held. This will become clear if the clause is studied with the fact situation above in mind. Under the clause, ignoring debts and administration expenses, there would be tentatively set aside $95,000 and from this would be subtracted the value of any assets passing to the widow which qualify for the deduction. This would include, in the supposed case, the jointly owned residence, the bonds, the insurance, but only if, at the time of his death, these assets (1) form part of his tax estate, (2) pass to his wife and (3) qualify for the deduction.

A word of warning about the indiscriminate use of these clauses may be appropriate. They have been criticized and they can cause real trouble in a limited class of cases. Assume a second wife who is not on speaking terms with the children of the first marriage. The husband's probate estate consists of $150,000. To placate the children who resented the second marriage he had given them $50,000 two years before his death. The Commissioner suggests this may have been in contemplation of death. He also suggests that the husband's business interest may be worth $50,000 more than the executor concedes. Under the clause suggested the widow is on the Commissioner's side. Her bequest under the will, if the gift is determined to be in contemplation of death, will be increased by $25,000. If the Commissioner's valuation of the Business Interest is finally sustained, her bequest will be further increased by another $25,000. But this is the unusual situation. In most cases family harmony exists and all can be counted on to assume a properly adverse position to the tax gatherer.

The best evidence of the practicality and desirability of these formula clauses has been the almost universal approval by trust officers and probate lawyers who have watched them in operation for the past eight years.

Many practitioners and corporate executors prefer a fractional-share type clause such as the following:

> If my wife survives me, I give to my trustees hereinafter named and their successor or successors that fractional share of my residuary estate which will equal the maxi-

mum estate tax marital deduction (allowable in determining the federal estate tax on my gross estate for federal estate tax purposes) diminished by the value for federal estate tax purposes of all other items in my said gross estate which qualify for said deduction and which pass or have passed to my wife under other provisions of this will or otherwise. In making the computations necessary to determine such fractional share, the final determinations in the federal estate tax proceedings shall control. Such fractional share shall be held in a separate trust as follows: . . .

FOURTH
Residuary Trusts

All the rest, residue and remainder of my property of whatsoever kind and wheresoever situated I give, devise and bequeath to my Trustees hereinafter named, IN TRUST NEVERTHELESS, to divide the same into equal shares as follows:

One equal share for each of my surviving children, and one equal share collectively for the living issue of each deceased child of mine.

Each such share shall be held, managed, invested and reinvested, as a separate and distinct trust, and the net income of each such trust, in the sole and absolute discretion of my CORPORATE TRUSTEE and without its being required to observe any precept or rule of equality, may be:

(a) distributed in whole or in part to my wife, Mary; or
(b) distributed in whole or in part to that child of mine because of whom the trust was established; or
(c) distributed in whole or in part to that child's spouse, or
(d) distributed in whole or in part to any one or more of the descendants of that child; or
(e) distributed in whole or in part to any one or more of the beneficiaries of any of the other trusts established by this Item FOURTH of this my Will; or
(f) expended in whole or in part to acquire and pay premiums on life insurance contracts on the lives of any one or more of the beneficiaries of any of the trusts established by this Item FOURTH of this my Will; or
(g) accumulated in whole or in part and added to the principal of the trust.

In exercising its sole and absolute discretion over income my CORPORATE TRUSTEE shall consider but shall not be controlled

by the fact that each separate trust is being established by me primarily for the benefit of a particular living child of mine and his family or the issue of a particular deceased child of mine.

During the lifetime of my wife, if there should arise any circumstances making it desirable, in the sole and absolute discretion of my CORPORATE TRUSTEE to distribute principal to my wife, my Trustees may pay over to her or apply for her benefit such amount or amounts of principal at such time or times as my CORPORATE TRUSTEE may determine. It is my desire, however, that prior to the distribution of any principal to my wife from any of the trusts established by this Item FOURTH of this my Will, the assets of the trust established under Item THIRD of this my Will shall first be exhausted.

