

WILLS: DRAFTING CONSIDERATIONS

**Probate Mini-Seminar
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I. Ethical Considerations Regarding Accepting Representation:

a. Competent Representation:

The preamble to the Texas Disciplinary Rules of Professional Conduct discusses a lawyer's responsibilities. The third paragraph provides in pertinent part, "In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent..." A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence unless another lawyer who is competent assists. Tex. Disciplinary R. Prof'l Conduct, Rule 1.01(a).

The Comments to Rule 1.01 provide in pertinent part that "Competence" is defined in Terminology provisions of the Texas Disciplinary Rules of Professional Conduct as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client. A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation. Tex. Disciplinary R. Prof'l Conduct, Rule 1.02(b).

b. Joint Representation:

A lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests. Tex. Disciplinary R. Prof'l Conduct, Rule 1.06(b).

A lawyer may represent a client in the circumstances described in 1.06(b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. Tex. Disciplinary R. Prof'l Conduct, Rule 1.06(c).

Comment 15 to Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct specifically acknowledges that a conflict may arise after a lawyer has been called upon to prepare wills for several family members, such as husband and wife. If multiple representation properly accepted becomes improper, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of the Rules. Tex. Disciplinary R. Prof'l Conduct,

Rule 1.01(a). An attorney should consider providing the disclosures set forth in Rule 1.06(c) in a written engagement letter. A sample provision for an engagement letter regarding joint representation of a married couple is attached as Addendum A.

II. Definition and Purpose of a Will:

a. Necessity of a Will. Every adult person needs to have a Will for the following reasons:

- (1) The Will determines who receives your property that is subject to probate upon your death. This can be a disposition contrary to the statutes of intestate succession.
- (2) A properly drafted Will may take advantage of estate tax planning strategies.
- (3) A properly drafted Will can reduce the cost of administration by providing for an independent administration and by containing a self-proving affidavit.
- (4) A Will can solve or avoid many other problems such as family hostility.
- (5) If there are minor children, a Will can name a guardian upon the death of the last spouse to die. Children can be placed in the care of competent people of the parents' choosing.
- (6) Trusts for individuals may also be established for those persons who are not capable of managing property (minors).

b. Testate Succession (death with a Will). Upon the death of an individual who has a properly executed Will, the decedent's probate property is disposed of in accordance with the terms of the Will once admitted to probate. The Will does not control the disposition of non-probate assets which may include the following:

- (1) Insurance Policy: If a beneficiary has been designated, the proceeds of the policy will pass to the designated beneficiary. An exception exists under Section 9.301 of the Texas Family Code to exclude an ex-spouse unless (i) the decree designates the insured's former spouse as the beneficiary; (ii) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or (iii) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse.
- (2) Retirement and Other Financial Plans: If a beneficiary has been designated, the ownership of such asset will pass to the designated beneficiary. As with insurance policies, an exception exists under Section 9.302 of the Texas Family Code to exclude an ex-spouse as a beneficiary under an individual retirement account, employee stock option plan, stock option, or other form

of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, unless (i) the decree designates the former spouse as the beneficiary; (ii) the designating former spouse redesignates the former spouse as the beneficiary after rendition of the decree; or (iii) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse.

- (3) JTWROS Accounts and Property. Any property that is owned as joint tenants with rights of survivorship will pass automatically to the surviving tenant. Tex. Estates Code §§111.001-111.002.
- (4) Pay On Death Accounts. Any accounts which have a pay on death beneficiary will pass directly to the named beneficiary.
- (5) Trusts. Any assets held in a trust, whether revocable or irrevocable will pass according to the terms of the trust agreement. If the individual is the beneficiary of a trust and the trust grants that individual a power of appointment, the individual can elect to exercise such power in accordance with the terms provided in the trust agreement.

c. Definition of a Will. A Will is an instrument which is testamentary in character. A Will is testamentary in character if it contains language indicating a person's intention to make an effective disposition of his or her property on his or her death. An instrument in the form of a Will is not executed with testamentary intent when it is executed under compulsion, merely as part of a ceremony, or for purposes of deception. See *Shiels v. Shiels*, 109 S.W.2d 1112, 1115 (Tex. Civ. App. –Texarakana 1937, no writ)(Will was denied probate because it was signed solely for the purpose of entering a lodge and testator was told he could revoke it after completion of initiation). The Will must be revocable prior to the person's death and must pass the property only on the death of the person. Therefore, a writing is not testamentary if its effect is to transfer a present interest in the property.

d. Requisites of a Will.

- (1) Who may make a Will?
 - 1. Any person who has attained age 18. Tex. Estates Code §251.001.
 - 2. Any person, although under age 18, who is lawfully married. Tex. Estates Code §251.001.
 - 3. Any person, although under age 18, who is in the armed forces. Tex. Estates Code §251.001.

4. The individual must be of sound mind. Tex. Estates Code §256.152(a). All that is required is that the individual have testamentary capacity on the day the will was executed. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983). To be of sound mind, an individual must possess the following characteristics:
 - a. Sufficient ability to understand the business to which he is engaged;
 - b. Sufficient ability to understand the effect of his act in making the Will;
 - c. The capacity to know the objects of his bounty;
 - d. The capacity to understand the general nature and extent of his property; and
 - e. “[M]emory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.” *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

(2) Handwritten Wills. Texas recognizes a holographic or handwritten Will. Tex. Estates Code §251.052.

1. The holographic Will must be totally in the handwriting of the Testator.
2. The Will must be signed by the Testator.
3. It may be written on anything, but it is best if it is written on paper containing no other writing or printing.
4. Problems With Holographic (Handwritten) Wills:
 - a. Testamentary intent may be difficult to prove (i.e., was the paper intended to be the Testator's Will).
 - b. Key items may be inadvertently omitted, such as the date (Texas does not require), the naming of an executor, or the making of the executor independent.
 - c. Imprecise wording may subject the Will to a contest for interpretation.
 - d. The Will must be admitted to probate with the testimony of two disinterested witnesses testifying to the Testator's handwriting.

(3) Formal (Typed) Attested Wills. Formal typewritten Wills must meet certain statutory requirements. See Tex. Estates Code §251.051.

1. The Will must be signed by the Testator. The signature need not be in the Testator's full signature or in Testator's own handwriting, but must be at the Testator's direction. See generally *Phillips v. Najjar*, 901 S.W.2d 561, 562 (Tex. App.

