ACHIEVING FAMILY HARMONY IN ESTATE PLANS/
PRACTICE TOOLS & TRUST PROVISIONS

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“RESTING IN PIECES”: TRADITIONAL ESTATE PLANNING
FOSTERS FAMILY DISHARMONY

by Timothy P. O’Sullivan

If given a choice between preserving family harmony and maximizing the value of assets passing to family members upon their deaths, most parents unquestionably would choose to preserve family harmony. In fact, not infrequently clients will tell their attorneys that they “would rather give my estate to charity rather than have my children fight over my estate.”

Thus, it is highly ironic that the topic of family harmony is largely absent from estate planning seminars, publications, and even the practice of estate planning. During the first two decades of his practice, the author similarly gave little more than a modicum of deference to this issue. The author is now convinced that this professional omission is the primary cause of the high incidence of family disharmony in the estate planning and administration process, its detritus of higher legal and administrative costs, and the often compromised integrity of estate plans. This article summarizes several selected strategies, which may significantly reduce, if not totally avoid, family disharmony in that most vulnerable of situations when adult children become primary beneficiaries under their parent’s estate plan. This usually occurs upon the death of the surviving parent.

Choice of Financial Fiduciary

The choice of a fiduciary to administer the estate or revocable trust when children become primary beneficiaries is probably the single most important decision impacting family harmony. A parent’s normal predilection is to name a child as such “financial fiduciary.” However, parents are notoriously poor prognosticators of potential disharmony in post-death estate or revocable trust administration matters in their own families. Personal experience and inquiries of scores of estate planning professionals have led the author to conclude that choosing a child as financial fiduciary in a multi-child family causes significant family disharmony at least a third of the time. Such family schisms tend to last the duration of children’s lifetimes.

The reasons for such high incidence of disharmony are legion and well-known to estate planners. Non-fiduciary children may resent the parental choice of financial fiduciary. Disputes frequently arise over a myriad of issues involved in the administration of a trust or estate. Other problem areas are lack of compliance with the complex legal and statutory requirements governing
probate and trust administration, valuation of property affecting beneficiary shares, issues regarding the management and investment of trust and estate property, the timing of the distribution of the trust or estate property, non-fiduciary siblings claiming lack of sufficient communication with them by their fiduciary sibling on trust and estate administration issues, interpretation of trust and estate provisions, personal use by a fiduciary sibling or a member of such sibling’s family of trust or estate property, and last, but certainly not least, the distribution among children of a parent’s tangible personal property which has not been specifically bequeathed in the instrument or under a separate memorandum incorporated by reference.

Attorneys are well aware of the aphorism that “an attorney who represents himself or herself has a fool for a client.” The rationale is obvious. Attorneys are too personally involved in their own legal matters to be able to remain objective, even though we are trained to be objective. The task for a child to remain objective regarding a sibling’s discharge of his or her fiduciary duties regarding a parent’s estate, or a child serving as such fiduciary to remain objective regarding the administration of a parent’s estate, is far more onerous and daunting.

Children’s objectivity in such matters, whether as a financial fiduciary or as a non-fiduciary, is unavoidably compromised by their conflicting financial interest in the estate or trust, if not also by sibling rivalry and power struggles, jealousy, inimical family relationships, and the emotional volatility accompanying parental loss. A family cauldron of suspicion, “second guessing,” discontent, confrontation, and even outright enmity often results, occasionally fomented by fractious in-law participation.

Children also often expect a sibling serving a financial fiduciary to serve with no fee, even if the testamentary instrument provides for a fiduciary to receive a fee. Such children believe such services to be provided “pro bono” due to their characterization of such administration as a “family matter.” Children serving as financial fiduciary will often take umbrage at the lack of appreciation exhibited by their siblings in the time they have to devote to such matters and the burden placed on them.

Occasionally, beyond mere hostility, siblings even sue a sibling serving as financial fiduciary for financial loss from a perceived or actual fiduciary inattention, negligence, or malfeasance. Parents often dismissively conclude this prospect “can’t happen in my family” or “I don’t have much to fight over.” However, the risk of family disharmony usually has a greater correlation with the number of children and in-laws than estate value. Additionally, estate and trust administration is a legal and financial matter, not a “family matter” as often categorized by not only children, as above discussed, but also by parents. Family dynamics can only serve as hindrance to the proper discharge of such matters.
Choosing an experienced third party fiduciary, such as corporate fiduciary or certified public accountant, lends professional objectivity and competency, greatly reduces family disharmony risks, and relieves a child or children of this administrative burden usually unappreciated by siblings. Even under the rosiest of scenarios where a child would have managed the estate or trust to the same economic benefit as an experienced third party fiduciary, the net additional cost of having a professional fiduciary is normally quite modest, perhaps averaging no more than 1%–2% of the underlying assets. In less salutary scenarios it can be far more financially beneficial to have an experienced third-party serve as financial fiduciary due to the reduction of costs otherwise occasioned by fiduciary errors and potential malfeasance, outside professional advice and legal fees attendant to family disharmony.

For parents who understandably desire at least some family input in the trust or estate administration process, children may be named to serve as fiduciary dischargers. In such capacity, they may discharge the fiduciary for any reason they deem appropriate and name a successor fiduciary. This is most easily effectuated if the principal testamentary instrument is a revocable trust, for personal representatives and executors of probate estates are subject to appointment under governing statutes. To ensure the experience and objectivity of a successor fiduciary, as well as avoid the appointment of a family member as a successor fiduciary, such successor may be specifically limited to a corporate fiduciary, or a certified public accountant or practicing attorney whose has at least ten years practice experience, preferably concentrating in trust or estate matters. To protect against the arbitrary exercise of a child who may unobjectively perceive the fiduciary to be favoring another child, it is often best that such authority may only be exercised with the unanimity of all children, or in large families, by the unanimity of several children selected as fiduciary dischargers.

Unfortunately, attorney-client discussions regarding financial fiduciary choices tend to be both truncated and rather perfunctory. When afforded a full discussion of the “pros and cons” of financial fiduciary choices, the author has found that a large majority of clients will choose a third party over a child. Less divisive constructive family input in the post-death administration process can be effectuated by reposing authority in a child or children to discharge the named third party financial fiduciary and designate another independent third party as successor. Parental concerns regarding a child’s adverse perception of such third party choice can be assuaged by including a “personal declaration” provision in the governing instrument, clearly stating such choice was made solely to minimize any potential risk to family harmony and avoid placing an administrative burden on children.
Very frequently, property passes outside the testamentary instrument to a child due to assets being held in joint tenancy with the child or the child being named as a beneficiary on parental assets. This may occur due to a parent not being properly informed that such assets were not governed by the testamentary instrument, dying prior to being able to correct the title to assets after executing a testamentary instrument, or titling a financial institution account in joint tenancy with a child for the purpose of permitting the child to pay parental bills. To avoid family disharmony as to the desired parental intent in this regard, as well as litigation to resolve any resultant dispute of this issue, the governing instrument should specify whether any property passing outside its provisions is to be disregarded or instead treated as an advancement against such child’s dispositive share.

Gifts and Loans to Children

A number of provisions can be inserted in wills and revocable trusts which reduce family disharmony by eschewing frequently contentious post-death administration situations. For example, lifetime parental transfers often present post-death family arguments, as well as legal and factual issues, whether such transfers were parentally intended to be gifts or loans, the terms of verbal loans, and their intended effect on children's shares of the estate or trust. Thus, if gifts are not intended to be treated as an advancement against a donee/child’s share, the governing instrument should so state. A viable strategy for loans consistent with most clients’ goals is to provide for the forgiveness of verbal loans (due to difficulty in proving status and terms) and allocating the unpaid balance of written loans to the child’s share, irrespective of legal impediments to enforcement or any alleged modifications not in writing.

Child’s Claim for Personal Services Rendered to a Parent
Following the passing of a parent, children frequently contend their dispositive share should be increased to account for personal services rendered to their parent outside of a fiduciary capacity, such as care, financial management, transportation, and meal preparation. Such claims may be based strictly on a “family equity” argument or an asserted express or implied contract. Unless based on a written agreement, such claims often are without legal merit and almost always result in significant family disharmony. To avoid such consequence, the governing instrument may specify parental intent that any such filial services not rendered under a written agreement are to be considered to have been rendered strictly out of affection and not in anticipation of any monetary remuneration. In that circumstance, the instrument would additionally provide that the satisfaction of any such claim would be treated as an advancement against the child’s share of the estate or trust. Such a provision should have a “chilling effect” on the making of such a claim, for it would place the child in a lesser economic status even if the claim was granted. Such payment for services would be taxable income and the benefit would be further reduced by the attendant costs, such as legal fees, required to obtain it.

**Overbroad Use of “In Terrorem” Provisions**

Estate planning attorneys are also well advised to discuss with clients other provisions discouraging legal challenges to the estate plan or providing for their resolution in a manner more conducive to family harmony. To that end, many estate planning attorneys routinely employ “no contest” or “in terrorem” clauses in wills and revocable trusts to combat the risk of family litigation. However, such clauses commonly are too broadly drafted, potentially applying not only to a challenge of a dispositive provision or the instrument’s integrity, but also to the seeking of an interpretation of ambiguous clauses or the raising of issues involving the post-death administration of the will or revocable trust. Such use of overbroad “in terrorem” clauses is tantamount to using a sledgehammer to kill a fly and may fail as a preventative strategy. They can cause litigation by placing a child’s entire share at issue in every conceivable circumstance such clause might apply. Further, courts often place legal limits on their enforceability. Additionally, overbroad and ambiguous language can have a chilling effect on the raising of quite legitimate legal and administrative issues. None of these consequences furthers family harmony. Such clauses normally should be narrowly crafted and sparingly used. In the author’s opinion their most appropriate use is in targeting challenges to the integrity of the instrument, such as undue influence or incompetency claims that the decedent’s attorney knows would be specious.

**Specifying Whether Spousal Wills or Trusts are Contractual in Nature**

If wills or revocable trusts are contractual in nature, they restrict in one or more aspects the ability of a surviving spouse to amend the testamentary instrument following the death of the
predeceased spouse. In order for testamentary instruments to be contractual in nature, courts normally require a provision providing for an identical disposition following the surviving spouse’s death in a joint testamentary instrument or in separate testamentary instruments. In “joint and mutual” wills, the court will review the use of plural pronouns, joinder and consent language, and a disposition of the entire estate to the surviving spouse to determine if there is contractual intent. Even in the absence of any contractual language, courts may allow parole evidence to establish intent that separate instruments were intended to be contractual in nature.

Obviously, a common disposition on the death of a surviving spouse is common to a high percentage of estate plans. In the absence of any local law requirement of actual contractual language in the testamentary instrument as a condition precedent to the finding of a contractual will or revocable trust, any child whose dispositive interest was adversely affected by the amendment of the testamentary plan by the surviving spouse could assert a contractual agreement between the spouses that such child’s interest in the estate or trust would not be reduced by the surviving spouse. Such an assertion will normally create immediate disharmony between the child and other siblings, adversely affect the integrity of the estate plan by leaving parental intent unspecified and incur substantial economic costs in the resolution of the issue. Even if there is a local law requirement that contractual language be included in a testamentary instrument as a condition precedent to a finding of a contractual instrument, a disaffected child might hold the surviving parent in disfavor or create family disharmony by asserting that a change to the estate plan by the surviving spouse violated the spirit and intent of the predeceased spouse with regard to the estate plan.

Thus, in spousal situations where there is no intent to restrict the surviving spouse from changing the dispositive provisions in any respect, it is important that the provisions of the instrument specifically delineate such intent. If the instrument is intended to be contractual, the instrument should not only clearly specify such intent, but provide the exact nature of such contractual obligation. If the instrument is not intended to be contractual, it should so specify and indicate that the surviving spouse is free to amend the instrument in any manner the surviving spouse may choose.

Not Considering Inclusion of Mediation and Arbitration Provisions

In addition to or in lieu of properly drafted “in terrorem clauses,” consideration should be given to including mediation and arbitration provisions in the instrument. Controversies where children are adversaries could be required to first be submitted to mediation, and if mediation proves unsuccessful, to binding arbitration. Such provisions have many clear advantages. First and foremost, alternative
dispute resolution is much less antithetical to family harmony than litigation. Moreover, the proceedings are private, not a matter of public record, more efficient, generally faster, and can be far less costly. Because mediation and binding arbitration normally must be by agreement, a “stick” to compel compliance among beneficiaries is usually needed. This can be provided by providing in the governing instrument for a forfeiture or substantial reduction of the share of a dissenter who resorts to a judicial resolution. The author’s preference is to repose in a Special Trustee or Trust Protector the authority to not only interpret the mediation and arbitration rules governing such mediation and arbitration, as well as name the mediator or arbitrator in the event the parties cannot otherwise agree, but also to effect a substantial forfeiture of a non-consenting beneficiary’s interest in the estate or trust estate.

Providing for Active and Passive Children in a Business Enterprise

An additional factor leading to a high percentage of family disharmony is an estate plan providing for both “active management” and “passive investor” children to hold interests in a business enterprise, be it agricultural or commercial in nature. This often arises when a limited liability company or corporation is formed to hold the enterprise and active management children are given a controlling voting interest in the enterprise following the parent’s death. It can also result by default when children are devised tenants in common interests in farm land under the testamentary instrument.

Typically, such “passive” children become quickly disenchanted with owning an illiquid, undiversified investment usually providing little cash flow. If the enterprise is being managed through an entity, they also tend to resent having no management role and frequently criticize, if not legally challenge, their “active” siblings’ salaries and management decisions. If the land is owned directly by children as tenants in common, the “passive” children may criticize the efficiency of an “active” sibling’s business or farming operation and threaten, or even initiate, a partition suit to divide business or agricultural real property. Such dissension usually becomes even more emphatic if the fortunes of the business begin to falter.

The “active” children, on the other hand, often become disgruntled with any suggestions, constructive advice or criticism made by “passive” children concerning their management of the enterprise. Indeed, they often tend to resent that any increase in the value of the enterprise also benefits the “passive” children, who played no role in such increase.
Consequently, if there are insufficient non-business assets to satisfy “passive” children’s estate or trust shares, the client should be advised of the highly incendiary nature of the situation, its extreme risk of engendering divisive family disharmony and alternative strategies for its avoidance. Such avoidance strategies include a parent purchasing life insurance to fund equalization of desired shares among “passive” children or including provisions in the testamentary instrument which compel “active” children, in consideration of their acceptance of business assets as part of their dispositive shares, to purchase business interests from the estate or trust that would otherwise have devolved to “passive” children.

Inappropriately Disclosing the Estate Plan to Children

Conventional wisdom held by the general public as well as a high percentage of estate planning professionals dictates that parents should inform children of their estate plans to “clear the air” or to “avoid surprises.” Admittedly, there are some situations favoring at least a limited disclosure of the estate plan. For instance, discussing any family business succession aspects of the plan with children active in the business is necessary to test the viability of the succession plan. However, in the vast majority of other scenarios the author believes that family disclosure meetings generally present far more family harmony problems than they can potentially solve.

It is first important to be cognizant of both parental expectancy levels and the typical family milieu such disclosure would take place. Just as parents are understandably less than accurate predictors of family disharmony following their deaths, they also tend to erringly assess the benefits of a disclosure meeting. Further, they normally have an unrealistic assessment of their children’s objectivity, failing to appreciate it has often been fatally compromised by economic self-interest and intra-family relationships. Also, children are tending to be more dispersed geographically and, thus, more emotionally distant as well. Finally, disclosure may create both an unhealthy “air of expectancy” or “entitlement” and unwanted in-law participation.

The fact is, specific post-death administration issues that might arise normally cannot even be anticipated with any reasonable degree of certainty during the parent’s lifetime. Instead, such potential disputes are best minimized by incorporating the above-discussed strategies in the estate planning process, i.e., providing for an objective third party fiduciary and including provisions which obviate the foregoing circumstances which are inimical to the maintenance of family harmony.
With regard to disharmony that might result from elements of the plan a child might hold in disfavor, the vast majority of such sensitive circumstances involve either the naming of children as financial fiduciary or dispositive provisions favoring one child over other children or which restrict access of a child to the estate through placement of such child’s share in trust with a third party trustee. In the author’s experience, lifetime parental disclosure of the estate plan normally does little to reduce such disfavor or prevent it from being vented against siblings. The better strategy is for the parent to simply place a well articulated rationale regarding such provisions in the parent’s will or revocable trust, keeping the sensibilities of children in mind and noting the estate plan was independently derived and not the product of the influence of any child. As revocable trusts are not normally a matter of public record, privacy as to such matters is best preserved through revocable trusts being the primary testamentary instrument.