At any time during the existence of the trusts established by this Item FOURTH of this my Will my CORPORATE TRUSTEE may pay over to any one or more of the beneficiaries, other than my said wife, such amount or amounts of principal at such time or times as it may in its sole and absolute discretion determine. The power granted herein to my CORPORATE TRUSTEE shall include the power to pay over the entire principal of all of the trusts to any one or more of the beneficiaries.

In exercising its sole and absolute discretion over principal my CORPORATE TRUSTEE shall consider but shall not be controlled by the fact that each separate trust is being established primarily for the benefit of a particular child of mine and his family or the issue of a particular deceased child of mine.

Comment: This clause illustrates the technique of creating several separate trusts and using the accumulation and sprinkle devises:

(a) *Separate trusts.* The trust device offers many income tax saving possibilities. Thus where a trust is being created for several beneficiaries the careful draftsman will provide for a separate and distinct trust for each individual beneficiary. If, for example, there are five children to share in the fund, the property may be given to the trustee with instructions:

1. to pay one-fifth of the income to each child, or
2. to divide the property on receipt thereof into five equal parts and to hold one such part for each child as a separate and distinct trust and to pay each child the income from his part.

This latter arrangement does not create any administrative difficulties since each trust may own a one-fifth undivided interest in each item of property and the five funds may be administered as a unit. The advantage is that five separate tax entities have been

set up. Assume the trustee buys Blackacre for $50,000 and some years later sells it for $80,000. As capital gains are normally taxed to the trustee, the trust or trusts have incurred a $30,000 long term capital gain. If there is a single trust and no other taxable income the trust would pay a tax of about $5,200. But if the gain is split five ways it is taxed at lower brackets and with five exemptions instead of one. The combined taxes would run about $3,200. Separate trusts are particularly important where accumulation powers are provided.

(b) *Discretionary Power to Accumulate Income.* In the past very considerable income tax savings were available through use of accumulation provisions. Where a beneficiary does not need all the income from the fund it is a tax waste to require that it be distributed to him. Prior to the 1954 Code under a discretionary accumulation trust, the income which the trustee decided to pay out was taxable to the beneficiary, the portion retained was taxable to the trust. Thus in years when the beneficiary was in high tax brackets income could be accumulated and later paid out as capital. The 1954 Code attempts to prevent this tax avoidance device by the new five-year-throw-back rule. This rule is designed to impose the tax on a beneficiary who receives a delayed payment of accumulated income, as though it had actually been delivered to him in the years received by the trustee (limited to accumulations of the prior five years). There is thus no tax benefit in accumulating for two or three years and then distributing. But the exceptions to the throw-back rule leave open many of the tax saving plans formerly available. As Casner points out, for all practical purposes the old advantages are still available under the new Code. See Casner, *The Internal Revenue Code of 1954: Estate Planning,* 68 HARV. L. REV. 433, 467 (1955).

The throw-back rule does not operate on:

1. Distributions on the final termination of a trust if made more than nine years after the creation of the trust or after the last transfer of additional capital to it.

2. Emergency payments, even though they come from accumulations of the prior five year period.

3. Income accumulated while the beneficiary is a minor.

4. Distributions from prior accumulations of $2,000 or less.

This special $2,000 exclusion emphasizes the desirability of separate trusts since if there are five trusts, instead of one, as in the example above, $10,000 of prior accumulations may be paid out without incurring the adverse effects of the rule.

(c) *Discretionary Power to Sprinkle Income.* It may be that

the entire income from the trust will be needed by the primary beneficiary for the support of his family but paying it all to the high-bracket income tax member can be wasteful. Thus if the primary beneficiary has two sons in college it would obviously be far cheaper to have the income distributed and taxed to the sons than to their father who would have to add it to his other income. This may be accomplished through a sprinkle provision similar to the above or a clause authorizing the trustee with respect to the income of the trust "to pay the income to or apply the income for the benefit of any one or more of a group consisting of my son John and the issue of John living from time to time in such amount or amounts as the trustee may in his sole uncontrolled discretion determine." The trustee may then distribute the income with an eye to the tax burdens.