—El Paso 1995, no writ)(signature by a rubberstamp); *Trim v. Daniels*, 862 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (signature by initials); *Orozco v. Orozco*, 917 S.W.2d 70, 73 (Tex. App.—San Antonio 1996, writ denied) (signature by mark); *Muhlbauer v. Muhlbauer*, 686 S.W.2d 366, 376-77 (Tex. App. —Fort Worth 1985, no writ) (witnesses did not remember testator requesting wife to sign on his behalf). Testator may direct another to sign in his presence.

Additionally, section 406.0165 of the Texas Government Code provides that a notary, in the presence of a witness, may sign for an individual who is physically unable to sign or make a mark on the document if directed by the individual to sign. The witness must have no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the Will. The notary must require identification from the witness just as if the witness was the person making the acknowledgment, and the notary must write beneath his signature the following or substantially similar to the following: "Signature affixed by notary in the presence of (name of witness), a disinterested witness, under Section 406.0165, Government Code." Tex. Gov't Code §406.0165(a),(b).

2. The Will must be witnessed by two or more credible (competent) witnesses who are at least 14 years old. Tex. Estates Code §251.05(3). If the Will contains a bequest to an individual who is also a witness and the Will cannot be otherwise established then (i) the bequest is void; and (ii) the subscribing witness shall be allowed and compelled to appear and give the witness's testimony in the same manner as if the bequest to the witness had not been made. Tex. Estates Code §254.002. If the witness would have been entitled to an intestate share of the estate, the witness is entitled to so much of the intestate share as will not exceed the value of the bequest made to the witness in the will. Tex. Estates Code §254.002(b). The Will can be otherwise established by the corroborating testimony of a disinterested and credible person who testifies that the beneficiary-witnesses testimony is true and correct. Tex. Estates Code §254.002(b).
3. The witnesses must sign in Testator's presence.
4. The entire transaction (all signatures) must be contemporaneous.

5. Although not a requirement, a self-proving affidavit may be attached to the Will. See Tex. Estates Code §251.101. The effect will be the ability to probate the Will without locating the witnesses for testimony. See Tex. Estates Code §251.102.

III. Selected Drafting Considerations:

- a. Intent to Create A Will. A properly drafted will should include an exordium clause to provide a clear indication of testamentary intent. The exordium clause usually identifies the Testator, declares the Testator's domicile, and revokes prior wills. A sample exordium clause might be the following: "I, John Doe, residing and being domiciled in Dallas County, Texas, hereby revoke all previous wills and codicils and publish this, my Will".
- b. Family. Including an identification provision of the Testator's family assists in establishing that the Testator knows the persons who are the natural objects of his bounty. Additionally, in the event a Will is to be probated as a muniment of title only under §257.001 of the Texas Estates Code, the identification of family enables third parties to deliver assets to the beneficiaries.
- c. Disposition of Property. A Will should provide for the disposition of the testator's probate property giving due consideration to the testator's wishes regarding specific bequests to specified individuals, encumbrances on any such property, and tax effects. A Will should contain a residuary clause that provides for disposition of all remaining assets after providing for debts and administration expenses that are not specifically bequeathed to other specified individuals.
- d. Appointment of Executor. In order to take advantage of an independent administration, the Will should provide for the appointment of an independent executor. Tex. Estates Code §401.001(a). The usual language provides that "[m]y executor shall act independently of any court, and I direct that no action shall be had in any court in relation to the settlement of my estate other than the probating and recording of this, my will, and, if required, the return of an inventory, appraisal and list of claims of my estate." The Will should provide for successor executors. Additionally, if desired by the testator, provide that the independent executor (and any successors) is to serve without bond; otherwise a bond will be required. Tex. Estates Code §305.101.
- e. Appointment of Guardian For Minors and Incapacitated Adults. The last surviving parent of a minor child may appoint a guardian of the person and estate of minor children. Tex. Estates Code §1104.053. The surviving

parent of an incapacitated adult may appoint a guardian of the person of such child but only if the parent is serving as guardian of the person of the incapacitated child. Tex. Estates Code §1104.103. If a Will is self-proved it should fulfill the requirements for a valid written declaration appointing a guardian for minor children as well as for adult incapacitated children. See Tex. Estates Code §1104.102.

- f. Restrictions on Disposition of Homestead. Sections 102.005 and 102.006 of the Texas Estates Code set forth restrictions on the partition of the homestead during the life of a surviving spouse or during the period that minor children occupy the homestead. Homestead rights of the surviving spouse are superior to any other takers of the homestead. For example, a husband dies leaving his share of the homestead to his children. His wife has the right to live in the house until her death or abandonment even though the children now own the title to the husband's share of the house.
- g. Restrictions on Disposition of Exempt Property. Section 353.051 of the Texas Estates Code permits exempt property to be set aside from creditors' claims for the benefit of the surviving spouse, minor children, and married children remaining with the family if the estate is insolvent. If the estate is not insolvent, the family members are entitled to the use and benefit of the exempt property only during the administration of the estate.
- h. Divorce. An ex-spouse and all relatives of such ex-spouse who are not related to the Testator will be treated as having predeceased the Testator and all provisions in a Will in favor of the former spouse or any such relative will be void. Tex. Estates Code §123.001. *But see In re Estate of Nash*, 220 S.W.3d 914, 918 (Tex. 2007) (finding that a former spouse was not deemed to have predeceased the testator for purposes of a contingent gift).
- i. Fiancé. The Will should state if bequests to a fiancé are contingent upon marriage.
- j. Children: The Will should state whether adopted children and issue are to be included. The Will should be drafted to include afterborn children to avoid application of Chapter 255 of the Texas Estates Code.
 - (1) Pretermitted or Posthumous Children.
 - 1. If a child is born after a will is made and there is a provision in the will for existing children, then such pretermitted child receives a pro rata share of the benefit left to the other children, whether vested or contingent, which has the same character as the other children received, such as a life estate interest or a fee simple interest. Tex. Estates Code §255.053(b) – (c).

2. If a child is born after a Will is made and there were no children living when such Will was made or such Will did not provide for any then living children, then such pretermitted child receives an intestate share of the estate that is not left to the parent of such pretermitted child. Tex. Estates Code §§255.053(a), 255.054.
 3. Posthumous children are included as children regardless of whether there were children living at the time a Will was signed. Tex. Estates Code §255.051.
- k. Bequests To Descendants. A will should clearly define whether a bequest to descendants is to be per stirpes or per capita. "Per stirpes" means taking "by representation" or "by class." In the estate planning context, this means that if the beneficiaries are to share in a distribution "per stirpes," then the living member in the class of beneficiaries who is closest in relationship to the person making the distribution will receive an equal share. However, if a member in the class of beneficiaries who is closest in relationship to the person making the distribution is deceased and survived by any descendants, then that deceased beneficiary's descendants will take "by representation" what their deceased parent would have taken. "Per capita," which means taking "by total head count" or "by total number of individuals." In the estate planning context, this means that if the beneficiaries are to share in a distribution "per capita," then all of the living members of the identified group will receive an equal share. However, if a member of the identified group is deceased, then a share won't be created for the deceased member and all of the shares of the other members will be increased accordingly.