Finally, parents should be counseled to consider three significant and highly prevalent downside risks to such disclosure beyond simply not having its desired effect. First, disclosure can create the very disharmonious family circumstance it was intended to alleviate. Lifetime disclosure and ensuing family discussions afford children an opportunity to discuss any elements of the plan, often resulting in disheartening disagreements, arguments and in-fighting over provisions with which they disagree. Children also often pressure parents to change the estate plan to their own advantage to the consternation of their siblings and parents. In contravention of most parental desires, they will often want their spouses to receive “their inheritance” in the event they should predecease their parents. Due to not having acceded to their wishes, parents who do not agree to make such changes will tend to be held in higher disfavor by their children following their passing than would have been the case in the absence of such disclosure. Often to the dismay of parents, such disclosure not infrequently will precipitate children to solicit parental gifts in order for them to “enjoy the benefits of our inheritance now, at a time we can most use it.” Even the relationship of parents with their grandchildren can be indirectly adversely affected if the parent’s children or spouses become upset with the parental estate plan. Second, any such disharmony will have presented itself during the parent’s lifetime and has a high risk of enduring for the remainder of the parents’ lifetime. Third, any unresolved disharmony among children emanating from such disclosure will tend to exacerbate family disharmony during the post-death administration of the parent’s estate or trust.

Conclusion

The preservation of family harmony in the estate planning process is only attainable through a holistic approach combining appropriate client counseling with ameliorative document provisions. Achieving this normally preeminent estate planning goal is also essential in achieving the other important estate goals of maximizing the amount of assets passing to family members and ensuring the integrity of the estate plan. Estate planning attorneys who give family harmony its rightful priority will
find immediate credibility with clients, as strategies fostering family harmony reduce legal and administrative fees. More importantly, such focus will provide clients with a much greater level of satisfaction with the entire estate planning process.

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Tim is also the author of “Family Harmony: A Far Too Frequent Casualty of the Estate Planning Process,” published in the May 2007 edition of the “Elder’s Advisor,” a publication of Marquette University School of Law. Readers can access the Marquette article on the NAELA News website.

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i See, e.g., GEN. PRACTICE SESSION, AM. BAR ASS’N, WILLS AND ESTATE PLANNING GUIDE: A STATE AND TERRITORIAL SUMMARY OF WILL AND INTESTACY STATUTES (1995) (discussing distribution to descendents, will execution, estate planning, and gifts without mention of family harmony considerations).

ii See id. at 1–5 (discussing fiduciary forms and responsibilities).

iii Although there was a wide range (between ten and ninety percent) in the estimated degree of this risk opined by a large number of estate planning attorneys surveyed by the author, the vast majority of such opinions fell in the twenty–five to fifty percent range.

iv See L. RUSH HUNT & LARA RAE HUNT, A LAWYER’S GUIDE TO ESTATE PLANNING: FUNDAMENTALS FOR THE LEGAL PRACTITIONER 125 (3d ed. 2004) (discussing the tendency for family fiduciaries to be less informed and less diligent with their compliance with provisions of the instrument and the law).
v See HUNT & HUNT, supra note 4, at 126 (stating that the selection of a financial fiduciary should be based on factors like capability, experience, and reputation).

vi See id. at 125 (“[T]he activities involved in estate settlement require a more thorough discussion of this important function [of estate asset management] with the client than simply asking whom they would like to name as executor.”).

vii In the context used by the author, the term “advancement” means that the gift is treated as if it was still part of the parent’s estate or trust in determining the child’s share and deemed distributed in satisfaction of such share in the same manner as an ademption.

viii Such forgiveness should have no adverse income tax consequence to the promissor. The forgiveness of debt under a will or revocable trust in a family context constitutes a gift. See I.R.C. § 61(a)(12) (2006).

ix Sometimes loans may be unenforceable for reasons such as a violation of the statute of limitations. See 51 AM. JUR. 2D Limitations § 135 (2002) (“[i]n some jurisdictions, there are separate statutes of limitations for written and unwritten contracts, and the statute for written contracts is longer.”).

x Such clauses have historically been favored by the courts in furthering public policy objectives of discouraging litigation and upholding the testator’s intent. The trend is now in the opposite direction. Now, a majority of states either do not enforce such clauses or enforce them only when the contestant lacks probable cause for initiating a judicial challenge to the testamentary instrument, which is the position of the Uniform Probate Code and the Third Restatement of Property. See Donna R. Bashaw, Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation with Pre-Death Procedures? 2 NAT’L ACAD. OF ELDERS’ ATT’YS J. 349 (2006) (discussing use of in terrorem clauses).

xi 79 AM. JUR. 2D Wills § 714 (2002); see also In re Estate of Chronister, 454 P.2d 438, 443 (Kan. 1969).

Studies have indicated that parties who go through mediation are more likely to have a higher satisfaction level than those who litigate. See, e.g., ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE CHILD CUSTODY, AND MEDIATION 184–93 (1994); GWYNN DAVIS & MARIAN ROBERTS, ACCESS TO AGREEMENT: A CONSUMER STUDY OF MEDIATION IN FAMILY DISPUTES (1988).

See JAY E. GRENI, ALTERNATIVE DISPUTE RESOLUTION 3–4 (3d ed. 2005) (discussing benefits of dispute resolution methods, including privacy and preservation of relationships).


I. PROVISIONS FURTHERING FAMILY HARMONY AND PLAN INTEGRITY.

A. Family Declaration. I am currently married. My spouse’s name is _________. I have _____ (*) children, namely, ____________________, ____________________ and ____________________. I have no other children, living or deceased.

B. Personal Declaration. I have carefully considered my estate plan and all of the various provisions of this Trust Agreement. Whether or not such provisions are considered by others to be unique to me, or common place, this Trust Agreement represents my desire, alone, without interference or influence of others. The provisions of this Trust Agreement are designed to preserve family harmony, provide for prudent and efficient management of the trust estate, minimize any estate and income taxation, protect trust assets following my death from claims against trust beneficiaries, maximize governmental resource availability to trust beneficiaries, protect beneficiaries under certain circumstances from their own possible imprudent management of trust assets, while providing as much flexibility as possible consistent with these goals.

C. *Purposes in Naming Non-Family Member as Successor Trustee. I have provided for a capable and experienced non-family third-party to serve as successor Trustee during appropriate periods of the trust administration process. Although ultimately deciding to the contrary, in making such decision I carefully considered naming a child of mine, or more than one child of mine, to serve in such capacity during such trust administration period. My decision to not do so was not based on any concern of mine that a child of mine could not, or would not, appropriately manage the trust estate. Rather, my decision was based solely on what I considered to be far more important, and ultimately controlling, considerations. First, as preserving family harmony is my most important goal, I did not
want to take any risk, no matter how small, that such goal would be jeopardized by the potential emotional and financial conflicts, as well as differences of opinion on the administration of the trust estate, that invariably arise between or among siblings due to a child or children serving as a fiduciary of a parent’s estate. Secondly, I did not want to place the burden of administering my trust estate upon a child of mine, nor detrimentally interfere with other aspects of such child’s life as a consequence of the significant time commitment such administration could well require. Finally, I simply did not want to have to choose which child or children to name in such capacity. *[Nonetheless, as I desired to have family oversight on the administration of the trust estate to ensure it is administered in a proper and cost effective manner, yet in a manner which would not pose the risk to family harmony that naming a child as Trustee would present during such trust administration period, I have provided hereunder for (*a child)(**children of mine )(***my children) to serve in the capacity of a Trustee Discharger, possessed under such provisions with the authority to discharge such then serving third-party Trustee during such period for any reason and designate a successor third-party Trustee to serve in such discharged Trustee’s stead.]

D. **Child Named to Serve as Successor Trustee; Intent to Receive a Reasonable Fee.** I have named a (*child)(**children) of mine to serve as successor Trustee(*s) of the Trust. As I hold my children in equal affection, my choice in that regard was based solely on *(e.g., practical considerations such as professional expertise, geographic proximity, etc.). Such appointment imposes a high degree of responsibility and carries with it a significant burden as well. Consequently, I would expect my family to respect my appointment and give consideration and appreciation to a sibling serving in such capacity for such services and the time commitment such services will require of the Trustee. In addition, I have provided for any Trustee to receive a reasonable fee for fiduciary services rendered on behalf of the trust estate. So that there can be no question of my intent in this regard, I do not consider it right, proper or fair that a child of mine serving as Trustee should be an exception. Thus, I additionally expect that a child of mine serving as Trustee will exercise such right and nothing less than all other family members will fully respect my wishes that appropriate compensation be paid to such child. Trustee fees paid to a child serving as Trustee are to be based upon normal fees charged by individual Trustees of similar experience and ability which a Court would find reasonable under the circumstances.

E. *Lifetime Trusts for Family Members.* Following my death, I have created lifetime trusts for the benefit of family members. I have done so to ensure that trust assets are protected as much as possible from third party creditor and spousal claims due to a marriage dissolution or an inheritance claim following the death of a child), minimize taxation of trust and maximize governmental resource availability such as SSI and Medicaid to trust beneficiaries, particularly with respect to beneficiaries who at that time may be, or who subsequently may become, physically or mentally disabled. These goals would have been severely compromised, if not totally lost, had I provided for the outright distribution of the trust estate to such family members. While trust assets remain in such lifetime trusts subject to distribution to beneficiaries in the manner and under the terms I have herein provided, the administrative and dispositive provisions governing such trusts are designed to provide clarity as to asset disposition, the desired amount of flexibility to the Trustee and trust beneficiaries, the appropriate desired amount of access to the trust assets by beneficiaries, and efficient and prudent asset management.

F. *Property Passing Outside Trust Agreement.* [Option 1: Treated as an Advancement]It is
my intent that all property I own on the date of this Trust Agreement, or which is subsequently owned by me, which might pass outside of the provisions of this Trust Agreement upon my death (e.g., due to being held in joint tenancy with rights of survivorship or having a beneficiary designation other than the Trustee to receive such property) to a beneficiary of the trust estate, shall not economically benefit such beneficiary to a greater extent than would have been the case had such property been a part of my trust estate at the time of my death. Thus, notwithstanding the dispositive provisions of this Trust Agreement below, if at the time of my death there is any such property so passing outside the provisions of this Trust Agreement to any person or entity who or which is also to receive a portion of the trust estate (whether outright or in trust) under the provisions of this Trust Agreement, the value of such property so passing outside the provisions of this Trust Agreement to such a beneficiary of the trust estate shall be treated as an advancement of such beneficiary's economic share of the trust estate (at the earliest time such allocation can be made) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust estate of such beneficiary which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (irrespective of whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust).

G. **Property Passing Outside Trust Agreement.** [Option 2: Not Treated as an Advancement] It is not my intent that property I own on the date of this Trust Agreement, or which is subsequently owned by me, which might pass outside of the provisions of this Trust Agreement upon my death (e.g., due to being held in joint tenancy with rights of survivorship or having a beneficiary designation other than the Trustee designated to receive such property) to a beneficiary of the trust estate, shall have an effect on the portion of the trust estate passing to such beneficiary. Thus, if following my death there is any such property which so passes outside of the provisions of this Trust Agreement to a beneficiary of the trust estate, the value of such property so passing outside the provisions of this Trust Agreement to such beneficiary shall not be treated as an advancement of such beneficiary's share of the trust estate or otherwise have any effect on such share.

H. Gifts or Loans to Trust Beneficiaries. If there are any gifts or loans not evidenced by a promissory note or other written instrument signed by any beneficiary under this Trust Agreement which would otherwise constitute a portion of the trust estate and with respect to which there is an unpaid balance owing from such beneficiary, any such gift or loan shall not be taken into consideration in determining such beneficiary's share of the trust estate. Instead, the Trustee shall determine the shares to be accorded the beneficiaries of the trust estate hereunder in the same manner such shares would have been determined had such gifts and loans not been made to such beneficiary, any unpaid balance on any such loans to be forgiven at the time of my death and not considered to be part of the trust estate. However, the unpaid balance on any loan to any beneficiary under this Trust Agreement which constitutes a portion of the trust estate and which is evidenced by a signed promissory note or other written instrument (including a guarantee of a loan of a beneficiary to the extent the trust estate is compelled to pay same), is not to be so disregarded, but instead allocated at its full unpaid balance (not considering any alleged modification or cancellation of such note or written instrument made by me or my legal representative which is not in writing) following my death (at the earliest time such allocation can be made), and irrespective of the fact it may not be legally enforceable (e.g., due to the expiration of a governing statute of limitations) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust
estate which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust).

I. Services or Care Provided by a Trust Beneficiary. In the absence of a written instrument signed by or my legal representative, which specifically provides to the contrary, it is not my intent that any beneficiary hereunder be compensated following my death for any services or care provided to me prior to my death in a non-fiduciary capacity which was not compensated by me during my lifetime. I assume that any such care or service was provided purely out of a sense of personal affection and generosity by such beneficiary and not in anticipation of any economic benefit from me or my probate estate or trust estate. Consequently, should any such beneficiary make any such claim of any nature for any such service or care either against my trust estate or my probate estate, including an alleged monetary claim or claim that I promised to make an additional provision for such beneficiary in compensation thereof under the provisions of my will or revocable trust, and such claim is allowed by a court of competent jurisdiction notwithstanding my expressed intent herein, such judicial awarding shall be treated as an advancement of such beneficiary’s economic share of the trust estate following my death (at the earliest time such advancement can be made) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust estate of such beneficiary which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust). Although it is certainly not my expectation that any beneficiary would make such a claim, I am including this provision solely as a protective measure in the unlikely event a beneficiary for whatever reason may be unclear concerning my intent in this regard in order to avoid any family disharmony or economic cost to the trust estate that might otherwise result from such a claim.

J. *Avoiding Undesirable Beneficiary Challenges; No Contest *(In Terrorem)* Provision. *[OPTION 1 TRIGGERING EVENT [BROAD]] If any beneficiary under this Trust Agreement or any legatee, devisee or beneficiary under my Will in any manner, directly or indirectly (including without limitation any separate legal action or claim against a beneficiary which seeks to diminish in any way the value of the benefits to be afforded such beneficiary hereunder), contests this Trust Agreement or my Will, or attempts in any manner to prevent the probate of my Will or set aside my Will or this Trust Agreement or alter any of the provisions of either, or to impede, interfere or otherwise contest the orderly administration of my estate or of any separate trust established under this Trust Agreement by my designated Personal Representative or Trustee, then, and in such event, I direct that such beneficiary and his or her spouse.

[*Suboption 1A PARTIES BEING DISINHERITED (ONLY BENEFICIARY AND SPOUSE)] shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary or such beneficiary’s spouse, and any right such beneficiary or spouse may have had under the terms of this Trust Agreement to serve or act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of
this provision is to effectively revoke all distributions or interest in favor of such beneficiary and such beneficiary’s spouse, whether current, contingent or otherwise. It is not my intent to terminate or revoke the interest of the descendants of a beneficiary (or other contingent beneficiary) who is to be deemed to have predeceased me by virtue of this provision, unless such descendant (or other contingent beneficiary) likewise meets the terms of this provision. However, any such descendant of such beneficiary (or other contingent beneficiary), or any other beneficiary, who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary's interest hereunder, shall be deemed to have also independently violated this provision.

[**Suboption 1B PARTIES BEING DISINHERITED (BENEFICIARY, SPOUSE AND DESCENDANTS) and all of his or her descendants and the spouses of such descendants shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, and any right such beneficiary, such beneficiary’s descendants or such beneficiary’s spouse may have had under the terms of this Trust Agreement to act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, whether current, contingent or otherwise. Any other beneficiary who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary (and such beneficiary’s descendants and spouse) who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary's interest hereunder, shall be deemed to have also independently violated this provision.]

[*It is not my intent, however, that the foregoing provisions apply to any proceeding initiated by a beneficiary under this Trust Agreement to either seek an interpretation of any provision of this Trust Agreement with respect to which there is a reasonable basis to conclude is ambiguous on its face or to challenge a Trustee’s fees or administration of a trust created hereunder if there is a good faith basis for such challenge.]

*[OPTION 2 TRIGGERING EVENT “LIMITED” OR “NARROW” PROVISION – CHALLENGES TO INTEGRITY OF RT] If any beneficiary under this Trust Agreement or any legatee, devisee or beneficiary under my Will in any manner, directly or indirectly (including without limitation any separate legal action or claim judicially or under the “Resolving Controversies Through Mediation and Arbitration” Paragraph below in this Article, against a beneficiary which seeks to diminish in any way the value of the benefits to be afforded such beneficiary hereunder), contests the validity of this Trust Agreement or my Will, or attempts in any manner to prevent the probate of my Will or set aside my Will or this Trust Agreement,
or alter the share of the trust estate such beneficiary is to receive hereunder (other than that which may result through seeking an interpretation of a provision with respect to which there is a reasonable basis to conclude is ambiguous on its face), then, and in such event, I direct that such beneficiary

[*Suboption 2A PARTIES BEING DISINHERITED (ONLY BENEFICIARY AND SPOUSE)] shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary or such beneficiary’s spouse, and any right such beneficiary or spouse may have had under the terms of this Trust Agreement to serve or act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary and such beneficiary’s spouse, whether current, contingent or otherwise. It is not my intent to terminate or revoke the interest of the descendants of a beneficiary (or other contingent beneficiary) whom are deemed to have predeceased me by virtue of this provision, unless such descendant (or other contingent beneficiary) likewise meets the terms of this provision. However, any such descendant of such beneficiary (or other contingent beneficiary), or any other beneficiary, who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.