Note the decision to accumulate or to distribute and the selection of the distributees is vested solely in the CORPORATE TRUSTEE. This is to assure that at all times the discretionary power will be vested in an independent trustee. For an excellent discussion of sprinkle trusts, see LASSER, ESTATE TAX TECHNIQUE 1077 (1955).

The authority to pay life insurance premiums is commented on in Item NINTH, paragraph (12), *infra.*

Note that with respect to the power to distribute principal to the wife it is suggested that this be done only after the principal of the marital deduction trust has been exhausted. The objective here is to have her first spend the capital that will be taxable at her death before dipping into the capital that will not form part of her taxable estate at her death.

FIFTH

Special Power of Appointment

Each child of mine, from and after the date of my wife's death, shall have power to appoint by deed or by will the whole or any part of the principal of the trust established on his account to or among any one or more of the beneficiaries, other than himself and other than the donee of any other special power hereunder, of any of the trusts established by Item FOURTH of this my Will, in such amounts or proportions and in such lawful interests and estates, whether absolute or in trust, as such child may direct.

No child of mine shall have any power to appoint any part of the principal either directly or indirectly in such a way as to benefit himself, his estate, his creditors or the creditors of his estate. Further he shall have no power to appoint any policies of insurance or the proceeds of any policies of insurance on his life which such trust may own.

Any power conferred on any child of mine shall be exercisable by such child by instrument in writing delivered to the Trustees during the life of such child or by a specific reference to the power in the will of such child. Any such power shall be releasable in whole or in part by such child. In addition to other methods of release or reduction recognized by law, such power may be released or reduced by an instrument in writing delivered to the Trustees expressly declaring the intention of such child to release his power in whole or in designated part.

Comment: Under INT. REV. CODE OF 1954, § 2641, only property subject to a general power of appointment is includible in the estate of the donee of the power. By definition a special power is one which is not exercisable in favor of the donee of the power, his estate, his creditors or the creditors of his estate. INT. REV. CODE OF 1954 § 2041(b). Here the power, exercisable by deed or will, is restricted to the trust beneficiaries. This may be preferable to a very broad class that excludes only the donee. See McCoid, *The Non-General Power of Appointment—A Creature of the Powers of Appointment Act of 1951*, 7 VAND. L. REV. 53 (1953). The first sentence of the second paragraph is designed to make doubly sure that the power will not be construed as general. The second sentence is designed to avoid a possible contention that a power over the proceeds of a life insurance policy on the life of the donee might be construed as an indirect power to designate the beneficiary and hence be classified as an incident of ownership.

The inclusion of a special power adds considerable flexibility and gives the donee many of the privileges of ownership without the attendant tax burdens. See BOWE, TAX PLANNING FOR ESTATES 10 (rev. ed. 1955). On the use of powers generally see LASSER, ESTATE TAX TECHNIQUES 1117 (1955).

The "donee of any other special power hereunder" is excluded from the class of appointees to avoid any contention that reciprocal powers have been created. This may be an unnecessary precaution in view of the second paragraph. On the subject of reciprocal or cross trusts, see Lehman v. Commissioner, 109 F.2d 99 (2d Cir. 1940), *cert. denied*, 310 U.S. 637 (1940); Newberry's Estate v. Commissioner, 201 F.2d 874 (3d Cir. 1953). This last case would seem to suggest that the cautious approach in this item may be wholly unnecessary.

SIXTH
Termination

Notwithstanding the directions heretofore given my CORPORATE TRUSTEE as to the distribution of income and principal, every trust

established by this Will shall terminate, if it has not previously terminated, 21 years after the death of the last survivor of my wife, my children, and any grandchildren of mine in being at the date of my death.

Upon such termination my Trustees shall immediately transfer, convey and pay over the principal of each of the trusts to the lineal descendants then living of the particular child of mine on whose account or on whose issue's account the particular trust was established, per stirpes, and if none, to my lineal descendants then living, per stirpes; if none, to Vanderbilt University, Nashville, Tennessee.