The most common distribution for descendants is per stirpes. There can be various interpretations of the term and construction problems may arise where all children are deceased. The Texas Estates Code provides for a per capita with representation approach in an intestate estate. Tex. Estates Code §§201.003, 201.101. A will should carefully address how the bequest should pass.

- l. Bequests To Drafting Attorney. Section 254.003(a) of the Texas Estates Code provides that a devise of property in a will is void if it is made to the attorney who prepares or supervises the preparation of the will, a parent, descendant of a parent, or employee of such attorney or the spouse of any of such persons. Tex. Estates Code §254.003(a). Section 254.003(a) does not apply to a bequest made to a person who is the testator's spouse, an ascendant or descendant of the testator, or related within the third degree by consanguinity or affinity to the testator. Tex. Estates Code §254.003(b). Rule 108(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or

spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. Tex. Disciplinary R. Prof'l Conduct, Rule 1.08(b).

- m. Definition of Survival Requirement. A Will should provide for the period of time that a beneficiary must survive the Decedent. Chapter 121 of the Texas Estates Code includes a 120-hour survival requirement for devisees and beneficiaries. Tex. Estates Code §§121.101, 121.102. It is usually desirable to have a longer period of time in order to avoid administration of multiple estates for the same property.
- n. Allocation of Debts, Expenses and Taxes. A Will should provide for the allocation of debts, expenses and estate taxes. Section 355.109 of the Texas Estates Code provides that bequest will abate in the following order (including for the payment of debts and expenses of administration other than estate taxes) unless otherwise provided by the Will:
 - (1) Property passing by intestacy;
 - (2) Personal property of the residuary estate;
 - (3) Real property of the residuary estate;
 - (4) General bequests of personal property;
 - (5) General devises of real property;
 - (6) Specific bequests of personal property; and
 - (7) Specific devises of real property.

Section 124.005(a) of the Texas Estates Code provides that, absent a provision in the Will to the contrary, federal estate taxes and Texas inheritance taxes are apportioned to the persons receiving assets that are included in the Decedent's estate on the basis of the "taxable value of [each] person's interest in the estate." Tex. Estates Code §124.005(a). A testator can allocate estate taxes to insurance proceeds, assets in a revocable trust, or other nonprobate assets, but the will cannot allocate more than a pro rata share of the tax to an interest passing under an instrument created by another person. Tex. Estates Code §124.005(d).

IV. Liability of Drafting Attorney

The Texas Supreme Court has held that the personal representative of a deceased client may bring a legal malpractice action against the drafting attorney on behalf of the estate. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). Previously, the Court had held that the draftsman of a will or other estate planning document owes no professional duty to the intended beneficiaries of an estate plan. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996). The Court distinguished *Belt* noting that while a drafting attorney owes no duty of care to intended beneficiaries, the action in *Barcelo* was a legal malpractice claim which is

an action that survives the deceased client because the alleged negligence occurs during the client's life and the client who discovers that negligence before death could sue the attorney for forfeiture of fees and for the costs to restructure the estate plan. *Belt*, 192 S.W.3d 785-86.

ADDENDUM A
SAMPLE JOINT REPRESENTATION PROVISION

Conflicts of Interest Between You

Each of you can have differing, and sometimes conflicting, interests and objectives regarding your estate planning. For example, each of you may have different views on how property should pass after the death of one or both of you. In some situations, our firm may recommend that your assets be structured to take advantage of available tax benefits, which may involve gifts from one of you to the other. Also, planning can involve advice as to classification of property as community property or the separate property of either of you. As a result, a marital property agreement may be desirable, and such an agreement will affect control over, and rights in, present and future property. Some of these actions can affect the division of property in the event of divorce. These are just a few general examples where your interests may differ. Each couple's situation is unique.

If you each had a separate lawyer, each would have an "advocate" for your position and would receive independent advice. Information given to your separate lawyer would be confidential and could not be obtained by your spouse without your consent.

That is not the case when one firm advises both of you. Our firm cannot be an advocate for one of you against the other. Information that either of you gives our firm relating to your planning cannot be kept from the other. If you ask our firm to continue to serve you jointly, our effort will be to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of your marriage and your family. Additionally, if we represent you jointly, you waive the attorney-client privilege between yourselves and the law firm.

If at any time either of you wishes to have the advice of separate counsel, you should feel free to obtain it. If a dispute should arise between the two of you in how to handle your estate planning, we will instruct each of you to go to another law firm. If either one of you wishes to change your estate plan, we cannot begin a new representation of just one of you without informing the other.

After considering the above factors, each of you have requested that you wish our firm to continue to represent you jointly in connection with your estate planning. If either of you decide that you need separate representation, each of you have agreed to advise me in writing.

ADDENDUM B

WILL OF FRED FLINTSTONE

I, FRED FLINTSTONE, residing and being domiciled in Dallas County, Texas, hereby revoke all previous wills and codicils and publish this, my WILL.

ARTICLE I

IDENTIFICATIONS

1.1 My Wife. All references in this will to “my wife” mean WILMA FLINTSTONE.

1.2 Children and Child. My wife and I have one child whose name is PEBBLES FLINTSTONE. I have a child from a prior marriage whose name is STONEY FLINTSTONE. All references in this will to “my children” mean only PEBBLES FLINTSTONE and any other child or children who may hereafter be born to or adopted through court proceedings by my wife and myself during the term of our marriage. The word “child” means any one of said children. I specifically intend to make no provision for STONEY FLINTSTONE in this will.

1.3 Issue and Descendants. The words “issue,” “descendants,” and similar words shall include issue and descendants born into the line of descent and those legally adopted into the line of descent, provided any adopted child must not have attained the age of eighteen (18) years at the time of adoption.

1.4 Executor. I appoint my wife as **Independent Executor** of this will and of my estate. If my said wife shall for any reason fail or cease to act as Executor, I appoint BARNEY RUBBLE as successor **Independent Executor**. If BARNEY RUBBLE shall for any reason fail or cease to act as Executor, I appoint BETTY RUBBLE as successor **Independent Executor**.