[**Suboption 2B PARTIES BEING DISINHERITED (BENEFICIARY, SPOUSE AND DESCENDANTS)] and all of his or her descendants and the spouses of such descendants shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, and any right such beneficiary, such beneficiary’s descendants or such beneficiary’s spouse may have had under the terms of this Trust Agreement to act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, whether current, contingent or otherwise. Any other beneficiary who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary (and such beneficiary’s descendants and spouse) who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.]
K. *Mediation and Arbitration of Family Differences.* I direct that any dispute regarding the interpretation of this Trust Agreement, the administration of any trust created hereunder, or a claim against the trust estate, and which either directly involves a beneficiary (including an individual beneficiary serving as trustee) of the trust estate related to me within the second degree on each side of the issue, or with respect to which the economic interests of at least two such beneficiaries of any trust created hereunder within such degree of relationship are adverse relating to any such matter, unless otherwise resolved by agreement of the parties, shall be settled by arbitration. It is my intent thereby to hopefully reduce the cost of resolving such a dispute, preserve privacy, and most of all, minimize family disharmony through such an alternative, non-judicial resolution of such dispute. Notwithstanding the foregoing, the following matters shall not be subject to arbitration: (a) questions regarding my competency, (b) attempts to remove a Trustee or impose personal liability on a Trustee (unless such removal or liability is with respect to a Trustee who is related to me within the second degree); (c) questions concerning the amount of bond, if any, of a Trustee; (d) any matter prohibited by applicable law from being subject to binding arbitration; and (e) any otherwise required arbitration which is waived by all trust beneficiaries within the second degree of relationship to me who would be parties to such compulsory arbitration.

In the event the parties who are so required to arbitrate a dispute are unable to agree on an arbitrator with respect to a matter subject to arbitration, the arbitrator(s) shall be selected by the Special Trustee, which arbitrator shall be a practicing attorney or attorneys licensed to practice law in the state whose laws govern my trust and whose practice has been devoted primarily to an estates, trusts and probate practice for a period of at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state the laws of which govern my trust. Unless the arbitrator, after careful consideration, determines it likely to be unproductive, I strongly encourage such arbitrator to recommend the parties in dispute mediate the matter prior to proceeding with a formal arbitration proceeding. Unless the parties agree otherwise, any such mediation shall be conducted in accordance with the Commercial Mediation Rules of the American Arbitration Association before a mediator who has extensive experience in estates, trusts and probate matters. If the arbitrator determines that mediation would not be helpful in resolving the dispute, the parties are unwilling to submit the dispute to mediation, or such mediation fails to resolve the dispute, the matter would then proceed to formal arbitration as set forth above. In the absence of fraud, the arbitrator's decision shall not be appealable to any court, and shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my trust, including minors or persons under a disability. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

By accepting to serve as Trustee hereunder, any Trustee is agreeing to mediate or arbitrate any dispute in which the Trustee is a party and which is governed by the foregoing provisions of this Paragraph. If beneficiaries of my trust estate are the only required parties not
agreeing to such arbitration and there is at least one such beneficiary who is a party who agrees to such arbitration, I would expect the Special Trustee to amend the provisions of the trust with respect to which each non-consenting party is a beneficiary to the extent of reducing each such non-consenting beneficiary’s economic beneficial interest in the trust estate by fifty percent (50%) from what such interest would have been in the absence of such reduction. Should any beneficiary under any trust created hereunder have any doubt as to whether this Paragraph is applicable to such beneficiary, I would expect such beneficiary to inquire of the Special Trustee as to its application prior to proceeding in any manner which could contravene its provisions. The Special Trustee’s responsive decision in this regard shall be binding on both the Special Trustee and such beneficiary.

Note: The Special Trustee references in this Paragraph assume there are Special Trustee (or Trust Protector) provisions in the Trust Agreement which authorize a third party as Special Trustee to discharge Trustees or amend provisions of the Trust Agreement under certain circumstances. Such authority would have the specific preface “In addition to other authority reposed in the Special Trustee under other provisions of this Trust Agreement,...”, thereby acknowledging the Special Trustee’s authority under the foregoing provisions.

L. *Non-Contractual. This Trust Agreement and the funding thereof is my free and voluntary act. It is not the result of, nor does it violate, any commitment or agreement with any person*[, including my spouse]. It may be revoked or amended by me in any manner and in my sole discretion pursuant to the provisions hereunder at any time*[, even if my spouse has predeceased me].

Note: This provision assumes that the Trust Agreement is not contractual in nature to confirm such intent.

Additional Notes

*-Indicates an optional provision.

*, followed by ** or ** and ***-Indicates mutually exclusive provisions.

It is assumed that although Paragraphs C and D, and F and G, are mutually exclusive provisions, that one of such alternative Paragraphs will be included in the Trust Agreement.

DIVIDING TANGIBLE PERSONAL PROPERTY
NEED NOT DIVIDE THE FAMILY

By Timothy P. O’Sullivan
If asked to prioritize estate planning goals, most clients would place maintaining family harmony at the apex, ahead of even maximizing the amount of their assets passing to family members. Such priority is rightfully placed, for family disharmony occurring during the post-death administration of an estate or revocable trust not only tends to endure for the lifetimes of family members, it can compromise the integrity of the estate plan and substantially reduce the value of the estate or trust passing to family members as a consequence of legal fees and other attendant economic costs. Despite such importance, family harmony objectives traditionally have been given very little attention in the estate planning process. Instead, estate planners mostly inadvertently, but nonetheless shortsightedly, have devoted their attention almost solely on the dispositive plan governing the distribution of assets and related technical administrative and tax facets.

This is most unfortunate, for the author is convinced that the vast majority of family disharmony frequently occurring in the administration of an estate or revocable trust would be avoided if estate planning attorneys took a much more proactive posture with their clients. Clients are rarely sufficiently counseled on preventive measures which avoid family disharmony and the vast majority of estate planning attorneys does not have ameliorative provisions favoring family harmony objectives in their will and revocable trust (both such instruments hereinafter being singularly referenced as the “testamentary instrument”) form systems. Until realizing the critical importance of family harmony in the estate planning process and the salutary role estate planning attorneys can play in its protection, the author was a similar unwitting participant in this long-standing professional neglect.

This article addresses an aspect of trust and estate administration at particularly high risk of engendering family disharmony, the disposition of a parent’s tangible personal property items among children. Mourning the loss of a parent, usually a surviving parent, children are understandably at that time in a fragile emotional state. Many of such items typically have a very high sentimental value among children and can be a touchstone to their family heritage. Impacted by sibling rivalry and possessed of intense emotional and financial conflicts of interest, children’s viewpoints on the fairness of their distribution usually have only a coincidental relationship to objectivity. Unwanted in-law participation frequently exacerbates already high tension levels. When these factors are infused into an estate plan typically devised with little sensitivity to family harmony issues, a “perfect storm” of family disharmony enabling factors is presented. The result is that the disposition of such items among children following a parent’s death is a major contributor to the family disharmony which all too frequently accompanies the administration of an estate or revocable trust.

Choice of Financial Fiduciary

Problems surrounding the distribution of tangible personal property items among children cannot be adequately addressed without discussing the importance of the choice of the executor or personal representative of an estate and the trustee of a revocable trust (such fiduciaries being hereinafter collectively referred to as the “financial fiduciary”). This choice has a great impact on family harmony during all phases of the post-death administration of estates and trusts, not the least of which is the distribution of such items. Most parents follow their natural instincts and choose a child or children, often their oldest child, to serve as financial fiduciary at the time
their property is to pass to children following their death. This is an understandable predilection, for parents are prone to view such post-death administration as a family matter, rather than its true character as a legal and financial matter. As a consequence, most parents instinctively trust a child is the proper financial fiduciary to carry out their dispositive wishes.

Following such tendency can have a disastrous effect on family harmony. What may be viewed as a great compliment by a child chosen as financial fiduciary is often viewed as a personal affront by other children, who tend to conclude that their parents either did not trust them or believed they were not sufficiently competent or responsible for the position. Further, children not named as financial fiduciary, possessed of financial and emotional conflicts of interest indelibly clouding their objectivity, have a propensity to “second guess” the myriad of administrative decisions normally required of their sibling serving as financial fiduciary or feel they were not sufficiently consulted regarding such decisions. If a child serving as financial fiduciary makes a mistake regarding any such administrative decision, such financial fiduciary’s siblings will tend to be quite unforgiving. Naming multiple children to serve as co-fiduciaries may avoid the resentment of children not being chosen, but it tends to exacerbate tension levels by involving multiple children in every administrative decision.

Such family disharmony risks do not redound solely upon children not chosen as the financial fiduciary. Children chosen as financial fiduciary can end up resenting both their parent’s appointment and their siblings. Fiduciary responsibilities can consume substantial amounts of the financial fiduciary’s time, negatively impacting both family life and employment. Disagreements and contentious disputes frequently arising between the financial fiduciary and siblings regarding the administration of the estate or trust can exact a considerable emotional toll. Adding insult to injury, the financial fiduciary’s services are typically unappreciated by siblings who usually ungraciously expect such services to be provided at no compensation.

As a consequence, there is little doubt but that much of the very high frequency of significant family disharmony which occurs in the post-death administration of an estate or trust in a multi-child family is directly attributable to children having served as financial fiduciary. Having polled scores of estate planning attorneys on this issue and with over thirty years of estate and trust administration experience, the author estimates such risk of family disharmony if a child is appointed as financial fiduciary to be at least one-third.

Due to the extremely sensitive nature of the disposition of tangible personal property items, family harmony risks at that point in the estate or trust administration process are often at their zenith at that time. As noted more fully in the discussion below, family dynamics which become pronounced when a child serves as financial fiduciary are a hindrance, not a benefit, to the objective distribution of such items. Moreover, any family disharmony resulting from the distribution of such items usually occurs early in the estate or trust administration period and tends to pervade not only throughout the remaining administration period, but can endure thereafter for the remainder of the children’s lifetimes.

Choosing a competent and experienced third-party financial fiduciary, such as a certified public accountant or bank or trust company, not only greatly lessens the risk of family disharmony at a normally quite modest cost (perhaps one to two percent of the value of the estate
or trust on the average), it furthers the proper administration of the estate or trust and relieves a child of the burden of such responsibility. Unfortunately, only in a small minority of situations are parents sufficiently counseled by estate planning attorneys on this overarching estate planning issue. As a result, a parent’s choice of financial fiduciary is usually more the product of an instinctive reaction to the estate planning attorney’s inquiry than an informed and well-reasoned decision. In the author’s experience, a clear majority of appropriately counseled parents who would otherwise have chosen a child as financial fiduciary in a multi-child situation instead will elect instead to choose a third party.

Selecting a third party as financial fiduciary need not exclude children from having a role in the administration of the estate or trust. Children can be named to serve in the indirect role of financial fiduciary discharger having a far less deleterious family harmony risk. As fiduciary discharger, children would possess the authority to discharge the financial fiduciary and name another third party of similar qualifications (e.g., certified public accountant or corporate fiduciary) as successor. Serving in the role of financial fiduciary discharger not only gives children the satisfaction of having a participatory role in the process, it provides a “check and balance” on the fees and proper discharge of the third party financial fiduciary’s duties. It is normally desirable that such authority be reposed in all responsible children to foster a broad and non-exclusionary feeling of participation and be exercisable only by unanimity to protect against an arbitrary exercise or one motivated by parochial economic interests. Such authority would be exercisable at any time such financial fiduciary’s fees or performance for any reason proved unsatisfactory to children serving in such role.

Securing the Personal Residence

When a parent passes away as the sole occupant of a personal residence, it is normally desirable for the personal residence to be secured by changing the locks (and installing an alarm system if one is not already present) as soon as possible following the parent’s death. Otherwise, the vacant residence is vulnerable to burglaries and its contents to theft by a known or unknown third party having access to a residential key. In addition, as most estate planners have unfortunately experienced, in the absence of securing the residence children or members of the decedent’s family have been known to surreptitiously take tangible personal property items from the premises outside the prescribed distribution process under the estate plan. A child’s access to the premises will at the very least often breed suspicion among other children that such untoward takings may have occurred. Such problematic circumstances can be avoided by not permitting access of family members to the residence when the financial fiduciary is not present until all important tangible personal property items have been distributed or otherwise disposed of in the estate or trust administration process.

For such authority to be exercised with the alacrity it warrants, the financial fiduciary needs to be aware of this directive at the time of the parent’s death. If the financial fiduciary was not made so aware during the parent’s lifetime, another person entrusted with such responsibility should make the financial fiduciary aware at the time of the parent’s passing. Otherwise, the financial fiduciary might not become aware of the directive until a later time the administration of the estate or trust is commenced. Even then, securing the personal residence of the decedent is much more practically and timely implemented by a trustee of the parent’s revocable trust than
by an executor or personal representative under the provisions of the parent’s will. The former financial fiduciary would possess immediate authority to do so following the parent’s death as successor trustee, while the latter fiduciary would have no such authority until judicially appointed as personal representative of the decedent’s estate.

Irrespective of when such authority is exercised, it is likely to incur resentment in children who tend to view such action as “heavy handed,” cold, exclusionary or distrustful of them. Testamentary instrument provisions or parental directions left for the financial fiduciary with the testamentary instrument can militate against this consequence by directing the financial fiduciary to secure the premises in the above manner. Such direction would avoid any specific mention of children, but simply enunciate its purposes of protecting the contents against burglary or theft by any unknown third party who might have access to a key and avoiding any question as to the integrity of its contents until tangible personal property items are distributed pursuant to the provisions of the testamentary instrument. Thus, in complying with such instruction, the financial fiduciary would not be acting upon the fiduciary’s initiative, but simply following the parent’s direction.

Despite the foregoing benefits of securing the personal residence, its implementation by a child serving as financial fiduciary carries with it family disharmony risks which may outweigh its benefits. Securing the residence and insisting that no sibling have access to the residence outside the financial fiduciary’s presence can be quite divisive, most particularly if there are other children in possession of a key to the residence. The fact that a child would be simply following the parent’s directive may not sufficiently assuage the resentment of siblings. Moreover, such resentment may spill over into a suspicion that the child serving as financial fiduciary improperly took tangible personal property items from the residence. Such problems illustrate yet another negative family harmony, as well as practical limitation, in appointing a child to serve as financial fiduciary.

Achieving Economic Parity among Children

The choice of financial fiduciary aside, there are two other fundamental causes of estate plans engendering family disharmony in the post-death disposition of tangible personal property items among children. First, they may actively foster such disharmony by specifying a distribution method providing a monetary incentive for children to compete against each other for such items or which could result in unequal monetary benefits being conferred among them. Second, they may passively permit such result by reposing discretion in the financial fiduciary to choose a distribution method which could occasion either such adverse consequence.

To avoid creating an unfavorable family harmony environment for the disposition of tangible personal property items, provisions in the testamentary instrument must satisfy two basic principles. First, they must foster an atmosphere in which children’s desires with respect to tangible personal property items are motivated not by their monetary value, but principally by their sentimental value (such as with respect to a family heirloom) or a combination of their sentimental and personal use value (such as a parent’s furniture) to the child. Secondly, the distribution of such items must have no adverse impact on a child’s ultimate economic share of
the estate or trust. Satisfaction of the former prerequisite is necessarily dependent upon satisfaction of the latter.

A simple requirement in the testamentary instrument for the equal value division of such items among children is insufficient. Family disharmony can nonetheless result from children seeking items they do not want, but which are wanted by a sibling, in order to achieve an actual or perceived equal value distribution of all items subject to distribution. Further, such provision fails to recognize that value parity in the distribution of such items is often impractical under the circumstances. Instead, enhancement of family harmony in the process of distributing tangible personal property items requires provisions in the testamentary instrument which properly adjust for any disparity in the values of such items actually distributed among children. This adjustment would come either from the sale proceeds of any items not desired by children or from the children’s shares of the residue of the estate or trust.