Should any share of any trust established hereby become vested (under the distributive provisions with respect thereto) in any minor beneficiary, then notwithstanding such vesting, the Trustees shall retain the share of such minor beneficiary in trust. The Trustees shall invest and reinvest such share, shall collect the income therefrom, and, after paying the expenses of the trust, shall apply to the support, maintenance, education, or use of the minor beneficiary so much of the net income or of the principal of such share as may be necessary or appropriate (in the discretion of the Trustees) for such purposes until such beneficiary shall attain the age of 21 years (or until his prior death), at which time the Trustees shall pay over the entire principal of such share to such beneficiary (or to his personal representatives).

Comment: The first paragraph requires vesting within the period of the common-law rule against perpetuities.

The last paragraph is designed to avoid the necessity of a guardianship should any distributees be minors. That a trust may continue beyond the period of the rule against perpetuities provided all interests vest within the period, see RESTATEMENT, TRUSTS § 62 (1935).

SEVENTH
Administrative Provisions

The CORPORATE TRUSTEE shall be the custodian of the assets and funds constituting the trust estates; and it shall be responsible for the maintenance of adequate records showing the condition of the trust estates and the income and expenses thereof, and for the preparation and filing of all required accountings, reports, and tax returns. The records pertaining to the trusts shall be open at all reasonable times to inspection by the Individual Trustees, or by any beneficiary of any trust, or by the representatives of any such person; and any such person shall have the right to demand annual accountings showing the administration of the trusts.

The Trustees may combine for investment purposes all or any part of the funds held in any or all of the trust estates, or may hold

the funds of all such trust estates in a combined trust fund; but the Trustees shall be responsible for the maintenance of full records showing the receipts and disbursements, and the funds held for the benefit, of each separate and distinct trust estate, and showing the allocable proportion of any such combined trust fund which belongs to each such separate and distinct trust estate.

The decision of a majority of the Trustees (except where it is otherwise provided herein) shall control upon any matter arising in the administration of the trusts. Any dissenting or abstaining Trustee may be absolved from personal liability by registering his dissent or abstention with the records of the trusts; but he shall thereafter act with the other Trustees in any way necessary or appropriate to effectuate the decision of the majority.

Comment: The burden of day to day administration is placed on the CORPORATE TRUSTEE where it clearly should be. But, as provision is later made for two individual trustees, the individual trustees can outvote and therefore control policy decisions. This puts the investment control in the hands of the individuals in the event of disagreement as to proposed purchases or sales in the event of a difference of opinion between corporate and family member-trustees. Item EIGHTH, which follows immediately, makes it again clear that this control shall not extend to discretionary powers over income or capital distributions and is designed to assure the tax advantages of the income sprinkle provisions of Item FOURTH.

EIGHTH
Certain Powers Vested Solely in Corporate Trustee

I have given the CORPORATE TRUSTEE of my residuary trusts certain discretionary powers over the distribution of income and principal to and among the beneficiaries; I desire to make it clear that, notwithstanding any of the general powers conferred upon my Trustees, no individual Trustee shall exercise or join in the exercise of such powers for his own benefit directly or indirectly. Whenever the participation in income or principal of a beneficiary who is also a Trustee is being considered or may be affected by other action under consideration, all decisions shall be made exclusively and solely by the CORPORATE TRUSTEE.

Comment: See last sentence of comment to Item SEVENTH.

NINTH
Trustee's Powers

I hereby expressly authorize and empower the Executors with respect to my estate and the Trustees with respect to each of the trusts

herein created, in their sole and absolute discretion:

(1) To purchase or otherwise acquire, and to retain, whether originally a part of my estate or subsequently acquired, any and all stocks, bonds, notes or other securities, or any variety of real or personal property, including stocks or interests in investment trusts and common trust funds, as they may deem advisable, whether or not such investments be of the character permissible for investments by fiduciaries, or be unsecured, unproductive, underproductive, overproductive or of a wasting nature. Investments need not be diversified and may be made or retained with a view to a possible increase in value. The Executors or the Trustees may at any time render liquid my estate or the trust estates, in whole or in part, and hold cash or readily marketable securities of little or no yield for such period as they may deem advisable.