1.5 Trustee. The trustee of each and every trust created hereunder shall be BARNEY RUBBLE. If BARNEY RUBBLE shall for any reason fail or cease to act as trustee, then I appoint BEDROCK NATIONAL BANK as successor trustee. Upon a child attaining twenty-five (25) years of age, such child shall serve as the co-trustee of his or her separate trust created under Article VII of this will. Upon a child of mine attaining thirty (30) years of age, such child may serve as the sole trustee of his or her separate trust created under Article VII of this will.

1.6 Guardian. If my wife shall not survive me, I appoint BETTY RUBBLE as guardian of the person and estate of any of my children during their minority. If BETTY RUBBLE shall for any reason fail or cease to act as guardian, I appoint BARNEY RUBBLE as guardian of the person and estate of my minor children. I direct any such guardian to serve without bond or other security, and free of court supervision insofar as legally possible.

ARTICLE II

EXECUTOR

2.1 Use of Term "Executor." As herein used, unless the context otherwise requires, the term "executor" in the singular form and the neuter gender used in reference to such term shall be applicable, collectively, to all persons or entities who may at any given time be serving as an executor or executrix. Such definition shall not be deemed, however, to restrict any applicable statute or rule of law which permits fewer than all executors to act without the joinder of all.

2.2 Fees and Bond. Any executor shall be entitled to reasonable fees commensurate with such executor's duties and responsibilities, taking into account the value and nature of my estate and the time and work involved, and without regard to any statutory provision as to fees. Any executor shall be entitled to reimbursement for the reasonable costs and expenses incurred in connection with the administration of my estate. **No bond or other security shall be required of any executor.**

2.3 Executor's Powers. In addition to all rights, powers and authorities conferred upon executors by law, **I direct that my executor shall have all of the rights, powers and authorities with reference to the control, management and disposition of my estate conferred upon trustees by the Texas Trust Code.** Without limiting the generality of the foregoing authorization, my executor shall further have the right, authority and power to retain any property of my estate; to sell, convey, transfer, exchange, partition, mortgage, pledge, assign, lease, or otherwise dispose of, hypothecate or deal with any and all properties in my estate; to borrow or lend money for such purposes and on such terms and conditions as my executor sees fit; to invest and reinvest any assets, funds, properties or income of my estate in such properties or investments as my executor may deem fit, proper and prudent; to extend or renew any indebtedness upon such terms and for such time or times as my executor deems best; to settle claims in favor of or against my estate; and to continue the operation of any proprietorship, partnership, corporation or other business owned by my estate, including the power to carry out and enforce the provisions of any agreement for the disposition of my interest in any such business enterprise. In addition, my executor shall have all the powers and discretions granted to the trustee or trustees under this will. My executor may exercise such powers for any purpose and upon such terms, conditions and limitations (whether or not to exist longer than the administration of my estate), which in the judgment of my executor shall be in the best interest of my estate and the beneficiaries thereof.

2.4 Time and Method of Distribution. Final distribution of my estate shall be made as soon as may be expedient in the discretion of my executor, but prior thereto partial distributions may be made whenever my executor shall deem it advisable. Distributions may be made in cash or in kind or partly in each, and for this purpose the determination of my executor as to the value of any property distributed in kind shall be conclusive. My executor is authorized to distribute my estate subject to any and all indebtednesses incurred by me or by my executor which in the opinion of my executor

need not first be paid. My executor is further authorized to begin distribution of income or principal from my estate exactly as if any trust created by Article VII of this will had been established at the time of my death.

2.5 Accounting to Successor Executor. Any successor executor is authorized to accept without examination or review the accounts rendered and the property delivered by or for a predecessor executor without incurring any liability or responsibility. No successor executor shall ever incur any liability for any act or omission of any predecessor executor.

2.6 Limitation of Court Supervision. **My executor shall act independently of any court, and I direct that no action shall be had in any court in relation to the settlement of my estate other than the probating and recording of this, my will, and, if required, the return of an inventory, appraisalment and list of claims of my estate.**

ARTICLE III

PROPERTY PASSING UNDER THIS WILL

3.1 Identification of Property. Under this will I intend to dispose of all property of which I have testamentary power of disposition at the time of my death, and only such property. I recognize, for example, that if my wife survives me, I am not disposing of her one-half interest in our community estate. I also recognize that, depending on circumstances, I may not be disposing of other property which passes upon my death, such as proceeds of insurance, annuities and employee benefit plans.

3.2 Providing for All Issue. **Under this will I am providing for all my issue in the manner and to the extent I desire, including any issue born or adopted after the date of this will.**

ARTICLE IV

DISPOSITION OF TANGIBLE PERSONAL PROPERTY

4.1 Disposition of Tangible Personal Property. All of my tangible personal property shall be distributed in accordance with the provisions of a memorandum written entirely in my handwriting and signed by me after the date of this will, or which is otherwise prepared, signed by me and witnessed by two witnesses after the date of this will. If for any reason such memorandum is not found after my death or such memorandum does not effectively dispose of all my tangible personal property, such tangible personal property not effectively disposed of shall pass pursuant to Sections 4.2, 4.3 or 4.4 of my will, whichever provision may then be applicable.

4.2 Gift to Wife. Except as provided in the foregoing provisions of Section 4.1 of this Article IV, I give all of my interest in personal effects (such as my jewelry, clothing, books, china, crystal and silverware), furniture and furnishings, objects of art, automobiles (including policies of insurance thereon, if feasible), club memberships, and

all other tangible personal property of a nature, use and classification similar to the foregoing, subject to any indebtedness on such property, but not including any such tangible personal property regularly used in connection with any business which I may own, to my wife, if she survives me.

4.3 Contingent Gift to Children. Except as provided in the foregoing provisions of Section 4.1 of this Article IV, if my wife fails to survive me, my executor shall distribute such property to my children who survive me, in shares of substantially equal value, to be divided as they shall agree; provided, however, that my executor in its sole and absolute discretion may sell any such property and include the proceeds in the residue of my estate or include such property directly in the residue. Any such division and distribution made by my executor shall be binding and conclusive upon my children and all other persons whomsoever.

4.4 No Survivor. Except as provided in the foregoing provisions of Section 4.1 of this Article IV, if neither my wife nor any of my children shall survive me, all of my interest in such tangible personal property shall be added to the residue of my estate.