In order to be able to monetarily adjust for disparate values of tangible personal property items distributed to children, such items need to be valued by the financial fiduciary. Valuations of such items would be required in any event in circumstances where a federal or state estate or inheritance tax return was required to be filed. Items having a significantly greater value or personal usage as a collection or set, rather than individually, would be valued and distributed as one item. To make such appraisals as economical as possible, the testamentary instrument should require the financial fiduciary to procure formal appraisals from knowledgeable and experienced appraisers only with respect to tangible personal property items judged to be of substantial value, e.g., antiques, paintings, jewelry and collectibles. A more economical “walk through appraisal” approach from knowledgeable estate sales persons would be authorized with respect to other tangible personal property items which, although not of substantial value, were perceived to have more than a nominal value (say perhaps in excess of $25 adjusted for inflation from the date of the testamentary instrument). All other items having a de minimis or no value would be given a value of zero in the distribution process.

As the economic parity provisions of the testamentary instrument favor selection based upon sentiment, it follows that children would normally select items they would not have purchased in the open market. Moreover, children would not be expected to net the full retail fair market value of selected items should they later choose to sell them. In recognition of these factors and the parental desire for true economic parity among children, the parent may want testamentary instrument provisions to direct that such appraised values of items be set at somewhat less than their actual fair market value on the open market, say eighty percent of such value.

To further ease the financial fiduciary’s task and reduce administrative costs in procuring such value determinations, the financial fiduciary would be directed to circulate a preliminary list of the parent’s tangible personal property items available for distribution to children which are to be later given an ascribed value greater than zero in the distribution process (thus being in need of an appraisal). The financial fiduciary would reference with children the economic parity provisions in the parent’s testamentary instrument regarding distributed items and inform them that such provisions are designed (and should specifically so state therein) to incentivize children to select items not on their monetary value, but on their sentimental or personal use value. When
all children have noted items in which they may have an interest, unless valuations were otherwise required for an estate or inheritance tax return, only those items would have to be appraised and valued for the purpose of the distribution process.

The above-determined values of tangible personal property items then would be given to children prior to the distribution process, thus providing them with sufficient information to make an informed decision relative to comparing an item’s sentimental or personal use value with its monetary value.

**Distribution of Tangible Personal Property by List**

The laws of most states assist in the disposition of tangible personal property items by providing, without need of the formalities of wills, for an individual to dispose of tangible personal property by simply leaving a written list (hereinafter referred to as a “Personal Effects List” or simply “List”), provided there is a reference in the will to such optional List. These laws usually require that the List either be in the handwriting of or signed by the testator. Further, the List must describe the items with “reasonable certainty” so that the items are easily identified and properly distributed. Some states, such as Kansas, repose similar authority in grantors of revocable trusts, although such disposition should be able to be effectuated even in the absence of specific statutory authority simply by drafting the List in the form of a trust amendment. Identifying furniture and household effects items by referencing numbers attached to the back of the item, rather than by description, although a time-honored technique employed by many parents, is far from foolproof and should be avoided. As most estate planners have unfortunately experienced, such numbers can become quite mobile following a parent’s death.

If parents duly provided for the disposition of all tangible personal property items of interest to children either in their testamentary instruments or under the provisions of a Personal Effects List, potential resentment by children of parental choices in their disposition aside, family harmony would not be impacted as a result. However, given the normally large number of such items, their changing makeup, the vicissitudes of parental desires regarding their disposition, and the reluctance of parents to undertake this task, this is understandably a far from normal occurrence.

Nonetheless, rather than leave the post-death disposition of tangible personal property to methods discussed below having at least some risk to family harmony, parents should be strongly encouraged by their estate planning attorneys to utilize such authority as much as practically possible. A Personal Effects List should be created which at a minimum includes items the parent perceives to be of the most significant sentimental or personal use value to children. Preparation of the List should also reduce both the impact and the possibility of a contentious, and frequently baseless, assertion by a child that a parent “told me that [a particular item] would be mine.” If true, it would have been expected that such item would have been included on the List.

The preparation of a Personal Effects List is particularly important in second marriages when the default provision in the testamentary instrument provides for the disposition of tangible personal property items to the surviving spouse. In that situation, the parent should ensure the
List directs the disposition of items important to their children rather than permit such items to pass under the default provisions to the surviving spouse, who may not later distribute such items among the predeceased spouse’s children by gift or testamentary instrument or simply not survive long enough to do so.

Personal Effects Lists have an unfortunate habit of “disappearing” when kept in an insecure place, such as in an unlocked cabinet or drawer in the parent’s residence, or even in a secure place, such as the parent’s safe deposit box, when a child is named as successor financial fiduciary. Thus, the List should be placed with the parent’s original documents in a sealed envelope in a safe deposit box when someone other than a child is named financial fiduciary. If a child is named as financial fiduciary, a duplicate original should also be given to the parent’s attorney. In other circumstances, the parent’s attorney should at least be given a copy of the most recent List.

The Personal Effects List should be revisited periodically, removing any items which may have been lost, sold, or destroyed in the previous year, and adding items acquired during the prior year which they believe might be of sentimental or personal value to their children. The parent also may find it desirable to make a video of such items. An accompanying audio component could reference items on the List and perhaps also outline the family heritage of heirlooms for the benefit of children and their descendants.

**Parental Discussions with Children in Preparation of List**

Prior to creating a Personal Effects List, it is advisable for parents to consider discussing with their children their preferences in receiving tangible personal property items following their death. Rather than leave parents to their own devices in such discussions, estate planning attorneys should outline a strategy for their clients to use that garners sufficient information for the parent to make an informed and equitable decision (from the parent’s perspective) while preserving family harmony in the process. The procedures outlined below typically satisfy both such objectives.

Parents choosing to discuss the disposition of tangible personal property items with children should preface such discussion by advising them that the distribution of such items following their death is designed to maximize family harmony, the parent’s most important estate planning goal, while achieving monetary equality among their children in their disposition. Consequently, children would be made aware that any inequality in values in their disposition among children will be adjusted from other assets in the estate or trust. With economic consequences being removed as a factor, children would be instructed to make their choices based solely upon their sentimental or personal value.

Each child would then be told to prepare a list of items they would like to receive following the parent’s death, listing them in order of their priority. Children would be informed that in circumstances where a given item is desired by more than one child, the parent would determine its disposition in as fair a manner as possible. Children could be told that the parent would take into consideration the priority placed on such item by mutually interested children and the overall number and priority of requested items of children not desired by other children.
If all factors were equal, the parent could indicate the choice would be made strictly by random selection.

Further, the parent would advise children that lists submitted would not be shared with other children, nor would the specifics of the parent’s Personal Effects List be disclosed to any child until the post-death administration of the parent’s estate or trust in order to further family harmony estate planning objectives. Children having knowledge of the List conceivably might try to persuade parents to make changes to the List, seek current distribution of such items, or take umbrage at their disposition to other children. They also might resent other children desiring the same items they wish to receive or believe other children were given an unfair preference by parents.

Following its preparation, in order to preserve confidentiality the Personal Effects List should not be stored in a place where it might be accessible to a child. Rather, as noted above, it should be kept in a secure location with the parent’s attorney being given a copy of the List.

*Single List for Married Couple*

In the common situation where married parents provide for all tangible personal property items to pass to the survivor and then pass to their children upon the death of the first parent, a high percentage of parents will see no need to prepare a Personal Effects List while both are living. Instead, that task is likely to be left for the survivor. Obviously, this is not a prudent strategy. The couple may die simultaneously or the surviving spouse might pass away within a short time of the predeceased spouse, leaving insufficient time for the survivor to prepare the List. Moreover, incurring such an extended delay in the preparation of the List significantly diminishes the chances of its eventual preparation.

Preparing the Personal Effects List while both parents are living need not necessitate the inconvenient preparation of a List by each parent. Instead, the couple may create one combined List. The List would specifically direct for the disposition of tangible personal property upon the death of the survivor. To facilitate the process, it is desirable for their estate planning attorney to prepare a form for this purpose which references an attached exhibit. The exhibit would have columns for the items and named distributees, noting the need for a description of an item sufficient for its proper identification.

The exhibit could also provide, item by item with a “yes” or “no” marking, whether the value of specific items disposed of by List are to be taken into account regarding the disposition of any remaining tangible personal property items not included on the List. Normally, as noted above, it is advisable for the provisions of the testamentary instrument to be designed to ensure that the disposition of all such items is intended to achieve an equal monetary disposition to all children. Consistent with the concept of equalizing monetary distributions of such items, it would be expected most items would be marked with a “yes.” Nonetheless, there may be a need to make an exception. For example, a “no” marking might be appropriate in extenuating circumstances, such as where a parent has designated a particular item received as a gift from a child to pass to the child who was its donor. If so, it would be both helpful and desirable from a
family harmony perspective for the reason for such non-advancement treatment to be noted thereon.

Time Period for Locating List

In addition to including any requisite provisions in the testamentary instrument necessary to validate the Personal Effects List, a reasonable time frame should be specified for the discovery of the List following the testator’s death, say perhaps sixty days. If, at the expiration of such period no List has surfaced, the financial fiduciary would be authorized to conclusively presume that no List exists and proceed to distribute such items as provided in default thereof under the provisions of the testamentary instrument. Thus, such distribution would be final even should a List later surface.

Distribution of Remaining Tangible Personal Property not Disposed of by List

Unfortunately, as noted above, only a minority of parents even prepare a Personal Effects List disposing of their tangible personal property. Those that do usually leave a List that is far from comprehensive. Thus, in the vast majority of situations, there is a significant amount of tangible personal property items not disposed of by a List. As such, it is important that the testamentary instrument appropriately address this situation by providing a mechanism for the disposition of such items not disposed of by a List that is most facilitative to the maintenance of family harmony. Placing the discretion for such disposition method in the financial fiduciary may incur risks beyond simply the financial fiduciary choosing a method not conducive to its maintenance. It leaves the financial fiduciary vulnerable to children asserting that the financial fiduciary was arbitrary in the method chosen. If a child is chosen as financial fiduciary, it risks disagreements with siblings over the method chosen and the financial fiduciary being blamed for an outcome a sibling deems unfavorable.

The distribution procedures that are favorably discussed below are designed to satisfy the two aforementioned family harmony prerequisites, i.e., providing an incentive for children to choose tangible personal property items solely on their sentimental or personal use value and ensuring their distribution does not affect a child’s ultimate economic share of the estate or trust. However, as will be noted in the discussion, their procedures can vary on their impact on family harmony. All such methods assume the financial fiduciary has determined the values of tangible personal property items in the manner discussed above and provided such values beforehand to the children. Strictly from a logistical standpoint, financial fiduciaries may find it favorable to implement them in two phases, first as to items having an ascribed value, then as to items given a value of zero.

Distribution by Agreement of Children

It would appear to be both reasonable and consistent with parental desire for the testamentary instrument to give children a reasonable amount of time, say sixty days, following a parent’s death, to agree among themselves on the disposition of tangible personal property items not disposed of by List. Such period would correspond with the above-discussed period for the List to be located. If there are any minor children at the time of execution of the testamentary instrument, such authorization should
have a condition precedent that there be no minor child at the time of such agreement. Items not disposed of by agreement would be distributed among the children under one of the methods discussed below.

However, clients should be counseled that such authorization for agreement by children possessed of emotional and financial conflicts of interest is fraught with the possibility of contentious arguments. This is where an independent third party serving as financial fiduciary could provide a facilitative role. The third party could be authorized to request each child to make a list of tangible personal property items the child wishes to receive. To the extent only one child desires a specific item, the financial fiduciary could award such items to the child who requested them. To foster objectivity and rational discourse, the third party financial fiduciary could moderate discussions among children regarding the distribution of the remaining items desired by more than one child. Due to their strong potential to have a fractious effect on family dynamics, in-laws should be specifically excluded from such discussions.

A child serving as financial fiduciary would be expected to be much less objective, and much more divisive, than an experienced third party in this role. Thus, rather than risking vitriolic arguments on the division of such items when a child is serving as financial fiduciary, consideration should be given to leaving such disposition entirely to one of the alternative distribution methods discussed below. Moreover, the request of a child serving as financial fiduciary for in-laws to be excluded from such meeting can incur significant sibling resentment and is yet another peril to naming a child as financial fiduciary.

**Distribution by Auction**

One distribution method for remaining tangible personal property items is by auction. The auction could be directed to be private, with each child either to use their own money or being given an equal amount of either “virtual money” to bid on items of their choice, with the proceeds in the former circumstance being distributed equally among the children. Alternatively, the testamentary instrument could provide for a public auction, whereby the attendees would be children and the general public, the proceeds being distributed equally among the children. Whatever the chosen auction method, having already valued items under the above described method with respect to which any child has expressed an interest will aid children determining the appropriate bid.

If the auction involves actual money, children ostensibly will be equally treated from an economic standpoint. The proceeds would be assigned to the residue of the estate or trust, where it would be proportionately distributed among the children, or perhaps more desirable administratively, the cumulative purchase price of items purchased by each child would simply
be charged as an advancement against each child’s shares of the residue. However, this may not be the substantive result. Children, when competing against each other in the bidding process, may pay well in excess of the fair market value of items, thereby proportionately diminishing the share they otherwise would have received in the trust or estate to the extent of such excess.

Nor is this procedure without significant family harmony pitfalls. Children who do not have significant outside assets may resent the purchasing power of siblings to procure desired items, particularly if the parent’s estate does not leave them a substantial residuary share. Children who have to bid beyond the market value of an item in order to get it may resent other children who drove up the bid price. Children who were outbid by other children may resent other children to whom items were lost in the bidding process. If the auction is open to the public, it can have the further deleterious consequence of strangers walking away with family heirlooms.

If a silent, as opposed to an open, auction is held, the bids would be sealed and not opened until all bids were in. If a child is serving as financial fiduciary, unless the bids are opened in the presence of the other children at the close of the auction, there can be suspicions they were reviewed by the financial fiduciary prior to the financial fiduciary making a bid. Irrespective of whether a child is serving as financial fiduciary, once opened, the sealed bids should be shared with all children to ensure process transparency. A sealed bid silent auction has the benefit over an open auction in avoiding confrontation in the bidding process, but it does not avoid the anxiety of children having to determine the purchase price necessary to outbid their siblings and will not avoid the possible resentment of children who have been outbid, particularly with respect to items of high sentimental interest.

The use of “virtual money” in the auction process is more problematic and should be avoided. Although each child is given an equal amount of virtual money to use in the bidding, it creates additional tensions in children having to strategize and compete among themselves in using their limited amount of allocated “money” to ensure they have enough left to secure remaining wanted items. If it is an open auction, they can also become quite resentful of other children when the “money” prematurely runs out during the bidding process. Moreover, as there is no certain nexus between the amount of “virtual money” used in bidding and the market value of such items, economic parity is not necessarily obtained with regard to the value of the items received and there can be no reconciliation in the residue, for there are no proceeds to allocate to the residue.

In short, even if economic parity is achieved among children regarding the proceeds of the auction, the tendency of the auction process to cause anxiety among children, the potential inequity in substantive economic benefits conferred among children due to the bidding process, the possible resentment of children who are outbid by siblings, and the confrontational and contentious nature of the proceedings if an open bidding process is chosen, are aspects that are unavoidably antithetical to the maintenance of family harmony.

Distribution by Lottery
A second distribution method is by lottery. A very common lottery method not consonant with the maintenance of family harmony is the use of a random number selection process determining the sequence of each child choosing a desired tangible personal property item. The sequence is repeated until all desired items have been chosen. Under this method, there is no monetary adjustment among the children for any disparity in the values of items distributed. This method is frequently preferred by estate planners and their clients due to its simplicity without much aforethought. Such method may be embodied in the provisions of the testamentary instrument or simply chosen by the financial fiduciary under authority granted there under. However employed, in failing to provide for economic equality in the distribution of such items, it is inherently not conducive to the maintenance of family harmony. Moreover, it creates some inequity in continuing to favor children who have drawn low numbers in subsequent rounds. The quite frequent use of this distribution method is attributable to parents and financial fiduciaries not being sufficiently advised by their counsel on its adverse effect on family harmony or other distribution methods much more amicable to its maintenance.

However, material variations can be made in such foregoing lottery procedure to yield a lottery method much more protective of family harmony. As with the foregoing lottery method, in the first round the child drawing the number one would choose the first item, the next item would be selected by the child who drew number two, and so forth. However, in the second round, the order would be reversed with the child who had the last number in the first round going first in the second round. The drawing order would again reverse every subsequent round to avoid children drawing the lowest numbers being continually favored throughout the process. Reversing such order tends to “even out” the advantage of children having a preferred initial selection in the process. Moreover, and more importantly, to eschew contentious competition among children to achieve an economic advantage, any inequality in the value of distributed items among children would be charged as an advancement against preferred children’s shares of the remaining assets of the estate or trust.

Thus, children would be advised at the outset of such modified lottery procedure that the economic parity provisions in the testamentary instrument favor selecting items principally on their sentimental or personal use value. Consequently, a child would not be expected to feel any compulsion to continue in any subsequent round should there be no remaining items of sentimental or personal use interest. Distribution of items would cease when all children had opted out of their turns. Although this method has some family harmony risk in that children may resent other children selecting an item they desired, it is far more protective of family harmony than the “bidding wars” dynamic inherent in all of the above permutations of the auction procedure.