Comment: Most lawyers and trust officers, remembering the depression of the thirties and the inflation of the forties believe it advisable to give the trustees the broadest possible investment powers. The power to hold cash uninvested and to purchase underproductive property (growth stocks) may prove particularly valuable. Note that such powers will not adversely affect the marital deduction bequest because of the specific limitations contained in Item THIRD with respect to underproductive property.

(2) To sell, lease, pledge, mortgage, transfer, exchange, convert or otherwise dispose of, or grant options with respect to, any and all property at any time forming a part of my estate or of the trust estates, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as they may deem advisable. Any lease made by the Executors or by the Trustees may extend beyond the period fixed by statute for leases made by fiduciaries and beyond the duration of the trusts.

Comment: Standard clause. Note power to lease beyond the duration of the trust. *Cf.* Nashville Trust Co. v. Lebeck, 197 Tenn. 164, 270 S.W. 2d 470 (1954).

(3) To borrow money for any purpose connected with the protection, preservation or improvement of my estate or of the trust estates whenever in their judgment advisable, and as security to mortgage or pledge any real estate or personal property of which I may die seized or possessed or forming a part of the trust estates upon such terms and conditions as they may deem advisable.

Comment: Standard clause.

(4) To vote in person or by general or limited proxy with respect to any shares of stock or other securities held by them; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of any corporation in which my estate or the trust estates may have any interest, or to the sale, lease, pledge or mortgage of any property by or to any such corporation; and to make any payments and to take any steps which they may deem necessary or proper to enable them to obtain the benefit of such transaction.

Comment: Standard Clause.

(5) To hold investments in the name of a nominee.

Comment: The purpose of nominee ownership is to avoid the necessity on a sale of securities for an examination of the trust instrument by the corporation or its transfer agent, with resulting delay. The speed-up in transferability may be very important in a rapidly fluctuating market. So long as the CORPORATE TRUSTEE holds the physical securities there is little risk of wrongdoing. Note that Tennessee law now provides for nominee ownership. TENN. CODE ANN. § 35-315 (1956).

Many of the powers expressly given merely echo existing statutory provisions. It nevertheless seems wise to recite them in the instrument since the authority of the trustees may then be determined by reading the will without the need for recourse to the statutes. Further the existing law may be amended or revoked. It is also possible that the law of some other jurisdiction may be determinative if the decedent should change his domicile prior to death or if the trusts acquire real estate situated in some other jurisdiction.

(6) To complete, extend, modify or renew any loans, notes, bonds, mortgages, contracts or any other obligations which I may owe or to which I may be a party or which may be liens or charges against any of my property or against my estate, although I may not be liable thereon, in such manner as they may deem advisable; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of my estate or the trust estates against others or of others against my estate or the trust estates as they may deem advisable, including the acceptance of deeds of real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith which they may deem advisable.

Comment: Standard clause.

(7) To apportion receipts and disbursements of my estate or the trust estates between principal and income in such manner as they may deem advisable, in their absolute discretion, including the power to pay as income, if they see fit, the whole of the interest, dividends, rent or similar receipts from property, whether wasting or not and although bought or taken at a value above par; to treat as income or principal or to apportion between them stock dividends, extra dividends, rights to take stock or securities and proceeds from the sale of real estate, although such real estate may have been wholly or partly unproductive.

Comment: The power to apportion receipts and disbursements to income or principal eliminates any necessity for applications to the court in doubtful cases and enables the trustee to do substantial justice as between life tenant and remainderman without being restricted by arbitrary rules of law. The power is of less importance where, as here, the CORPORATE TRUSTEE is given broad discretionary powers over income and principal distributions. Its inclusion, nevertheless, seems desirable.