4.5 Distribution to a Minor. If any child of mine is a minor at the time of such division, my executor may distribute such child's share to such child, or to the guardian of such child or to any person with whom such child resides for the use of the child and the distributee's receipt shall be a complete discharge of my executor with regard to such distribution.

4.6 Employee Benefit Plans. I hereby give all of my interest in any and all IRAs or employee benefit plans of which my wife is the owner or participant to my wife if she survives me.

ARTICLE V

DISPOSITION OF RESIDENCE

I give and devise to my wife, if she survives me, all of my right, title and interest in the real property, including improvements thereon, which is our principal residence at the time of my death, subject to any indebtedness on such property, together with all rights that I may have under any insurance policies relating thereto. If my wife shall not survive me, this devise shall lapse and my interest in such property shall be added to the residue of my estate.

ARTICLE VI

APPORTIONMENT OF LEGAL OBLIGATIONS AND TAXES

6.1 Payment of Expenses. Except as otherwise provided in this will, my executor shall pay (or extend and renew as in the judgment of my executor seems in the best interest of my estate) my legally enforceable obligations, funeral expenses, and expenses of the administration of my estate, out of my residuary estate.

6.2 Payment of Taxes. My executor shall pay out of my residuary estate all federal and state estate and inheritance taxes (except any generation-skipping tax imposed by the Internal Revenue Code), including interest and penalties, payable by reason of my death, upon or with respect to any property required to be included in my gross estate for estate or like tax purposes, whether passing hereunder or not, including any such taxes due as a result of life insurance proceeds payable by reason of my death, even though such taxes, or a part thereof, may be by law imposed upon a beneficiary, and my executor shall not require any contribution or reimbursement from any beneficiary on account of any such taxes paid on behalf of any such beneficiary.

ARTICLE VII

DISPOSITION OF RESIDUARY ESTATE

7.1 Disposition of Residuary Estate If My Wife Survives Me. If my wife survives me, I give all of my residuary estate, being all real and personal property, wherever situated, in which I may have an interest at the time of my death, not otherwise effectively disposed of, to my wife.

7.2 Disposition of Residuary Estate If My Wife Does Not Survive Me. If my wife does not survive me, my executor shall divide my residuary estate into separate fractional shares equal in value, one for each child of mine who survives me and one for the then living issue, collectively, of each deceased child of mine. After division of my residuary estate as set forth in this Section 7.2, my executor shall distribute each share for a child of mine to the trustee who shall hold and administer such share in a separate trust for the benefit of such child in accordance with the provisions of Section 7.3 of this Article VII. My executor shall distribute the share allocated to the descendants of a deceased child of mine to the trustee, who shall hold or distribute such share for the benefit of the descendants of such deceased child in accordance with the provisions of Section 7.4 of this Article VII.

7.3 Separate Trust for Each Child. Each trust for the benefit of a child of mine shall be held and disposed of by the trustee as follows:

(a) Distributions. Except as provided in Section 9.34 of Article IX of this Will, the trustee may pay to or use for the benefit of such child so much of the income and principal as the trustee, in its sole and absolute discretion, determines will adequately provide for his or her health, education, support and maintenance, taking into consideration his or her standard of living, adding any excess income to principal at the discretion of the trustee. In exercising the foregoing discretionary power to make distributions of principal, the trustee shall first take into consideration all other financial resources available to such child.

(b) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate when such child attains the age of twenty-five (25) or upon the death of such child, whichever occur first. If such child dies prior to the distribution of the entire trust, the remaining trust assets

shall, except as provided in Section 7.6 of this Article VII, be distributed or held as follows:

- (i) Special Power of Appointment. Such child shall have the power to appoint the assets and property in his or her trust at the time of his or her death, or any part thereof, in fee simple and free of trust, or upon such terms and conditions as he or she may determine, to the limited class consisting of his or her spouse, his or her descendants, my descendants, descendants of a parent of mine who are living at the death of such child and such charitable organizations as described in Sections 170(c) and 2055(a) of the Internal Revenue Code, in such shares, proportions, and amounts, and for such estates and interests as such child may determine. This special power of appointment must be exercised by such child in a will or codicil, executed after my death, which refers specifically to this power of appointment; provided, however, that no appointment shall benefit, directly or indirectly, persons other than members of the restricted group who are the objects of this power. Nothing herein shall be construed as authorizing such child to appoint to himself or herself, his or her creditors, his or her estate or creditors of his or her estate; nor may such power of appointment be exercised in such a manner as would violate the rules against perpetuities or other law restricting the period of time for which property may validly be held in trust.
- (ii) Disposition of Remaining Assets of Trust. Upon the death of such child, all property not otherwise disposed of pursuant to the foregoing shall be distributed to or for such child's then living descendants, such descendants to take per stirpes, in accordance with the provisions of Section 7.4 of this Article VII, and if no descendants of such child are then living, the trustee shall pay the remaining trust assets in accordance with Section 7.5 of this Article VII as if such distribution had occurred immediately following such child's actual death.

7.4 Separate Trust for Each Descendant of a Deceased Child. The trustee shall distribute the share allocated to the descendants of a deceased child of mine to the then living descendants of such deceased child, such descendants to take per stirpes. Notwithstanding any provision contained herein to the contrary, if at the time distribution is to be made to him or her, any descendant of a deceased child of mine has not attained the age of thirty (30) years, his or her share shall be held by the trustee in a separate trust for his or her benefit and shall be administered as follows:

(a) Distributions. Except as provided in Section 9.34 of Article IX of this Will, the trustee may pay to or use for the benefit of such descendant so much of the income and principal as the trustee, in its sole and absolute discretion, determines will adequately provide for his or her health, education, support and maintenance, taking into consideration his or her standard of living, adding any excess income to principal at the discretion of the trustee. In exercising the foregoing discretionary power to make

distributions of principal, the trustee shall first take into consideration all other financial resources available to such descendant.

(b) Termination. If not earlier terminated by distribution of the entire trust estate under the foregoing provisions, the trust shall terminate when such descendant attains the age of thirty (30) years, or upon the death of such descendant, whichever occurs first. When such descendant attains the age of thirty (30) years, the trustee shall pay the trust estate then remaining to him or her outright and free of trust. If such descendant dies while any portion of the assets of his or her trust remains undistributed, the trustee shall, except as provided in Section 7.6 of this Article VII, distribute the remaining trust assets to or for his or her then living issue, such issue to take per stirpes, in accordance with the provisions of this Section 7.4 of this Article VII, and if no issue of such descendant is then living, the trustee shall pay the remaining trust assets in accordance with Section 7.5 of this Article VII.