*Distribution by Financial Fiduciary*

*Pursuant to Testamentary Instrument Guidelines*

The final distribution method is for the financial fiduciary to distribute remaining tangible personal property items under a method the fiduciary deems fair and equitable without any formal procedure being designated in the testamentary instrument, such as an auction or lottery. This is probably by far the most frequent method under most testamentary instruments, arrived at usually with little or no discussion with clients. If a full discussion of the above options is
entertained with a client, giving the financial fiduciary authority to determine the distribution of such items outside a designated formal procedure in the testamentary instrument would result only if the client either could not conclude which method was most desirable or had concluded neither the auction nor lottery method was acceptable. Otherwise, one would assume a specific method would be delineated in the instrument. If such authorization was due to the client concluding neither method was acceptable, it is very important that guidelines for such financial fiduciary to employ be provided in the instrument. Otherwise, leaving the choice of such method up to the financial fiduciary runs a significant risk of the fiduciary selecting a method inapposite to the preservation of family harmony.

For example, the financial fiduciary could be directed to request that children, already possessed of a list of value determinations of tangible personal property items, submit priority lists to the financial fiduciary regarding tangible personal property items they desire for sentimental or personal use value. Items requested by only one child would automatically be distributed to such child. The financial fiduciary would take into account the priority and number of items on the individual lists (including uncontested items received in the initial “child agreement” phase of such distribution) in making a final determination as to the remaining items. To ensure accountability, the financial fiduciary would be required to distribute all lists submitted to the financial fiduciary to all of the children along with the fiduciary’s rationale as to their distribution. To the extent the final distribution by the financial fiduciary resulted in disparate values being distributed to children, the provisions of the testamentary instrument would provide that financially favored children would be charged with an advancement against their share of the remainder of the estate or trust.

For obvious reasons, this method has the potential of being quite disruptive of family harmony in circumstances where a child or children are named as financial fiduciary. When an experienced and competent third party is named financial fiduciary, this method is probably the most protective of family harmony, as it removes children totally from the final determination of the disposition of such items. However, although only be a small risk in actuality, parents can still be wary the financial fiduciary might exercise such discretionary authority in a capricious manner.

Summary

Providing a time period in which children can agree on a method of distribution of tangible personal property items not distributed by a Personal Effects List is more advisable when a child is not named as financial fiduciary. When a child is named financial fiduciary, it can be problematic to family harmony by risking contentious arguments in the distribution process. Regarding tangible personal property items not distributed by List or by agreement of children, the above-discussed auction method, modified lottery method and distribution by the financial fiduciary pursuant to the guidelines outlined above all incorporate the most important family harmony friendly aspects of achieving economic parity among children and incentivizing children to select items not on their monetary value, but upon their sentimental value or a combination of sentimental value and personal use value.
Nonetheless, such methods do not have an equal impact on family harmony. The auction method places family harmony at significant risk due to competitive aspects inherent in a bidding process, a “sealed bid” private auction procedure having the least such adverse aspects. The modified lottery method outlined above is most protective of family harmony procedurally when a child is chosen as financial fiduciary. When a third party is chosen as financial fiduciary, distribution by the financial fiduciary pursuant to the foregoing guidelines outside a formal auction or lottery process is the most protective of family harmony. On balance, however, the author favors the modified lottery method overall because it avoids the slight risk of an arbitrary distribution by the financial fiduciary under a guideline procedure while only being slightly less favorable to the preservation of family harmony.

Miscellaneous Testamentary Instrument Provisions

Providing for a separate Personal Effects List in the testamentary instrument, as well as outlining specific family harmony friendly procedures for the distribution of tangible personal property items and the equalization of disparate monetary values which may result in that process, are not the only pertinent drafting considerations. The testamentary instrument also should include other provisions designed to limit the types of tangible personal property items to be distributed under the personal effects clause, address the disposition of items unwanted by children, and provide practical considerations in their outright distribution and treatment of intangible items.

Definition of Tangible Personal Property

A significant problem area in the disposition of tangible personal property items is in their definition. Many provisions governing their disposition either fail to clearly define such items or are too broad in their definition. If the definition of such items is too encompassing, family harmony problems are exacerbated by unnecessarily increasing the number of items which are part of the distribution process and thus could occasion family disharmony. Their definition should be limited to personal use property and thus specifically exclude business and investment property, the latter normally being precluded from being distributed by a Personal Property List under wills.

Moreover, consideration should also be given to further limiting such definition to specified categories of sentimental items (jewelry, scrapbooks, pictures, clothing, heirlooms, etc.) or items of interest for their personal usage (furniture, recreational equipment) which are not of significant value. This would exclude such “big ticket” items as cars, airplanes, and boats, as well as valuable paintings, artworks and collections (such as coin, stamp, and figurines). Such items typically have limited sentimental value, are often more in the nature of investment property, and their significant monetary value can destabilize family dynamics in the distribution process.

Such limited definition also favors estate planning objectives. Tangible personal property items having little or no sentimental or personal use value to children, particularly if they have significant monetary value, are best distributed from an estate planning standpoint through the residuary clause. Residuary assets are normally sold to third parties with the proceeds often left
in trust either for management purposes for young, disabled or spendthrift children, or for asset protection and estate tax purposes for older children typically named as trustees of trusts created to hold such assets for their benefit.

**Disposition of Undistributed or Unwanted Items**

If the outright distribution of tangible personal property items is to be based strictly on sentiment or personal use value to children, it is desirable for the testamentary instrument to include a provision for the disposition by the financial fiduciary of unwanted items or items having no sentimental or personal use value to children. In addition to possessing the discretionary authority to sell such items and distribute the proceeds under the residuary clause, the financial fiduciary should be specifically given the discretion to donate items of de minimis value to charitable institutions or dispose of them in any other manner the financial fiduciary should deem appropriate.

**Physical Distribution of Tangible Personal Property**

The testamentary instrument should also address the financial fiduciary’s responsibility in the delivery or storage expenses relating to the distribution of tangible personal property items. This issue can come into play when children who are not in the same geographic area as the estate or revocable trust situs request items be shipped and the subject property is of a size, weight or value that its shipping costs (including insurance) could be significant, particularly in relation to the value of the property. It might also arise when the child is currently incapable of picking up the property (e.g., in the military service overseas, disabled, in ill health or under detention) so as to favor storage of the property for a period of time.

These issues should not be left open to interpretation, for they can lead to possible disagreements as to fairness and parental intent, and resultant family dissension. As in many estate and trust administrative issues, such issues can have a level of dissent far in excess of the monetary issue involved. If the financial fiduciary pays such costs without authority in the testamentary instruments to charge the residuary estate or trust share of the child directly benefiting with an advancement equal to such costs, such costs would be borne by all children. Thus, the governing instrument should make it clear that the financial fiduciary is not be required to pay the costs for the packing, shipping, or storage of such tangible personal property items passing to children, but instead be given the discretion to pay such expenses in circumstances where such costs are deemed nominal or insignificant. In the event the financial fiduciary decides not to pay such expenses, the child receiving the item would be required to pay such costs or pick up the item within a reasonable period, say forty-five days of being so notified, or the fiduciary would be authorized to sell the item and send the net proceeds to the child.

Regarding the disposition of tangible personal property items to minors, provisions in the testamentary instrument should permit such items to be held either in any residuary trust created for such beneficiaries or by a Custodian to be named by the financial fiduciary under the Uniform Transfers to Minors Act until such beneficiary attains age twenty-one. In the absence of such provisions, state law would normally require the appointment of a conservator to hold such item until the minor attains the age of majority.
Electronic Duplication of Intangible Items

The increasing ease in using electronic reproduction has reduced the importance of actual possession by children of significant intangible parental items such as photographs, letters and legal documents. Consequently, the testamentary instrument should specifically authorize the financial fiduciary to electronically duplicate the pictures, letters, documents and records of the parent for dissemination among all children who desire them, with the costs being borne by all children proportionately according to their shares of the residue of the estate. This helps mollify any potential resentment among children who did not receive the original of the item in the distribution process.

Conclusion

The death of a parent is an emotionally tumultuous time for children. When such tumult is infused into a cauldron of financial conflicts of interest, sibling rivalries and the panoply of potentially contentious issues accompanying the administration of a parent’s estate or trust, family harmony is placed at significant peril. The administrative task of distributing tangible personal property items among children in such environs is particularly problematic, for it involves items of great familial interest and emotional significance to children. If this very precarious post-death administrative task is not properly and comprehensively addressed by legal counsel in the estate planning process, family relationships can suffer irreparable damage and parents can literally leave a lasting legacy of family disharmony in their wake.

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THE ADVANTAGES OF USING A

STAND-ALONE PERSONAL EFFECTS TRUST

By: Elder Law Firm of Anderson Associates, P.C.

A Stand-Alone Personal Effects Trust is a trust specifically dedicated to hold items of tangible personal property (or personal effects). In such a Trust, specific provisions guide the appointed Trustee on how to distribute items of personal effects among certain designated beneficiaries. Alternatively, these distributional
provisions for personal effects are inserted into a person’s general living trust into which all assets are placed, not just personal effects.

The primary purpose of special personal effects trust provisions is to reduce the risk of disharmony among loved ones since the distribution of personal effects is often a source of friction and disputes. The advantages of using a *Personal Effects Trust* include:

1. **Small Estate.** A Personal Effects Trust may be an ideal tool to resolve disputes among beneficiaries as to personal effects, which are the only assets left to fight over.

2. **To Ease the Burden on a Professional Trustee Appointed to Handle Other Assets.** A Personal Effects Trust with a family member as Trustee may be an ideal way to ease the burden on an appointed professional trustee who is administering cash and investments. Assume that there are substantial cash, land and other investments in an estate and a bank or other professional trust department is appointed as Trustee. Some professional trustees may prefer not to be involved in lengthy discussions, home visits, and procedures involving personal effects. A family member appointed as trustee of a stand-alone *Personal Effects Trust* is better suited to handle the distribution of personal effects, unless that family member is one of the Beneficiaries and there is a degree of potential dysfunction among the Beneficiaries. Then a stand-alone *Personal Effects Trust* may not be the best idea.

3. **Different Beneficiary Situations.** In some estate planning cases, a client may want to give his/her personal effects to certain beneficiaries, such as
children, but may want to give cash and investments to other beneficiaries, such as charities or grandchildren. If both personal effects, cash and investments, were in just one big trust, all beneficiaries might be able to find out about all other gifts. By establishing a stand-alone Personal Effects Trust, it would be more difficult for the Beneficiaries of one trust to discover what happened in the other trust.

Whether they are placed in a stand-alone or a general living trust, comprehensive and specific personal effects provisions are needed in every estate plan to lessen the risk of disharmony.

II. PROVISIONS FURTHERING FAMILY HARMONY AND PLAN INTEGRITY.

A. *Family Declaration.* I am currently married. My spouse’s name is _________. I have _____ (*) children, namely, ___________________, ________________ and ______________. I have no other children, living or deceased.

B. *Personal Declaration.* I have carefully considered my estate plan and all of the various provisions of this Trust Agreement. Whether or not such provisions are considered by others to be unique to me, or common place, this Trust Agreement represents my desire, alone, without interference or influence of others. The provisions of this Trust Agreement are designed to preserve family harmony, provide for prudent and efficient management of the trust estate, minimize any estate and income taxation, protect trust assets following my death from claims against trust beneficiaries, maximize governmental resource availability to trust beneficiaries, protect beneficiaries under certain circumstances from their own possible imprudent management of trust assets, while providing as much flexibility as possible consistent with these goals.

C. *Purposes in Naming Non-Family Member as Successor Trustee.* I have provided for a capable and experienced non-family third-party to serve as successor Trustee during appropriate periods of the trust administration process. Although ultimately deciding to the contrary, in making such decision I carefully considered naming a child of mine, or more than one child of mine, to serve in such capacity during such trust administration period. My decision to not do so was not based on any concern of mine that a child of mine could not, or would not, appropriately manage the trust estate. Rather, my decision was based solely on what I considered to be far more important, and ultimately controlling, considerations. First, as preserving family harmony is my most important goal, I did not want to take any risk, no matter how small, that such goal would be jeopardized by the potential emotional and financial conflicts, as well as differences of opinion on the administration of the trust estate, that invariably arise between or among siblings due to a child or children serving as a fiduciary of a parent’s estate. Secondly, I did not want to place the burden of administering my trust estate upon a
child of mine, nor detrimentally interfere with other aspects of such child’s life as a consequence of the significant time commitment such administration could well require. Finally, I simply did not want to have to choose which child or children to name in such capacity. *[Nonetheless, as I desired to have family oversight on the administration of the trust estate to ensure it is administered in a proper and cost effective manner, yet in a manner which would not pose the risk to family harmony that naming a child as Trustee would present during such trust administration period, I have provided hereunder for (*a child)(*children of mine )(**my children) to serve in the capacity of a Trustee Discharger, possessed under such provisions with the authority to discharge such then serving third-party Trustee during such period for any reason and designate a successor third-party Trustee to serve in such discharged Trustee’s stead.]

D. **Child Named to Serve as Successor Trustee; Intent to Receive a Reasonable Fee.** I have named a (*child)(*children) of mine to serve as successor Trustee(*s) of the Trust. As I hold my children in equal affection, my choice in that regard was based solely on *(e.g., practical considerations such as professional expertise, geographic proximity, etc.). Such appointment imposes a high degree of responsibility and carries with it a significant burden as well. Consequently, I would expect my family to respect my appointment and give consideration and appreciation to a sibling serving in such capacity for such services and the time commitment such services will require of the Trustee. In addition, I have provided for any Trustee to receive a reasonable fee for fiduciary services rendered on behalf of the trust estate. So that there can be no question of my intent in this regard, I do not consider it right, proper or fair that a child of mine serving as Trustee should be an exception. Thus, I additionally expect that a child of mine serving as Trustee will exercise such right and nothing less than all other family members will fully respect my wishes that appropriate compensation be paid to such child. Trustee fees paid to a child serving as Trustee are to be based upon normal fees charged by individual Trustees of similar experience and ability which a Court would find reasonable under the circumstances.

E. *Lifetime Trusts for Family Members*. Following my death, I have created lifetime trusts for the benefit of family members. I have done so to ensure that trust assets are protected as much as possible from third party creditor and spousal claims due to a marriage dissolution or an inheritance claim following the death of a child, minimize taxation of trust and maximize governmental resource availability such as SSI and Medicaid to trust beneficiaries, particularly with respect to beneficiaries who at that time may be, or who subsequently may become, physically or mentally disabled. These goals would have been severely compromised, if not totally lost, had I provided for the outright distribution of the trust estate to such family members. While trust assets remain in such lifetime trusts subject to distribution to beneficiaries in the manner and under the terms I have herein provided, the administrative and dispositive provisions governing such trusts are designed to provide clarity as to asset disposition, the desired amount of flexibility to the Trustee and trust beneficiaries, the appropriate desired amount of access to the trust assets by beneficiaries, and efficient and prudent asset management.

F. *Property Passing Outside Trust Agreement. [Option 1: Treated as an Advancement]* It is my intent that all property I own on the date of this Trust Agreement, or which is subsequently owned by me, which might pass outside of the provisions of this Trust Agreement upon my death (e.g., due to being held in joint tenancy with rights of survivorship or having a beneficiary designation other than the Trustee to receive such property) to a beneficiary of the trust estate, shall not economically benefit such
beneficiary to a greater extent than would have been the case had such property been a part of my trust estate at the time of my death. Thus, notwithstanding the dispositive provisions of this Trust Agreement below, if at the time of my death there is any such property so passing outside the provisions of this Trust Agreement to any person or entity who or which is also to receive a portion of the trust estate (whether outright or in trust) under the provisions of this Trust Agreement, the value of such property so passing outside the provisions of this Trust Agreement to such a beneficiary of the trust estate shall be treated as an advancement of such beneficiary’s economic share of the trust estate (at the earliest time such allocation can be made) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust estate of such beneficiary which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (irrespective of whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust).

G. **Property Passing Outside Trust Agreement.** [Option 2: Not Treated as an Advancement] It is not my intent that property I own on the date of this Trust Agreement, or which is subsequently owned by me, which might pass outside of the provisions of this Trust Agreement upon my death (e.g., due to being held in joint tenancy with rights of survivorship or having a beneficiary designation other than the Trustee designated to receive such property) to a beneficiary of the trust estate, shall have an effect on the portion of the trust estate passing to such beneficiary hereunder. Thus, if following my death there is any such property which so passes outside of the provisions of this Trust Agreement to a beneficiary of the trust estate, the value of such property so passing outside the provisions of this Trust Agreement to such beneficiary shall not be treated as an advancement of such beneficiary’s share of the trust estate or otherwise have any effect on such share.