(8) To employ agents, experts, and counsel, investment or legal; even though they may be associated with, employed by, or counsel for any of the Executors or Trustees or any of the beneficiaries of my estate or the trust estates; and to make reasonable and proper payments to such agents, experts, or counsel for services rendered.

Comment: Standard clause.

(9) To accept beneficial employment with or from any business in which my estate or the trust estates may be interested, whether by way of stock ownership or otherwise, and even though the interests of my estate or the trust estates in said business shall constitute a majority interest therein, or the complete ownership thereof; and to receive appropriate compensation from such business for such employment.

Comment: This may be important to the family trustees where the trust owns a substantial block of stock in a family corporation.

(10) To sell to or purchase assets from any trust or estate, in which any beneficiaries of any of the trusts established by this my Will may be interested, including sales by one of the trusts hereby established to any other one of the trusts hereby established.

Comment: Occasionally it may be desirable to shift assets from one trust to another. Thus if cash is needed in one of the trusts a sale of one of its assets to another trust may be made, without losing family control over the asset.

(11) To purchase from, sell to, or otherwise deal with any corporation, association, partnership, or firm with which any of them may be affiliated, or in which any of them may in any other way be interested, as freely as they might or could deal with an independent third party, and without any greater responsibility, all rules or provisions of law to the contrary being hereby expressly waived.

Comment: Like paragraph (9) above, this power may be important where family businesses are likely to have transactions with the trusts.

(12) To purchase policies of insurance on the life of any beneficiary of any trust, or on the life of any other person in whom any trust may have an insurable interest, and to continue in effect or to terminate any life insurance policy which may be owned or held by any trust; and to pay (from income or principal) any premiums or other charges, and to exercise any and all rights or incidents of ownership, in connection therewith.

Comment: Income used to pay premiums will be taxed to the trustee. The purchase of such insurance relieves the beneficiaries of the personal need to carry insurance which would have to be paid for out of income after it had been subjected to their top income tax brackets. Further it elimmates any estate tax on the proceeds since the trusts own the policies. The insurance nevertheless may serve the usual objective of making cash available to the family for death costs through the power of the CORPORATE TRUSTEE to distribute principal or by a purchase of assets from the estate of the insured decedent.

(13) To pay over all or any part of any net income or principal which the CORPORATE TRUSTEE has determined (in the exercise of its discretion) to distribute to or apply for the benefit of any beneficiary who is a minor or who is legally incapacitated to the legal custodian or to the parents or a parent of such beneficiary, or to any person with whom such beneficiary shall reside at the time; and the receipt or acquittance of such payee shall be a complete discharge of the Trustees with respect to any payments so made, and the Trustees shall not further be required to see to the application of such payments.

Comment: Avoids necessity for Guardianship.

(14) To make distribution of my estate or of the principal of the trust estates in kind or partly in kind and to cause any share to be composed of cash, property or undivided fractional shares in property different in kind from any other share.

Comment: Standard clause.

(15) To execute and deliver any and all instruments in writing which they may deem advisable to carry out any of the foregoing powers. No party to any such instrument in writing signed by the Executors or by the Trustees shall be obliged to inquire into its validity, or be bound to see to the application by the Executors or by the Trustees of any money or other property paid or delivered to them pursuant to the terms of any such instrument.

Comment: Standard clause.

TENTH
Tax Clause

I direct my Executors to pay all federal and state estate, inheritance, succession, transfer or other death taxes which are assessed against my estate or against any beneficiary (including estate and inheritance taxes assessed on account of life insurance proceeds or any other property which shall be included in my gross estate for the purpose of such taxes, whether or not included in my estate for probate purposes) out of that portion of my residuary estate described in Item FOURTH of this my Will.

Comment: No will should be written without a tax clause. The federal code requires that, absent a contrary provision in the will, life insurance and property subject to a general power of appointment, shall bear their shares of the federal estate taxes. INT. REV. CODE OF 1954, §§ 2206, 2207. Beyond that the matter is left to local law. Speaking generally taxes are payable from the Residuary Estate unless the testator manifests a contrary intent or the domiciliary state has an apportionment act. Many, if not most states, require apportionment unless the will provides otherwise. The problem is further complicated by the inclusion of non-probate assets in the taxable estate, *i.e.*, jointly held property, gifts in contemplation of death, etc.