7.5 Contingent Disposition. If none of my children nor any of their descendants shall survive me, or if all of my children and their descendants shall die prior to final distribution of the trust assets as provided in this will, and all or any portion of the trust assets or my residuary estate should not be disposed of under other provisions of this will, all of the remaining trust property or my residuary estate, as the case may be, shall be distributed to my wife, if she is then living. If my wife is not then living, all of the remaining trust property or my residuary estate, as the case may be, shall pass to and vest in those persons, other than creditors, who would have taken my property were I to have died intestate, a single person without descendants, domiciled in the State of Texas, under the laws of the State of Texas in force at that time, the shares and proportions of taking to be determined by said laws as if I had died thirty (30) days after the actual date of my death.

7.6 Creation of Separate Trusts for Issue. After my death, if the inclusion ratio of property directed to be added to a trust is different than the inclusion ratio of such trust, the trustee may decline to make the addition and may instead administer the property as a separate trust with provisions identical to the trust. After my death, the trustee, in its sole discretion, may divide each trust for issue of mine into separate trusts, each with identical provisions, except as hereinafter provided, one having an inclusion ratio (as defined in Section 2642 of the Internal Revenue Code) of zero (0), and one having an inclusion ratio of one (1). The trustee may distribute income and principal from such separate trusts in accordance with the standards for distribution provided, but such distributions need not be made prorata from each separate trust. Notwithstanding anything contained in this trust agreement to the contrary, if any trust, has an inclusion ratio of one (1), then the beneficiary of such trust shall have the power, exercisable by him or her alone, and in all events, to appoint the assets and property in this trust at the time of his or her death, or any part thereof, in fee simple and free of trust, or upon such terms and conditions as he or she may determine, to his or her estate, creditors of his or her estate, his or her creditors, or to any other persons, or entities, in such shares, proportions, and amounts, and for such estates and interests as he or she may determine, such general power of appointment to be exercised by the beneficiary for whom the trust is created in a will or codicil, executed after the my death,

which refers specifically to this power of appointment. If, or to the extent that, the foregoing general power of appointment is not effectively exercised, the trustee shall pay, or reimburse, from the remaining trust estate, without apportionment, to the extent requested by the representatives of the probate estate of the deceased beneficiary, expenses of his or her last illness, funeral and burial (or other disposition of his or her remains), legally enforceable obligations of his or her estate, expenses of administration of his or her estate, and inheritance and other estate and death taxes and duties occasioned by his or her death, whether incurred with respect to property of this trust or otherwise, and shall not seek reimbursement therefor from the estate of the deceased beneficiary or other sources. Payments may be made to the estate of the deceased beneficiary or directly to those to whom his or her estate is indebted; and the trustee shall be entitled to rely entirely upon the written certificate and certification of the representatives of the estate of the deceased beneficiary as to the amounts required and those entitled thereto. No distribution under this paragraph shall entitle the trustee or any trust beneficiary to reimbursement from the estate of the deceased beneficiary or from the distributees of his or her estate.

ARTICLE VIII

SPECIAL DISTRIBUTION PROVISIONS

8.1 Maximum Duration of Trusts. Notwithstanding anything to the contrary, the trusts under this instrument shall terminate not later than twenty-one (21) years after the death of the last survivor of my children, descendants of my children and my descendants living on the date of my death, at the end of which period the trustee shall distribute the remaining trust property to the then income beneficiary or beneficiaries, and if there is more than one beneficiary, in the proportions in which they are beneficiaries.

8.2 Restrictions Upon Alienation. No beneficiary of any trust created under this will shall have the right or power to anticipate or in any manner impair, by assignment or otherwise, his or her beneficial interest in and to either the corpus or income of the trust estate; nor have the right or power to sell, transfer, encumber or in any way charge his or her interest in the trust estate prior to actually receiving same; nor shall such income or corpus or any portion of same be subject to any execution, garnishment, attachment, bankruptcy, nor to claims for alimony or support, or other legal proceeding of any character, or legal sequestration, levy or sale, or in any event or manner be applicable or subject, voluntarily or involuntarily, to the payment of such beneficiary's debts. In accordance with these provisions the trustee shall make distributions to or for each beneficiary according to the terms hereof, notwithstanding any purported sale, assignment, hypothecation, transfer, attachment or judicial process exactly as if the same did not exist. This paragraph shall not be construed or interpreted to limit or restrict (1) any beneficiary's power to disclaim any interest in my estate or in any trust established by the provisions of this will or (2) the right of any beneficiary to exercise any power of appointment established under the provisions of this will.

8.3 Method of Payment. If any beneficiary to whom the executor or the trustee, as the case may be, is authorized by this will to make distributions (during the administration of my estate, the term of a trust or upon final distribution of a trust) is under legal disability or is, in the opinion of the executor or the trustee, incapable of properly managing his or her affairs, the executor or the trustee may make such distributions in any one or more of the following ways:

- (a) To such beneficiary directly;
- (b) By the executor or the trustee, as the case may be, applying same directly for the benefit of such beneficiary;
- (c) To the parent or guardian of such beneficiary; or
- (d) To a person designated as a custodian under any Uniform Gifts or Transfers to Minors Act of any state.

In each case, the receipt by such beneficiary or other person to whom payment is made or entrusted shall be a complete discharge to the executor or the trustee, and the executor or the trustee shall be without obligation to see to the further application of such distribution.

8.4 Dealing with Fiduciaries. The trustee is authorized to enter into any transaction permitted by this will with trustees, executors or administrators of other trusts or estates in which any beneficiary has any interest, even though any such trustee or personal representative is also trustee under this will. Such transactions shall include, but not be limited to:

- (a) the lending of any part of the trust funds to the personal representatives of my estate, for such security and upon such terms as the trustee, in its absolute discretion, may deem proper; and
- (b) the purchasing from the personal representatives of my estate any item of property, real or personal, at fair market value, upon such terms as the trustee may deem proper.

Notwithstanding any provision in this section to the contrary, any assets (including, but not limited to, employee benefits payable to the trustee), which are not includable in my gross estate for federal estate tax purposes, shall not be used in any manner for the benefit of my estate unless they can be used for the benefit of such estate without their becoming includable in such gross estate for federal estate tax purposes.