H. Gifts or Loans to Trust Beneficiaries. If there are any gifts or loans not evidenced by a promissory note or other written instrument signed by any beneficiary under this Trust Agreement which would otherwise constitute a portion of the trust estate and with respect to which there is an unpaid balance owing from such beneficiary, any such gift or loan shall not be taken into consideration in determining such beneficiary’s share of the trust estate. Instead, the Trustee shall determine the shares to be accorded the beneficiaries of the trust estate hereunder in the same manner such shares would have been determined had such gifts and loans not been made to such beneficiary, any unpaid balance on any such loans to be forgiven at the time of my death and not considered to be part of the trust estate. However, the unpaid balance on any loan to any beneficiary under this Trust Agreement which constitutes a portion of the trust estate and which is evidenced by a signed promissory note or other written instrument (including a guarantee of a loan of a beneficiary to the extent the trust estate is compelled to pay same), is not to be so disregarded, but instead allocated at its full unpaid balance (not considering any alleged modification or cancellation of such note or written instrument made by me or my legal representative which is not in writing) following my death (at the earliest time such allocation can be made), and irrespective of the fact it may not be legally enforceable (e.g., due to the expiration of a governing statute of limitations) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust estate which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust).
I. Services or Care Provided by a Trust Beneficiary. In the absence of a written instrument signed by or my legal representative, which specifically provides to the contrary, it is not my intent that any beneficiary hereunder be compensated following my death for any services or care provided to me prior to my death in a non-fiduciary capacity which was not compensated by me during my lifetime. I assume that any such care or service was provided purely out of a sense of personal affection and generosity by such beneficiary and not in anticipation of any economic benefit from me or my probate estate or trust estate. Consequently, should any such beneficiary make any such claim of any nature for any such service or care either against my trust estate or my probate estate, including an alleged monetary claim or claim that I promised to make an additional provision for such beneficiary in compensation thereof under the provisions of my will or revocable trust, and such claim is allowed by a court of competent jurisdiction notwithstanding my expressed intent herein, such judicial awarding shall be treated as an advancement of such beneficiary’s economic share of the trust estate following my death (at the earliest time such advancement can be made) as follows: first, to any outright non-discretionary pecuniary distribution(s) of the trust estate to such beneficiary; second, to any other share of the trust estate of such beneficiary which is either to be distributed outright to such beneficiary or continued to be held in a trust for such beneficiary (whether such beneficiary is a current or remainder beneficiary, or the sole beneficiary, of such trust). Although it is certainly not my expectation that any beneficiary would make such a claim, I am including this provision solely as a protective measure in the unlikely event a beneficiary for whatever reason may be unclear concerning my intent in this regard in order to avoid any family disharmony or economic cost to the trust estate that might otherwise result from such a claim.

J. *Avoiding Undesirable Beneficiary Challenges: No Contest (In Terrorem) Provision. *[OPTION 1 TRIGGERING EVENT [BROAD]] If any beneficiary under this Trust Agreement or any legatee, devisee or beneficiary under my Will in any manner, directly or indirectly (including without limitation any separate legal action or claim against a beneficiary which seeks to diminish in any way the value of the benefits to be afforded such beneficiary hereunder), contests this Trust Agreement or my Will, or attempts in any manner to prevent the probate of my Will or set aside my Will or this Trust Agreement or alter any of the provisions of either, or to impede, interfere or otherwise contest the orderly administration of my estate or of any separate trust established under this Trust Agreement by my designated Personal Representative or Trustee, then, and in such event, I direct that such beneficiary and his or her spouse.

[*Suboption 1A PARTIES BEING DISINHERITED (ONLY BENEFICIARY AND SPOUSE)] shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary or such beneficiary’s spouse, and any right such beneficiary or spouse may have had under the terms of this Trust Agreement to serve or act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary and such beneficiary’s spouse, whether current, contingent or otherwise. It is not my intent to terminate or revoke the interest of the descendants of a beneficiary (or other contingent beneficiary) who is to be deemed to have predeceased me by virtue of this provision, unless such descendant (or other
contingent beneficiary) likewise meets the terms of this provision. However, any such descendant of such beneficiary (or other contingent beneficiary), or any other beneficiary, who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.]

[**Suboption 1B PARTIES BEING DISINHERITED (BENEFICIARY, SPOUSE AND DESCENDANTS) 
and all of his or her descendants and the spouses of such descendants shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, and any right such beneficiary, such beneficiary’s descendants or such beneficiary’s spouse may have had under the terms of this Trust Agreement to act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, whether current, contingent or otherwise. Any other beneficiary who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary (and such beneficiary’s descendants and spouse) who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.]

[*It is not my intent, however, that the foregoing provisions apply to any proceeding initiated by a beneficiary under this Trust Agreement to either seek an interpretation of any provision of this Trust Agreement with respect to which there is a reasonable basis to conclude is ambiguous on its face or to challenge a Trustee’s fees or administration of a trust created hereunder if there is a good faith basis for such challenge.]

**[OPTION 2 TRIGGERING EVENT [“LIMITED” OR “NARROW” PROVISION – CHALLENGES TO INTEGRITY OF RT] If any beneficiary under this Trust Agreement or any legatee, devisee or beneficiary under my Will in any manner, directly or indirectly (including without limitation any separate legal action or claim judicially or under the “Resolving Controversies Through Mediation and Arbitration” Paragraph below in this Article, against a beneficiary which seeks to diminish in any way the value of the benefits to be afforded such beneficiary hereunder), contests the validity of this Trust Agreement or my Will, or attempts in any manner to prevent the probate of my Will or set aside my Will or this Trust Agreement, or alter the share of the trust estate such beneficiary is to receive hereunder (other than that which may result through seeking an interpretation of a provision with respect to which there is a reasonable basis to conclude is ambiguous on its face), then, and in such event, I direct that such beneficiary
[*Suboption 2A PARTIES BEING DISINHERITED (ONLY BENEFICIARY AND SPOUSE) shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary or such beneficiary’s spouse, and any right such beneficiary or spouse may have had under the terms of this Trust Agreement to serve or act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary and such beneficiary’s spouse, whether current, contingent or otherwise. It is not my intent to terminate or revoke the interest of the descendants of a beneficiary (or other contingent beneficiary) whom are deemed to have predeceased me by virtue of this provision, unless such descendant (or other contingent beneficiary) likewise meets the terms of this provision. However, any such descendant of such beneficiary (or other contingent beneficiary), or any other beneficiary, who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.]

[**Suboption 2B PARTIES BEING DISINHERITED (BENEFICIARY, SPOUSE AND DESCENDANTS) and all of his or her descendants and the spouses of such descendants shall be deemed to have predeceased me for purposes of determining the disposition of any interest or property otherwise directed to be made under this Trust Agreement to or for the benefit of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, and any right such beneficiary, such beneficiary’s descendants or such beneficiary’s spouse may have had under the terms of this Trust Agreement to act as Trustee or in any other capacity with regard to any trust established or to be established under this Trust Agreement, is revoked. I understand that the effect of this provision is to effectively revoke all distributions or interest in favor of such beneficiary, such beneficiary’s descendants and such beneficiary’s spouse, whether current, contingent or otherwise. Any other beneficiary who enters into an agreement, release, consent, waiver or other arrangement the effect of which is to prevent or frustrate the application of this provision to the beneficiary (and such beneficiary’s descendants and spouse) who is to be deemed to have predeceased me by virtue of this Paragraph, or otherwise supports any attempt to preserve such beneficiary’s interest hereunder, shall be deemed to have also independently violated this provision.]

**K. *Mediation and Arbitration of Family Differences.* I direct that any dispute regarding the interpretation of this Trust Agreement, the administration of any trust created hereunder, or a claim against the trust estate, and which either directly involves a beneficiary (including an individual beneficiary serving as trustee) of the trust estate related to me within the second degree on each side of the issue, or with respect to which the economic interests of at least two
such beneficiaries of any trust created hereunder within such degree of relationship are adverse relating to any such matter, unless otherwise resolved by agreement of the parties, shall be settled by arbitration. It is my intent thereby to hopefully reduce the cost of resolving such a dispute, preserve privacy, and most of all, minimize family disharmony through such an alternative, non-judicial resolution of such dispute. Notwithstanding the foregoing, the following matters shall not be subject to arbitration: (a) questions regarding my competency, (b) attempts to remove a Trustee or impose personal liability on a Trustee (unless such removal or liability is with respect to a Trustee who is related to me within the second degree); (c) questions concerning the amount of bond, if any, of a Trustee; (d) any matter prohibited by applicable law from being subject to binding arbitration; and (e) any otherwise required arbitration which is waived by all trust beneficiaries within the second degree of relationship to me who would be parties to such compulsory arbitration.

In the event the parties who are so required to arbitrate a dispute are unable to agree on an arbitrator with respect to a matter subject to arbitration, the arbitrator(s) shall be selected by the Special Trustee, which arbitrator shall be a practicing attorney or attorneys licensed to practice law in the state whose laws govern my trust and whose practice has been devoted primarily to an estates, trusts and probate practice for a period of at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state the laws of which govern my trust. Unless the arbitrator, after careful consideration, determines it likely to be unproductive, I strongly encourage such arbitrator to recommend the parties in dispute mediate the matter prior to proceeding with a formal arbitration proceeding. Unless the parties agree otherwise, any such mediation shall be conducted in accordance with the Commercial Mediation Rules of the American Arbitration Association before a mediator who has extensive experience in estates, trusts and probate matters. If the arbitrator determines that mediation would not be helpful in resolving the dispute, the parties are unwilling to submit the dispute to mediation, or such mediation fails to resolve the dispute, the matter would then proceed to formal arbitration as set forth above. In the absence of fraud, the arbitrator's decision shall not be appealable to any court, and shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my trust, including minors or persons under a disability. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

By accepting to serve as Trustee hereunder, any Trustee is agreeing to mediate or arbitrate any dispute in which the Trustee is a party and which is governed by the foregoing provisions of this Paragraph. If beneficiaries of my trust estate are the only required parties not agreeing to such arbitration and there is at least one such beneficiary who is a party who agrees to such arbitration, I would expect the Special Trustee to amend the provisions of the trust with respect to which each non-consenting party is a beneficiary to the extent of reducing each such non-consenting beneficiary’s economic beneficial interest in the trust estate by fifty percent.
(50%) from what such interest would have been in the absence of such reduction. Should any beneficiary under any trust created hereunder have any doubt as to whether this Paragraph is applicable to such beneficiary, I would expect such beneficiary to inquire of the Special Trustee as to its application prior to proceeding in any manner which could contravene its provisions. The Special Trustee’s responsive decision in this regard shall be binding on both the Special Trustee and such beneficiary.

Note: The Special Trustee references in this Paragraph assume there are Special Trustee (or Trust Protector) provisions in the Trust Agreement which authorize a third party as Special Trustee to discharge Trustees or amend provisions of the Trust Agreement under certain circumstances. Such authority would have the specific preface “In addition to other authority reposed in the Special Trustee under other provisions of this Trust Agreement,...”, thereby acknowledging the Special Trustee’s authority under the foregoing provisions.

L. **Non-Contractual.** This Trust Agreement and the funding thereof is my free and voluntary act. It is not the result of, nor does it violate, any commitment or agreement with any person*[, including my spouse]. It may be revoked or amended by me in any manner and in my sole discretion pursuant to the provisions hereunder at any time*[, even if my spouse has predeceased me].

Note: This provision assumes that the Trust Agreement is not contractual in nature to confirm such intent.

**Additional Notes**

* - Indicates an optional provision.

*, followed by ** or ** and *** - Indicates mutually exclusive provisions.

It is assumed that although Paragraphs C and D, and F and G, are mutually exclusive provisions, that one of such alternative Paragraphs will be included in the Trust Agreement.

**ARTICLE 6**

**CHILDREN'S TRUST**
6.1. **Division of Trust Estate:** Upon the death of the surviving Settlor, Trustee shall take the following actions:

6.1.a **Settlement Conference.** Trustee shall call a Settlement Conference before making any distributions. Trustee shall call the Settlement Conference within a reasonable time, i.e., 21 days after Settlor’s death, which shall attempt to include the attendance (in person or conference call) of the Trustee(s), the Attorney Advisor, a CPA or an experienced accountant, Settlor’s primary financial advisor, if there is one, and the Primary Beneficiaries. The purpose of the Settlement Conference is to provide clarification of trust settlement so that settlement can be conducted orderly, efficiently, and without conflict. The issues to be discussed will minimally include (1) distributional wishes of Settlor, (2) the role of the Trustee, (3) the role of the financial advisor, if any, (4) the role of the CPA/accountant in assisting with preparation of an accounting and tax preparation, (5) the role of the Attorney Advisor, (6) clarification of tax aspects of settlement, (7) distribution of assets, (8) any need for probate, and (9) compliance with Settlor’s desire for harmony among beneficiaries in the settlement process. If necessary, one or more Settlement Conferences can be called by the Trustee(s).

The Attorney Advisor shall have the right to initiate a mediation process if conflicts develop among the beneficiaries. Service provided by the Attorney Advisor and CPA/accountant shall be compensated at their normal billing rates.

6.1.b. **Distribution of Personal Property.** Trustee shall distribute personal property and certain cash gifts as described below in this Article and in accordance with any Schedule of Special Gifts or other list, any Personal Effects Lottery Election and any List of Gifts Subject to Silent Auction Settlor or Settlors may have made.

6.1.c **Rest and Remainder.** Trustee shall then divide the remaining Trust Estate into as many equal shares as may be necessary to apportion one share for each living child of Settlor. If a child of Settlor shall predecease and leave a child or children surviving, then Trustee shall form an additional share for such deceased child’s surviving
children according to paragraph 6.4 below. No share shall be formed for a predeceasing child leaving no surviving children. Trustee may obtain a separate tax identification number for each Trust share and, except as provided elsewhere in this Trust document, treat each Trust share as a separate tax entity in accordance with proper accounting rules and procedures.

6.2. Distributions of Income and Principal from Children’s Separate Trusts:

6.2.a Each share apportioned to a child of Settlors shall be held as a separate trust for such child. Subject to restrictions and provisions set forth elsewhere in this trust agreement, the Trustee shall pay to or apply for the benefit of such child so much of the net income and principal of such share as Trustee, in Trustee’s discretion, shall deem necessary or advisable, considering the best interest of the child, for his or her care, support, education, health, a deposit for a first home purchase or any hardship with emphasis on necessities rather than frivolous expenditures. Any net income of this Trust in any year which is not disposed of by the terms of the preceding paragraphs of this section shall be added to the principal of the trust share at the end of each year.

6.2.b Trustee may make loans to a child from his or her share on reasonable terms for the purposes described above.

6.2.c Trustee may satisfy a child’s trust share in whole or in part by purchasing an immediate annuity for a period certain.

6.2.d Based upon Trustee’s assessment of a child’s maturity, Trustee may allow a child to withdraw (a) 1/3 of his or her share at an appropriate age, such as age 25, (b) ½ of the balance at a later age, such as age 30, and (c) the remainder at a later age, such as age 35. Trustee shall not provide a child with such withdrawal rights if such rights may result in negative tax consequences to the child.
Such withdrawal rights, if allowed, are subject to any restrictions set forth elsewhere in this trust agreement and may be declined by the child at any time.

6.2.e Trustee may purchase property retained in trust from a child’s trust share for the child’s use and enjoyment.

6.3 Administration of Retirement Benefits:

6.3.a If an IRA or other retirement plan tax-qualified under the Internal Revenue Code is payable to a separate share set aside for a child under this Article, the distribution provisions of this Paragraph shall apply to those assets rather than all other distribution provisions of this Trust.

6.3.b Trustee shall annually withdraw sufficient amounts from the IRA or other tax-qualified retirement plan payable to each separate share to satisfy the required minimum distribution rules of the Internal Revenue Code (IRC) Section 401(a)(9) and the regulations thereunder and may withdraw additional amounts as Trustee shall determine is advisable under the next Paragraph.

6.3.c Trustee shall then annually pay to or apply for the benefit of each child an amount sufficient from his or her share to satisfy the required minimum distribution rules of IRC Section 401(a)(9) and the regulations thereunder and Trustee may, in Trustee’s discretion, pay to or apply for each child’s benefit additional amounts available from his or her share for health, education, support and maintenance.