There is no rule of thumb as to the desirable clause. Some testators want each beneficiary to bear his share; others would have it paid from the residue; others would exclude lifetime transfers from the burden. Because of the heavy impact of taxes the entire testamentary plan may be distorted if the matter is not fully discussed with the testator and a clause drawn that will

satisfactorily carry out his wishes. See 3 RABKIN AND JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS 603 (1955) (form 8.33).

ELEVENTH

Authorization To File Joint Income and Gift Tax Returns

I specifically authorize my Executors to elect to file a joint return of income with my widow for any period or periods for which such a return may be permitted following my death and to pay from my estate the full amount of the tax due on such return or any adjustment thereof; and to consent that any gifts made by me or by my wife prior to my death shall, for gift tax purposes, be considered as having been made half by me and half by my wife, and, if such consent be given, to pay from my estate any and all gift taxes that may be due because of such gifts.

Comment: Absent this clause the executor may hesitate to assume the liabilities included. By filing a joint tax return the executor becomes liable for the full tax, including any later assessment and penalties.

TWELFTH

Simultaneous Death

In the event my wife and I die under such circumstances that there is no sufficient evidence to establish who survived the other, I hereby declare that my wife shall be presumed to have survived me and that this Will and all its provisions shall be construed upon that assumption and basis.

Comment: In the past it has been rather common to insert clauses in wills to the effect that if the testator and beneficiary perish in a common disaster, it shall be presumed that testator survived. The reason for this was to avoid heavy successive death taxes on the almost simultaneous transmission of wealth through two estates. If such a clause results in the failure of a bequest to a spouse, the intended marital deduction will be completely lost. It, therefore, may, in some situations, be advisable to reverse the usual clause and provide that in the event of the deaths of both spouses under such circumstances that it cannot be determined who survived, the other spouse shall be presumed to have survived the testator. U. S. Treas. Reg. 105, § 81.47a (p)—1305 (1939), as amended T. D. 6082, 1954-1 CUM. BULL. 195, provides as follows: "Where the order of deaths of the decedent and his spouse cannot be established by proof, a presumption (whether supplied by local law, the decedent's will, or otherwise) that the decedent was survived by his spouse will be recognized as satisfying re-

quirement (1) [requirement (1) is that the decedent's wife survive him] only to the extent that it has the effect of giving to such spouse an interest in property includible in her gross estate under Section 811."

THIRTEENTH
Successor Trustees

Realizing that my Individual Trustees may die, resign, or become incapacitated and that my CORPORATE TRUSTEE may resign and further realizing that unforeseen contingencies, conflicts, real and imagined, among my Trustees, lack of harmony and other events may make it desirable at some time in the future to remove one of my Trustees, I hereby authorize any two of my Trustees, whenever it is in their judgment in the best interests of the trusts, to remove the third Trustee provided (a) that if one of my Individual Trustees be removed, or resigns, dies or becomes incapacitated, the other Individual Trustee shall designate his successor and (b) if the CORPORATE TRUSTEE be removed, or resigns, his successor shall be another CORPORATE TRUSTEE with assets of at least $5,000,000, appointed by unanimous action of my two Individual Trustees. It is my wish and I direct that there shall always be two Individual Trustees and one CORPORATE TRUSTEE, acting as Co-Trustees. If my Individual Trustee, or Trustees, as the case may be, shall fail for any reason to designate a successor, or successors, then upon such failure to act of such Trustee or Trustees, successor Trustee or Trustees may be designated by a majority of the adult beneficiaries currently entitled in the discretion of the Trustees to receive income from the trusts established in this my Will.