8.5 Housing. In providing for the standard of living of any trust beneficiary as provided for in this will, the trustee, in its sole discretion, may acquire and maintain any residential real property, together with any necessary furniture, furnishings and equipment, for the use and enjoyment of such beneficiary, without rental or other accounting to the trust estate. The expense of purchase, maintenance, repair, improvements, and other costs and expenses of such residential real property and its

furniture, furnishings and equipment may be paid by the trustee out of trust income as an expense of administration, or, if necessary or appropriate, out of trust principal. The independent trustee may at any time, in its sole discretion, acquire any such property by purchase, lease, or transfer from my estate or any other person, or sell or lease any such property to other persons and may, in its sole discretion, terminate the use and enjoyment of any such property by any person, including a trust beneficiary.

8.6 Education. Whenever provision is made in this trust agreement for payment for the “education” of a beneficiary, the term “education” shall be construed to include elementary, secondary, vocational, college (including junior and community college), and postgraduate study, so long as pursued to advantage by the beneficiary, at an institution of the beneficiary’s choice; and in determining payments to be made for such college or postgraduate education, the independent trustee shall take into consideration the beneficiary’s related living expenses to the extent that they are reasonable.

8.7 Termination of Small Trust. Notwithstanding any provision of this trust agreement, the trustee shall have the discretionary power to terminate any separate trust established by this instrument whenever in its opinion such trust is so small in value that the administration thereof is no longer economically advisable, after first considering all financial or special advantages to the beneficiary, or beneficiaries, of continuing the trust estate. In the event of such termination, the trustee shall distribute the remaining trust assets to the then income beneficiary or beneficiaries as their interests may appear. The trustee’s judgment shall be final and binding upon all interested parties, including future parties-in-interest, and may be made without the necessity of court approval and distribution of trust assets in any manner provided in this trust agreement shall relieve the trustee of any further responsibility with respect to such assets.

8.8 Separate Property. I intend to make a gift to the respective beneficiaries of only that portion of the income and principal of the trust which is in fact distributed to them. Inasmuch as the amounts actually distributed to the respective beneficiaries constitute a gift or bequest, such distributions, whether they are income or principal, shall constitute the separate property of each such distributee and not the community property of such distributee and spouse. Furthermore, it is my intention that no beneficiary shall have any interest in any undistributed income and principal until the time for such distribution occurs and, accordingly, such undistributed income and principal shall not be deemed the community property of any such beneficiary.

ARTICLE IX

TRUST ADMINISTRATION

9.1 Use of the Term “Trustee.” As used herein, unless another meaning is clearly indicated or required by context or circumstances, the term “trustee,” in the singular form and neuter gender, shall refer collectively to all persons or entities who may at any time be serving as trustee of any trust created in accordance with the

provisions of this will, whether original or successor, and all powers and discretions vested in the trustee shall be vested in and exercisable by any successor trustee.

9.2 Successor Trustee. Any trustee may resign by giving written notice, specifying the effective date of the resignation, to the beneficiaries to whom the trustee is to or may distribute income at the time of giving notice. If any trustee at any time resigns or is unable or refuses to act, the successor trustee named in Article I of this will shall act. If all trustees named in Article I of this will are unable or have refused to act, or have resigned, another trustee shall be appointed by an instrument delivered to it and signed by a majority in number of the beneficiaries to whom the trustee is to or may distribute income at the time of appointment. Any successor trustee so appointed shall have the qualifications set forth in Section 9.3 of this Article IX. In the event a successor trustee shall not be so designated, the resigning trustee or any beneficiary of such trust may secure the appointment of a successor trustee by a court of competent jurisdiction at the expense of the trust estate. Any appointment of a successor trustee shall be by an instrument in writing signed by the appointers, acknowledged and filed with the trustee so appointed. The parents, custodians or guardians of any income beneficiary who is under the disability of minority or other legal, physical or mental disability, may, in carrying out the provisions of this Section, act and receive notice for the beneficiary and sign any instrument for him or her.

9.3 Qualifications of Successor Trustee. Any successor trustee so appointed shall be either (a) an individual, provided that such individual is not a beneficiary of the trust and provided such individual has attained thirty (30) years of age, and provided further that a child of mine shall be entitled to serve as a co-trustee upon attaining twenty-five (25) years of age; or (b) a trust corporation or a state or national bank in the Continental United States of America, having trust powers, with not less than Five Million Dollars unimpaired capital and surplus; provided, however, that no individual shall be appointed trustee of a trust if such individual's serving as trustee would cause the trust principal to be includable in his or her estate for federal estate tax purposes.

9.4 Appointment of Co-Trustee. The trustee of each and every trust hereunder shall be entitled to appoint as a co-trustee (the "Appointed Co-Trustee") to serve with the trustee either (a) an individual, provided such individual has attained twenty-five (25) years of age; or (b) a trust corporation or a state or national bank in the Continental United States of America, having trust powers, with not less than Five Million Dollars unimpaired capital and surplus. The appointing trustee shall have the discretionary power to remove any Appointed Co-Trustee, with or without cause, upon giving at least sixty (60) days' written notice to such Appointed Co-Trustee (unless a lesser period of time is agreed to in writing by such Appointed Co-trustee). The Appointed Co-trustee so removed shall then transfer all of the trust assets in such trustee's possession to the remaining co-trustee or co-trustees, as the case may be.

9.5 Removal of Trustee by Children. Upon attaining thirty (30) years of age, a child of mine to whom the trustee shall or may distribute income shall have the discretionary power, upon giving at least sixty (60) days' written notice to the trustee (unless a lesser period of time is agreed to in writing by the trustee), to remove said

trustee, with or without cause, and shall thereafter appoint a successor trustee having the qualifications set forth in Section 9.3 of this Article IX. The trustee, upon receiving written acceptance of the trust from the successor trustee, shall transfer all the trust assets to such successor trustee.

9.6 Reorganization of a Corporate Trustee. If any corporation appointed as a trustee should, before or after qualification, change its name, be reorganized, merged or consolidated with or acquired by any other corporation, or be converted into a different type of entity, it shall be deemed a continuing entity, and shall continue to act as a trustee, or be eligible for appointment as a trustee, as the case may be.

9.7 Trustee's Fees. No individual entitled to receive income or principal from a trust created hereunder shall receive any fees for serving as trustee of such trust. Any other individual or corporation serving as a trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities, taking into account the value and nature of the trust estate and the time and work involved. Any trustee shall be reimbursed for the reasonable costs and expenses incurred in connection with its fiduciary duties hereunder.