6.3.d Notwithstanding any other provision hereof, and except as provided in any other governing instrument taking precedence over this Trust, Trustee may not distribute to or for the benefit of Settlors’ estate, any charity or any other non-individual beneficiary any benefits payable to this Trust under any qualified retirement plan, traditional IRA or other retirement arrangement subject to the minimum distribution rules of IRC Section 401(a)(9) and applicable regulations or other comparable provisions.
of law. It is Settlors’ intent that all such retirement benefits be distributed to or held for only individual beneficiaries, within the meaning of IRC Section 401(a)(9) and applicable regulations. Accordingly, Settlors direct that such benefits not be used or applied for payment of Settlors’ debts, income taxes not attributable to such benefits, expenses of administration or other claims against Settlors’ estate, nor for payment of estate, inheritance or similar transfer taxes due on account of a Settlor’s death. The prohibitions against payment of charitable bequests in this paragraph shall not apply to any charitable bequest which is specifically directed to be funded with retirement benefits by other provisions of this Trust instrument.

6.3.e At any time, a child or children may elect, in whole or in part, to receive the separate IRA or tax-qualified retirement plan made payable to his or her separate trust share out of trust in his or her individual name. Any such election shall be in written form and shall be notarized.

On the death of a child, the property shall be distributed as provided in Paragraph 6.4 (Deceased Child).

6.4 Deceased Child: Each share apportioned above to the living descendants of a deceased child of Settlors shall be held or distributed in accordance with the Grandchildren’s Trust below. Upon the death of __________________________ after a Settlor’s death, Trustee shall distribute that child’s Trust, as then constituted, to the recipients of any special power of appointment made by that deceased child in accordance with Paragraph 6.5 below. To the extent the deceased child does not effectively exercise his or her power of appointment, then that child’s Trust shall be distributed to his or her then living descendants in accordance with the provisions of the Grandchildren’s Trust below. If the deceased child has no living descendants, then that child’s Trust shall be distributed according to the paragraph titled No Designated Beneficiaries Surviving.

6.5 Procedures for Distributing Personal Property.
6.5.a Settlor’s Goal of Harmony and Trustee’s Authority to Delegate. In distributing personal property, Trustee shall be guided first and foremost by Settlor’s overriding goal to achieve harmony among the designated beneficiaries. Settlor confirms that Settlor does not intend that the values of the distributed gifts of personal property be equal among the designated beneficiaries. Settlor also confirms that any special gifts of personal property made in this paragraph shall not reduce the ultimate share of other assets made to a beneficiary under other provisions of this Trust. Trustee may delegate Trustee’s duties under this paragraph to another person or financial company with a preference in appointing a third party who is not a designated beneficiary used in this paragraph, the term Settlor in the singular also means Settlors in the plural.

6.5.b. Schedule of Special Gifts. Trustee shall first distribute items of personal property or cash as described on the one or more signed Schedules of Special Gifts, or other list. The most current Schedule shall supersede any prior Schedule to the extent of a designation conflict. If Settlor has already given away an item of personal property during Settlor’s lifetime to a person other than designated in Settlor’s signed Schedule, then the lifetime gift shall take precedence over the Schedule, except when there is substantial evidence presented to the Trustee that Settlor did not intend to make the supposed lifetime gift. However, a mere oral promise by Settlor to make a gift of personal property, which is not included in a Schedule of Special Gifts, shall not be honored by the Trustee. If a beneficiary of a gift of personal property designated in a Schedule of Gifts shall predecease Settlor, or die before receiving it, the gift shall lapse and the subject item shall be distributed as described below.

6.5.c. Items to Be Returned to the Original Giver(s). Trustee shall then abide by any Schedule of Special Gifts To Be Returned to the Giver Settlor may have signed. If no such Schedule has been signed, then Trustee shall not honor such gifts.

6.5.d. Silent Auction for Certain Valuable Items. Trustee shall next abide by any List of Gifts Subject to Silent Auction Settlor may have signed. Such a list will designate certain valuable items of personal property for which the designated beneficiaries may offer a silent bid. The highest bidder will receive the item and may use his/her share of other trust assets to purchase said item.
6.5.e  Remaining Items of Personal Property Distributed by Agreement or Lottery. In distributing the remaining items of desired personal property, as specially defined herein, Trustee may first attempt to obtain a unanimous agreement among the designated beneficiaries on how to distribute such items. If the Trustee decides that such a unanimous agreement is not possible or its attempt would hurt harmony among the beneficiaries, then the Trustee shall not attempt distribution by unanimous agreement. In lieu of this, Trustee shall distribute the remaining items of personal property in accordance with any Personal Effects Lottery Election Settlor has signed in which desired items are distributed by drawing numbers. Trustee shall have the discretion in handling the remaining items of personal property not distributed as described above by (a) donating the them to charity, (b) selling them at fair market value to any person or by auction with sale proceeds to be distributed to the beneficiaries as specified by other provisions of this Trust and/or disposing them as refuse.

6.5.f. Vehicles and other Transport Property. Any vehicles, boats, airplanes, or other transport property not otherwise distributed on a Schedule of Special Gifts or a List of Special Gifts or a List of Gifts Subject to Silent Auction shall be sold by Trustee and its proceeds shall be distributed to the beneficiaries in accordance with the other distributional provisions of this Trust.

6.5.g. Securing Settlor’s Home and Inventory of Personal Property. In order to preserve the gifts of personal property for the beneficiaries and provide safety for the home, Trustee shall change the locks on Settlor’s home and outbuildings as soon as possible after Settlor’s death, except when it clearly is not needed or impractical. Trustee shall thereafter carefully control access to the home. Trustee is authorized and directed to conduct a written or video inventory of all Settlor’s personal property. Trustee is authorized and directed to conduct a walk-through inspection of Settlor’s home for the designated beneficiaries of personal property.

6.5.h. Shipping, Storage, Insurance, and Abandonment. Trustee shall pay for the cost to ship, store, and insure any gift of personal property which total cost does not
exceed $100 per gift. If the total of such costs exceeds $100 per gift, Trustee shall have the discretion to pay for such costs with trust assets or shall use the beneficiaries share of other cash/investments to cover such cost excess or shall bill such cost excess or shall bill such cost excess to the beneficiary. Trustee shall establish a deadline for beneficiaries to pick up gifts of personal property of not less than 100 days. If a beneficiary fails to meet said deadline, such gift shall be considered void, and such gift shall be distributed according to the other provisions of this paragraph in Trustee’s discretion.

6.6 Special Power of Appointment to Children Beneficiaries: ____________________________, from and after the date of death of a Settlor, shall have the Special Power to Appoint by lifetime written instrument the whole or any part of the principal of the Trust established on his or her account to or among that child's spouse and living descendants and among any legal heirs of Settlors.

No child of Settlors shall have any power to appoint any part of the principal either directly or indirectly in such a way as to benefit his or her probate estate, his or her creditors or the creditors of his or her probate estate.

Any Power conferred on ____________________________ shall be exercisable by such child by instrument in writing delivered to Trustee during the life of such child or by a specific reference to the Power in the Will of such child.

6.6 Death and Tax Expense of Beneficiary: Upon the death of a child, Trustee may pay from the Trust his or her expenses of last illness, funeral and burial together with any inheritance, estate or other death taxes that may by reason of such death be due upon or in connection with the Trust, unless Trustee determines, in Trustee's sole discretion, that other provisions have been made for the payment of such expenses and taxes, and provided however, funds received from an IRA or other tax-qualified retirement benefit shall not be used to pay such expenditures.

6.7 Disclaimer: ____________________________ may disclaimer, in whole or in part, any property that is to become or has become the vested interest of a child, before such
property is distributed to the child. Such disclaimer shall be in writing under any method recognized at law. The property subject to the disclaimer shall then be held or distributed in accordance with Paragraph 6.4 (Deceased Child). A written signed copy of the disclaimer shall be mailed or delivered to the Trustee.

The Elder Law Firm of Anderson Associates, P.C.

148 W. Hewitt Avenue 906-228-6212
Marquette, MI 49855 For Your Peace of Mind www.upelderlaw.com

FAMILY DISHARMONY RISK ASSESSMENT
FOR PARENTS WITH CHILDREN

For most parents, achieving family harmony among their children after they’re gone is far more important than assuring them wealth. For them, resting in peace will come from the firm expectation that the loved ones they leave behind will get along with each other in harmony.

Unfortunately, for many parents who pass on, family discord, disputes, and disharmony over money, assets, choice of fiduciaries and other issues are robbing that peace and harmony. Some experts say that there is a 33% chance of disharmony when a child is named as the person in charge of an estate ¹.
The purpose of this Assessment is to help parents and their legal counsel predict the chance of disharmony in an estate. Armed with this information, we can determine how many and what kind of conflict resolution strategies should be incorporated into an estate plan in order to lessen the risk of disharmony.

Each item below tends to promote disharmony.

Check the items that apply.

FAMILY DYNAMICS AFFECTING DISHARMONY

Check Which Apply

1. The more children there are, the greater the chance of disharmony.
   You have more than 3 children. ____________

2. The greater number of in-laws, the greater chance of disharmony.
   You have more than 3 spouses of your children. ____________

3. The greater the geographic dispersal of the family, the greater chance of disharmony.
   There are more than two children living in other states. ____________
4. Presence of adoptive children. __________

5. Second marriage of client(s). __________

6. Parents have children from prior marriages. __________

7. Divorce(s) among children. __________

8. You lack strong and healthy relationships with all of your children. __________

9. You lack strong and healthy relationships with all spouses of your children. __________

10. Your children lack strong and healthy relationships among themselves. __________

11. There has been more than one divorce among your children. __________
12. A child has serious relationship problems with one of their children. 

13. Parent needs input from one child before making decisions. 

PSYCHOLOGICAL AND ILLNESS FACTORS AMONG CHILDREN

14. Presence of psychological problems among one or more children. 

15. Presence of serious illnesses among one or more children. 

16. Presence of bossy or controlling behaviors among one or more children. 

17. Alternative lifestyles among one or more children. 

Check Which Apply
18. One or more children have a sense of entitlement/greed.

19. Presence of lingering grievances among family members

**FINANCIAL FACTORS AMONG CHILDREN**

20. One or more children are struggling financially.

21. One or more children have been through bankruptcy.

22. One or more children spend too much.

**TREATING CHILDREN DIFFERENTLY**
23. Desire to give one or more children a greater share or specific gifts. 

24. Desire to disinherit a child. 

25. Existence of pre-death loans or gifts to certain children. 

26. One or more children spend substantial more time helping parent/parents. 

ASSET-BASED PROBLEMS

27. Desire to keep family farm, cottage, or camp in the family in the future. 

28. Presence of family business as a substantial asset when fewer than all children participate.
29. The value of assets in the estate exceeds $400,000.

30. The estate includes a large number of valuable personal effects.

FIDUCIARY SELECTION PROBLEMS

31. Desire to appoint one or more children as Trustee of the estate.

32. Desire to appoint all children as Trustee.

33. The child you want to appoint lacks substantial financial experience.

34. The child you want to appoint doesn’t get along with one or more other children.

FAILURE TO UPDATE ESTATE PLAN AND
EDUCATE FAMILY TRUSTEE

35. Failure to regularly update estate plan due to changes in law, assets and family circumstances.  _____________

36. Failure to provide named family Trustee with education of duties.  _____________

Each of the checked item counts as one point. There are 36 total points. The higher the score, the more Harmony Enhancing Measures should be considered.

RECOMMENDED HARMONY ENHANCING MEASURES

1. Declaration of Harmony Intent.  _____________

2. Trust Settlement Conference. Soon after death, Trustee, beneficiaries, trust attorney, and accountant meet to “clear the air” and clarify issues.  _____________
3. **Mandatory Mediation/Arbitration of Disputes.**

   Disputes are settled out-of-court by mediation or arbitration.

4. **Name a bank or other professional as Fiduciary with complete powers.**

5. **Name a bank or other professional as Financial Trustee and a child as Family Trustee.**

6. **Name a child as “fiduciary discharger” when a bank or professional is named as Trustee.**

7. **Name Attorney as “Trust Protector” to monitor duties, enforce mediation, and discharge the Trustee.**

8. **Enroll in our firm’s Longevity Program, which provides updates and education.**

9. **Prepare anti-bicker forms for tangible personal**
How to Bomb-Proof

Your Estate Plan

By Robert C. Anderson, Certified Elder Law Attorney

In the past two years, we have seen a surprising increase in the number of serious disputes among the children of our clients, especially baby-boomers with a sense of entitlement, after their parents have passed on. Disharmony has risen to at least 25%\(^1\). Even worse is the resulting alienation which for many of these families will last a lifetime.
Why the increase? It boils down to the resentment and jealousy of those excluded from decision making; the mistakes, delays, and controlling behavior of those in charge after the parental “glue” that held the family together is gone. “I would rather have my children live in harmony without money after I’m gone than be in miserable alienation with millions,” one client recently admitted.

Take the Carlson family for example. We wrote a living trust for Mr. and Mrs. Carlson 15 years ago. They had 3 children who were “good kids and got along with each other.” They named a local son, a business man, as successor trustee. After the parents passed on, the local son who became Trustee, refused to give an accounting to the other 2 children and did not cash in any investments 9 months later. The 2 children who were left in the dark hired an attorney to force the son to fulfill his duties.

In another family, the local child who was named as trustee did a great job, but her older siblings resented her being in control and demanded that all decisions taken by the local child be approved by the older siblings.

We offer ten innovative Harmony Enhancing Measures to reduce the risk of disharmony. These measures include:

1. A pre-death meeting to “clear the air” regarding parental harmony wishes;
2. Having children sign a conflict resolution agreement;
3. Prepare anti-bicker forms for tangible personal effects;
4. Divide successor trustee duties between a professional and
a family member, or assign all duties to a professional;

5. Enroll in our Firm’s Longevity Program designed to update your plan and prepare your family trustee for the future;

6. Include “life planning” provisions, which clearly state your preference to *age in place* in the least restrictive housing setting when you need assistance and use your funds to access quality care.

7. Direct children to attend a “clear the air” settlement conference after your passing—guided by an experienced attorney.

8. Name a neutral party, e.g., a friend, attorney, or accountant, to serve as a “Trust Protector”, who will check-up on the Trustee and enforce mediation upon a dispute.

9. Include a “no contest” provision which disinherits a child who contests the estate plan.

10. Set an exact fee to compensate a child for serving as Successor Trustee so that no one can complain later.

Only you can decided which of these measures are right for your family. Please ask about our Disharmony Risk Assessment form. By filling it out, you will be able to more carefully evaluate your family’s disharmony risk.

---

1 In his law review article, Timothy P. O’Sullivan estimates current family conflicts at 33% in estate plans, see “Family Harmony: All Too Frequent Casualty of the Estate Planning Process”, p. 250, Marquette University Law School “Elder Advisor”, May 2007.
Robert C. Anderson, a graduate of Georgetown University Law Center, is active with the National Academy of Elder Law Attorneys and has served over 6,000 families in the Upper Peninsula. His firm, the Elder Law Firm of Anderson Associates, of 148 W. Hewitt, Marquette, MI 49855 is the longest serving Elder Law Firm in the Upper Peninsula and the only one with professional care coordinators. We have six offices throughout the Upper Peninsula. We can be reached at (877) 304-3119 or at upelderlaw@upelderlaw.com. The designation of Certified Elder Law Attorney is awarded by the National Elder Law Foundation, which is accredited by the American Bar Association.

FAMILY HARMONY AGREEMENT

I have complete trust in my parents’ ability to decide what is best for me in devising their estate plan. I understand that the most important goal they desire in their estate plan is for their children not to argue or harbor resentment against their parents or among themselves.

I agree to accept who they have appointed as agent under Powers of Attorney and as Trustee(s) under Trust(s). I agree to accept with appreciation whatever gifts they have previously made and have planned for me even if the values of gifts may not be equal among their children.
THIS AGREEMENT made the ___ of __________, ____ by and between _____________ and ______________ (hereinafter collectively referred to as "Settlor" or "Settlors"), of ________________, ___________ and ____________ (hereinafter referred to as "Trustee" or "Trustees"), and ____________________________ (hereinafter referred to as "First Successor Trustee").

__________ and ______________ are married at the time of execution of this Trust and have ___ children together. __________________.
In consideration of the acceptance by Trustee of the trust hereby created, Settlors have paid over, assigned, granted, conveyed, transferred and delivered unto the Trustees, their current and future tangible personal property.

ARTICLE 1

TRUSTEES AND BENEFICIARIES

1.1 Designation of Trustees: Upon the death of either Trustee, ___ or ____, or if either Trustee shall be unable or unwilling to act, then the other Trustee may either appoint a Successor Trustee with whom to serve or may serve as the only Trustee.

Upon the death of both Trustees, or if both shall be unable or unwilling to act, then the First Successor Trustee, ______, shall, ipso facto, serve as the new Trustee.

Additional Trustee provisions are set forth in later Articles of this Trust.

1.2 Designation of Beneficiaries: The Primary Beneficiaries of this Trust shall be _____ and _____, husband and wife.

The Secondary Beneficiaries of this Trust shall be [ INSERT ] and their rights are set forth in Articles 3 and 4.