Comment: Because of the long duration of the trusts, provision is made for successor trustees. The power of removal gives the family trustees some control over the CORPORATE TRUSTEE. This may be important since the personnel actually administering the trust for the CORPORATE TRUSTEE will change from time to time and occasionally not in the best interests of the beneficiaries. At any rate testators may so think. A clause such as this overcomes much of the objection many people have to a corporate trustee. It is believed that the power to remove does not under present law adversely affect the tax savings through the sprinkle provisions since the successor must be another corporate trustee. But since one can never be sure how the law may develop, Item FIFTEENTH contains an escape clause, whereby individual trustees who might be beneficiaries or regarded as subservient to the wishes of beneficiaries (should the law develop along these lines) may release this power.

FOURTEENTH

Waiver of Bond

I direct that my Executors shall not be required to file any inventory of my estate and that no Executrix, Executor, or Trustee shall be required to give any bond, and that if, notwithstanding this direction, any bond is required by any law, statute or rule of court, no sureties shall be required thereon.

Comment: Standard clause. It seems perfectly safe to waive a bond since there will always be a financially responsible corporate trustee.

FIFTEENTH

Release of Powers

Any Trustees may release (in whole or in part, temporarily or irrevocably, and with respect to any one or more of the trusts) any power, authority or discretion conferred upon him by this my Will, by instrument in writing delivered to the other Trustees and to the adult beneficiaries of each trust involved. If the discretion to distribute, apply or accumulate income is released by the CORPORATE TRUSTEE upon whom it is conferred, the entire net income of the trust shall thereafter during the period such release is effective be distributed:

(a) to my wife during her life and after her death,
(b) to that child of mine, because of whom the trust was established, during his life and after his death,
(c) equally to and among his spouse and lineal descendants, per stirpes, the spouse to have a child's share and if and when none shall be living,
(d) to my lineal descendants then living, per stirpes.

Comment: This is an escape clause designed to protect against future changes in the tax law which might make it desirable for the trustees or some of them to release certain powers. Thus in the event that Congress should impose a burdensome tax on sprinkle trusts (to compensate for the tax savings now available) this clause provides an escape. It also provides for temporarily releasing powers so that if one of the individual trustees expects to be away for a long period he can in effect delegate his powers during his absence.

SIXTEENTH

Executors and Trustees

I hereby nominate and appoint my son, Richard Sprinkle; my son-in-law, John Doe, and the Third Commerce Bank of Special Power, Taxhaven, to be the executors and trustees of this my will.

IN WITNESS WHEREOF,[1] I, Marital Deduction Sprinkle have to this my Last Will and Testament subscribed my name this 1st day of April, in the year of Our Lord One Thousand Nine Hundred and Fifty-six.

s/Marital Deduction Sprinkle

This instrument consisting of nineteen (19) pages, was subscribed by the Testator in the presence of us and of each of us, and at the same time published, declared and acknowledged by him to us to be his Last Will and Testament, and thereupon we, at the request of the said Testator, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses this 1st day of April, 1956.

s/Jane Doe	residing at Special Power, Taxhaven
s/Janet Roe	residing at Special Power, Taxhaven
s/Edward Poe	residing at Special Power, Taxhaven

1. The usual spendthrift clause has been purposely omitted. The sprinkle provisions with respect to both income and principal make such a clause wholly unnecessary. Indeed the sprinkle clause has for hundreds of years been the English practitioner's method of protecting the assets from the claims of a beneficiary's creditors.

Draftsmen would do well to avoid the routine inclusion of spendthrift clauses in wills, absent some real reason for using this device. They seem to be always included as clauses that can do no harm but may upon some extremely remote contingencies prove beneficial. Their presence, however, frequently comes as a shock to donors, who in reliance upon Blair v. Commissioner, 300 U.S. 5 (1937), have wanted, for income tax reasons, to assign their life interests in trusts. Under the *Blair* doctrine an assignment of a life interest in a trust may effectively shift the income tax to the donee. But if such an assignment is ineffective under state law, as is true when the spendthrift clause is used, the donor is precluded from shifting the tax burden.