ARTICLE 2

RIGHTS TO REVOKE OR AMEND TRUST
Settlors together may (1) amend this Trust, or (2) revoke this Trust or any provision therein. Upon the death of first Settlor, surviving Settlor may amend or revoke this Trust except for the purpose of adding new Beneficiaries. The power to amend, revoke, or withdraw may be exercised by anyone holding a financial durable power of attorney from Settlor.

ARTICLE 3

PROVISIONS DURING LIFETIMES OF SETTLORS

While both Settlors are alive and during the lifetime of the surviving Settlor, Trustee (or Trustees) shall hold and manage Settlors Tangible personal property as follows:

3.1  *During Lives of Both Settlors.*

3.1.a *General.* Generally while both spouses are alive, the Settlors shall exercise full dominion and control over their tangible personal property in trust and shall have the right to dispose of, gift or sell any item.

3.1.b *Downsizing.* If both Settlors shall no longer live in a single-family residence, Trustee is authorized to implement the distribution provisions of Article 4 below.

3.2  *Upon Death of a Settlor.*

3.2.a *General.* If one spouse shall die with the other spouse surviving, all items of tangible personal property shall belong to the surviving spouse except those items listed on a Schedule of Special Gifts taking effect upon the death of that spouse.
3.2.b **Downsizing.** If the surviving spouse shall no longer live in a single-family residence, Trustee is authorized to implement the distribution provisions of Article 4 below.

**ARTICLE 4**

**DISTRIBUTION OF TANGIBLE PERSONAL PROPERTY**

**UPON DEATH OF BOTH SETTLORS**

Upon death of the surviving Settlor, the remaining items of tangible personal property shall be distributed for the benefit of the surviving Secondary Beneficiaries as follows:

4.1 **Securing Settlor’s Home and Inventory of Personal Property.** In order to preserve the gifts of personal property for the Secondary Beneficiaries and provide safety for the home, Trustee shall change the locks on Settlor’s home and outbuildings as soon as possible after surviving Settlor’s death, except when it clearly is not needed or impractical. Trustee shall thereafter carefully control access to the home. Trustee is authorized and directed to conduct a written or video inventory of Settlor’s personal property. Trustee is authorized and directed to conduct a walk-through inspection of Settlor’s home for the Secondary Beneficiaries.

4.2 **Settlement Conference.** Trustee shall call a Settlement Conference before making any distributions. Trustee shall call the Settlement Conference within a reasonable time, e.g., 10 days after surviving Settlor’s death, which shall attempt to include the attendance (in person or conference call) the Trustee(s), the Attorney Advisor, and the Secondary Beneficiaries. The purpose of the Settlement Conference is to provide clarification of trust settlement so that settlement can be conducted orderly, efficiently, and without conflict. The spouses of the Secondary Beneficiaries are not authorized to attend the Conference, nor participate in the distribution process in order to minimize the risk of disharmony. The Attorney Advisor shall have the right to initiate a mediation process if conflicts develop among the beneficiaries. Service provided by the Attorney Advisor and CPA/accountant shall be compensated at their normal billing rates.

4.3 **Settlor’s Goal of Harmony and Trustee’s Authority to Delegate.** In distributing personal property, Trustee shall be guided first and foremost by Settlers’ overriding goal to achieve harmony among the Secondary Beneficiaries. Settlors confirm that they do not intend
that the values of the distributed gifts or personal property be equal among the designated beneficiaries. Settlors also confirm that any special gifts of personal property made in this paragraph shall not reduce the ultimate share of other assets made to a Secondary Beneficiary under provisions of any other trust, will, joint property arrangement, or other transfer device. Trustee may delegate Trustee’s duties under this paragraph to another person or financial company with a preference in appointing a third party who is not a Secondary Beneficiary. As used in this paragraph, the term Settlor in the singular also means Settlors in the plural.

4.4 Schedule of Special Gifts. Trustee shall first distribute items of personal property as described on the one or more signed Schedules of Special Gifts, or other list. The most current Schedule shall supersede any proper Schedule to the extent of a designation conflict. If Settlors have already given away an item of personal property during a Settlor’s lifetime to a person other than designated in a Settlor’s signed Schedule, then the lifetime gift shall take precedence over the Schedule, except when there is substantial evidence presented to the Trustee that a Settlor did not intend to make the supposed lifetime gift. However, a mere oral promise by a Settlor to make a gift of personal property, which is not included in a Schedule of Special Gifts, shall not be honored by the Trustee. If a beneficiary of a gift of personal property designated in a Schedule of Gifts shall predecease Settlors or die before receiving it, the gift shall lapse and the subject item shall be distributed as described below.

4.5 Items to Be Returned to the Original Giver(s). Trustee shall then abide by any Schedule of Special Gifts to Be Returned to the Giver Settlor may have signed. If no such Schedule has been signed, then Trustee shall not honor such gifts.

4.6 Silent Auction for Certain Valuable Items. Trustee shall next abide by any List of Gifts Subject to Silent Auction Settlor may have signed. Such a list will designate certain valuable items of personal property for which the designated beneficiaries may offer a silent bid. The highest bidder will receive the item and may use his/her share of other trust assets to purchase said item.

4.7 Remaining Items of Personal Property Distributed by Agreement of Lottery. In distributing the remaining items of desired personal property, as specially defined herein, Trustee may first attempt to obtain a unanimous agreement among the Secondary Beneficiaries on how to distribute such items. If the Trustee decides that such a unanimous agreement is not possible or its attempt would hurt harmony among the Beneficiaries, then the Trustee shall not attempt distribution by unanimous agreement. In lieu of this, Trustee shall distribute the remaining items of personal property in accordance with any Personal Effects Lottery Election Settlor has signed in which desired items are distributed by drawing numbers. Trustee shall have the discretion in handling the remaining items of personal property not distributed as described above by (a) donating them to charity, (b) selling them at fair market value to any person or by auction with sale proceeds to be distributed to the beneficiaries as specified by other provisions of this Trust and/or disposing them as refuse.
4.8  Vehicles and Other Transport Property. Any vehicles, boats, airplanes, or other transport property not otherwise distributed on a Schedule of Special Gifts or a List of Special Gifts or a List of Gifts Subject to Silent Auction shall be sold by Trustee and its proceeds shall be distributed to the beneficiaries in accordance with the other distributional provisions of this Trust.

4.9  Shipping, Storage, Insurance, and Abandonment. Trustee is authorized to pay for the cost to ship, store, and insure any gift of personal property which total cost does not exceed $100 per gift, if funds are available to cover such costs. If the total of such costs exceeds $100 per gift, Trustee shall have the discretion to pay for such costs with trust assets or shall ask the affected Beneficiary to cover such cost excess. Trustee shall establish a deadline for Beneficiaries to pick up gifts of personal property of not less than 100 days. If a Beneficiary fails to meet said deadline, such gift shall be considered void, and such gift shall be distributed according to the other provisions of this Trust in Trustee’s discretion.

4.10  Cash Account and Payment of Expenses. The Trustee is authorized to request the Trustee of any other of Settlors’ Trust or Trusts or the beneficiaries of any of Settlors’ life policies, joint accounts, mutual funds, annuities, or IRAs to transfer sufficient funds to cover the expenses of administering this Trust. If funds are available, Trustee is authorized to pay for the cost to ship, store and insure the personal property, reasonable compensation for Trustee’s services, and reimbursement of Trustee’s expenses and reasonable compensation for the advice of an attorney, accountant, or other advisor. If a bank or credit union, or other account, is needed, Trustee is authorized to obtain a Taxpayer Identification Number for the Trust.

If there are any remaining funds in the Trust account after all expenses have been paid, Trustee shall distribute such funds in equal shares to the Secondary Beneficiaries.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals as Settlors and Trustees on the date and year first above written.

In Presence of:
Settlor and Trustee

Settlor and Trustee

STATE OF MICHIGAN

) ss.

COUNTY OF MARQUETTE )

_____________ and _____________ personally appeared before me this ____________ day of _____________________, 2010, the above named, to me known to be the persons who executed the foregoing instrument and acknowledged the same.

, Notary Public

Marquette County, Michigan

My commission expires:
ATTORNEY’S CERTIFICATE

I certify that I am a licensed practicing attorney with offices at 148 W. Hewitt, Marquette, Michigan, and have written this legal document, and it is my opinion that this document complies with the existing laws and is legally binding according to law. Anyone having any questions about this document, needing any background information concerning this document or desiring any interpretation of this document may contact my law firm.

ELDER LAW FIRM OF ANDERSON ASSOCIATES, P.C.

Dated: ____________________  By: ________________________________

HARMONY PROCEDURES TO DISTRIBUTE

TANGIBLE PERSONAL PROPERTY®

Completing the Anti-Bicker Forms

One of the key conflicts among your beneficiaries, which can result in a lifetime of disharmony among them, is the distribution of tangible personal
property. Your estate plan includes a part advanced comprehensive set of procedures which will minimize the risk of disharmony as follows:

1. **Preliminary Protective Measures.** The first step is to secure the home in order to protect what is inside. Then a Settlement Conference should be held soon after passing to “clear the air” and to fully inform the beneficiaries of what to expect. This Conference should be directed by the attorney advisor designated in the Trust. The use of a neutral party is an important ingredient to harmony.

2. **Schedule of Special Gifts With Historic Memorandum.** Trustee shall first distribute items of personal property as described on the one or more signed Schedules of Special Gifts, or other list. The most current Schedule shall supersede any prior Schedule to the extent of a designation conflict. If Settlor(s) have already given away an item of personal property during a Settlor’s lifetime to a person other than designated in a Settlor’s signed Schedule, then the lifetime gift shall take precedence over the Schedule, except when there is substantial evidence presented to the Trustee that a Settlor did not intend to make the supposed lifetime gift. However, a mere oral promise by a Settlor to make a gift of personal property, which is not included in a Schedule of Special Gifts, shall not be honored by the Trustee. If a beneficiary of a gift of personal property designated in a Schedule of Gifts shall predecease Settlor(s) or die before receiving it, the gift shall lapse and the subject item shall be distributed as described below.

To make your job easier, we have provided a Donor’s Initial Worksheet, Beneficiary’s Wish List, and the Historical Memorandum. First, you will fill out the key items on the Donor’s Initial Worksheet, which you believe your loved ones may want. Provide the Worksheet to your designated Beneficiaries who will then fill it out, listing their preferences in order of priority. If two Beneficiaries desire the same item with the same priority, they will have to check the box at the bottom of the page as to whether they wish to defer to the other Beneficiary.
Armed with this information, you can fill out what hopefully will be a conflict-free Schedule of Special Gifts.

You may also complete the Historical Memorandum in order to create a family tradition and enhance the meaning of these gifts.

3. **Items to Be Returned to the Original Giver(s).** Trustee shall then implement any Schedule of Gifts to be Returned to the Giver Settlor may have signed. If no such Schedule has been signed, then Trustee shall not honor such gifts.

4. **Silent Auction for Certain Valuable Items.** Trustee shall next abide by any List of Gifts Subject to Silent Auction Settlor may have signed. Such a list will designate certain valuable items of personal property for which the designated beneficiaries may offer a silent bid. The highest bidder will receive the item and may use his/her share of other trust assets to purchase said item.

5. **Remaining Items of Personal Property Distributed by Agreement or Lottery.** In distributing the remaining items of desired personal property, as specially defined herein, Trustee may first attempt to obtain a unanimous agreement among the designated beneficiaries on how to distribute such items. If the Trustee decides that such a unanimous agreement is not possible or its attempt would hurt harmony among the beneficiaries, then the Trustee shall not attempt distribution by unanimous agreement. In lieu of this, Trustee shall distribute the remaining items of personal property in accordance with any Personal Effects Lottery Election Settlor has signed in which desired items are distributed by drawing numbers. Trustee shall have the discretion in handling the remaining items of personal property not distributed as described above by (a)
donating them to charity, (b) selling them a fair market value to any person or by auction with sale proceeds to be distributed to the beneficiaries as specified by other provisions of this Trust and/or disposing them as refuse.

DONOR’S INITIAL WORKSHEET
TO CREATE A SCHEDULE OF SPECIAL GIFTS

Realizing that for most donors it is difficult to decide on who should receive special items of personal effects, making the following list of those special items to be divided is an important first step. Step two will be to give this list to each Beneficiary along with the Beneficiary’s Wish List For Personal Effects. Armed with each Beneficiary’s Wish List, you will be able to make some final decisions.

PLEASE LIST THOSE SPECIAL ITEMS YOU WISH TO GIVE TO OTHERS:


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I choose not to participate in this because:________________________________________________________
______________________________________________________________________________

Dated:________________________

________________________________________________  Signature

NOTE: This list will NOT guarantee you will receive an item on your Wish List.

---

SCHEDULE OF SPECIAL GIFTS FOR HUSBAND
Upon death of husband, the following special gifts of personal effects shall be made to his descendants:

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SCHEDULE OF SPECIAL GIFTS FROM WIFE

Upon death of wife with husband surviving, the following special gifts of personal effects shall be made:

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<th>Beneficiary</th>
<th>Gift</th>
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Signature of Husband
PERSONAL EFFECTS LIST
(Husband and Wife)

Pursuant to [Cite any appropriate statutory reference] and provisions referencing this Personal Effects List (the “List”) in the HUSBAND Revocable Trust dated *, 2010, and in the WIFE Revocable Trust dated *, 2010 (“Trusts” or “Trust Agreements”), upon the death of the survivor of us, we hereby dispose of the following “personal effects” as referenced and defined in such Trust Agreements to the following persons, understanding that under such statutory authority that WE MAY NOT INCLUDE ANY TANGIBLE PERSONAL PROPERTY HELD PRIMARILY FOR INVESTMENT OR USED IN A TRADE OR BUSINESS:

Provided, however, in the event we have inadvertently included any item(s) of tangible personal property held primarily for investment or used in a trade or business, or which otherwise would not legally be governed by the List, it is our intent that this List shall be considered to be an amendment to each of our Trusts referenced above if to do so would give this List legal efficacy with respect to the disposition of the foregoing property following the death of the survivor of us. To the extent any item(s) of “personal effects” on this List is also included on any prior List, this List shall supercede the disposition of such item(s).

*[DON’T USE IF ONLY ONE CHILD OR NO CHILDREN By both of us initialing ONE of the alternatives in the boxes below, we have indicated whether items on the Personal Effects List should be considered an Advancement against a beneficiary’s share of “personal effects”:

☐ It is our intent that any disposition of “personal effects” under this List shall be treated as an Advancement against any share of “personal effects” not disposed of under this List such individual may be entitled to under the provisions of our Trust Agreements;

☐ OR

☐ It is our intent that any disposition of “personal effects” under this List shall NOT be treated as an Advancement against any share of “personal effects” not disposed of under this List such individual may be entitled to under the provisions of our Trust Agreements.

Each of us reserves the right to revoke or amend this List at any time, in whole or in part, by an instrument in writing signed by the revoking or amending party.]

DATED this _________ day of __________________, 2010.


WIFE, Individually and as Grantor and Trustee of the Wife Revocable Trust dated *, 2010.

PLEASE NOTE: To avoid being lost or misplaced, each executed List should be kept with your original documents in safekeeping. Please also send a copy of each executed List to [Attorney’s office].
# SCHEDULE OF SPECIAL GIFTS

**Effective Upon Death of Surviving Spouse**

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Dated: ___________________  Signature of Settlor(s)

Witness

NOTE: This document should be witnessed and a copy mailed or faxed to the Elder Law Firm of Anderson Associates, P.C., 148 W. Hewitt Avenue, Marquette, MI 49855. Our fax number is (906) 228-6219.

SCHEDULE OF SPECIAL GIFTS
Effective Upon Death of Unmarried Settlor

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<th>Beneficiary</th>
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Dated: ___________________  Signature of Settlor

___________________________________________________________
Witness

NOTE: This document should be witnessed and a copy mailed or faxed to the Elder Law Firm of Anderson Associates, P.C., 148 W. Hewitt Avenue, Marquette, MI 49855. Our fax number is (906) 228-6219.

SPECIAL GIFTS TO BE RETURNED TO GIVER
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<th>ORIGINAL GIVER OF GIFT</th>
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LOTTERY ELECTION FOR TANGIBLE PERSONAL PROPERTY

[   ] FAMILY TRUST

After the gifts of personal property listed on the Schedule of Special Gifts and any gifts subject to a silent auction are made, the designated current Beneficiaries shall select the remaining items of tangible personal property on a progressive rotating round basis. Each child will pick a number by chance. In the first selection round, the highest number has the first pick, the next highest has the second pick, and so on. In the second selection round, the second highest number shall have the first pick, the third highest number, if applicable, shall have the second pick and so on, and the highest number shall have the last pick. The selection rounds shall continue until all desired items of personal effects are
selected. The remaining items shall be disposed of as the Trustee shall decide, such as by auction and/or gifts to charity.

Dated:_________________ ____________________________________________

Settlor and Trustee