9.8 Replacement of Beneficiary Serving as Trustee. If any portion of the income or corpus of the trust estate of any trust created hereunder be subject to the threat of or the actual execution, garnishment, attachment, bankruptcy or claims for alimony or support, or other legal proceeding of any character, or legal sequestration, levy or sale, or in any event or manner be applicable or subject, voluntarily or involuntarily, to the payment of such beneficiary's debt as a result of such beneficiary serving as trustee, then such beneficiary is removed as trustee and the successor trustee set forth in Article I of this trust agreement shall serve, or if all trustees named in Article I of this trust agreement shall fail or cease to act as trustee of such trust, then a successor trustee of such trust shall be appointed in accordance with the provisions of this Article IX of this trust agreement; provided, however, that notwithstanding anything contained in this Article IX to the contrary, no person or entity shall be appointed as a successor trustee of such trust if such appointment would cause the trust estate to be subject to the threat of or the actual execution, garnishment, attachment, bankruptcy or claims for alimony or support, or other legal proceeding of any character, or legal sequestration, levy or sale, or in any event or manner be applicable or subject, voluntarily or involuntarily, to the payment of a beneficiary's debt.

9.9 No Bond. No trustee, whether original or successor, shall be required to furnish bond or other security, except as herein expressly provided.

9.10 Beneficiary under Disability. The parents, custodians or guardians of any beneficiary who is under disability of minority or any other legal, physical or mental disability, may, in carrying out the provisions of this Article IX, act and receive notice for the beneficiary and sign any instrument for him or her.

9.11 General Investment and Management Powers. The trustee shall have, in addition to, and not in limitation of, all common law and statutory authority, the following

powers with respect to each trust, to be exercised as the trustee, in its discretion, determines to be to the best interests of the beneficiaries: to retain any property, or undivided interests in property, received from any source, regardless of any lack of diversification, risk, or non-productivity; to invest and reinvest the trust estate in any property or undivided interests in property, including common trust funds, without being limited by any statute or rule of law concerning investments by trustees; to sell any trust property, for cash or on credit, at public or private sales, and to exchange any trust property for other property, and to determine the prices and terms of such sales and exchanges; to borrow or lend money for any purpose; to mortgage or pledge any trust property; to maintain, renew, or extend any mortgages or pledges; to take any action with respect to conserving or realizing upon the value of any trust property, and with respect to foreclosures, reorganizations or other changes affecting the trust property; to collect, pay, contest, compromise or abandon demands of or against the trust estate wherever situated; to execute contracts, notes, conveyances and other instruments, including instruments containing covenants and warranties binding upon and creating a charge against the trust estate and containing provisions excluding personal liability; to receive additional property from any source and add it to the trust estate; to exercise in person or by proxy all voting and other rights with respect to stocks or other securities; to carry insurance of such kind and in such amount as the trustee deems advisable; to keep any property in bearer form or in the name of the trustee or a nominee, with or without disclosure of any fiduciary relationship; to employ attorneys, auditors and agents, with or without discretionary powers; to engage in any lawful business, including the right to commence or continue the operation of any business which may become a part of the trust estate; to operate, maintain, repair, rehabilitate, alter, erect, improve or remove any improvements on real estate; to make leases and subleases for terms of any length, even though the terms may extend beyond the termination of the trust; to subdivide real estate; to grant easements, give consents and make contracts relating to real estate or its use; to release or dedicate any interest in real estate; to borrow money from, lend money to, buy assets from, or sell assets to the trustees, executors or administrators of other trusts or estates in which any beneficiary has any interest, even though any such trustee or representative is also a trustee under this instrument; to determine in accordance with generally accepted accounting principles, or in an equitable manner in those cases not clearly covered by such principles, the allocation or apportionment of all receipts and disbursements between income and principal, and the trustee may establish out of income reasonable reserves for depreciation or depletion as it deems fair and equitable; to allocate different kinds or disproportionate shares of property or undivided interests in property among the beneficiaries or trusts, and to determine the value of any such property; to make joint investments of funds in the trusts; to hold the several trusts as a common fund dividing the net income among the beneficiaries of the several trusts proportionate to their interest therein; to make any distribution or division of the trust property in cash or in kind or both, and to determine the value of any such property; and generally to do and perform any and all acts, things or deeds which in the judgment of the trustee may be necessary, requisite or proper for the protection, preservation and promotion of the interest of the trust properties and estate. In addition to the foregoing powers, the trustee shall have the privileges, powers and authorities granted to trustees by the Texas Trust Code (Vernon's Annotated Civil

Statutes of Texas) and any amendments thereof, it being intended that this provision shall be construed solely to extend the powers heretofore granted and not to limit the same. The trustee is also authorized to collect the proceeds of any insurance policy upon my life and employee death benefits payable to the trustee as beneficiary, and the trustee's receipt for such proceeds shall constitute a final, conclusive release of the payee from any further liability or obligation for any payment to or growing out of such policy or employee benefit.

9.12 Selection and Retention of Assets. The trustee shall have the power to retain, without liability for loss or depreciation resulting from such retention, any property or undivided interests in property received from any source, including residential property, regardless of any lack of diversification, risk, or nonproductivity, for such time as the trustee shall deem advisable and the trustee shall be under no obligation to dispose of or convert any such property. Any investments made by the trustee pursuant to the terms of this instrument need not be diversified, may be of a wasting nature and may be made or retained with a view to possible increase in value. The trustee is expressly authorized to invest in non-income-earning or producing property if in its judgment the best interest of the particular trust estate will be served thereby. The trustee, except as herein otherwise specifically provided, shall have as wide latitude in the selection, retention or making of investments as an individual would have in retaining or investing his or her own funds, and shall not be limited to nor be bound or governed by any rules of law, statutes or regulations respecting investments by trustees.

9.13 Division of Powers Between Trustees. The powers, discretions, duties and authorities of the trustees shall be exercised by the trustees jointly in all instances, except as follows:

(a) No individual serving as a trustee of a trust shall participate in the exercise of any power or discretion with respect to distributions of income or principal from such trust (i) if such individual has a legal obligation to support any beneficiary of such trust; or (ii) if such individual's serving as trustee would cause the trust principal to be includable in his or her estate for federal estate tax purposes. Such powers and discretions shall be exercised solely by a co-trustee.

(b) Any co-trustee may at any time by a signed instrument delivered to another co-trustee delegate to it any or all powers and discretions under this instrument, including the power to convey real property, either for a specified time or until the delegation is revoked by a similar instrument. Any person dealing in good faith with such co-trustee may rely without inquiry upon its representation with respect to any delegation.

9.14 Power to Determine Income and Principal. The trustee shall have the power and authority to determine in a reasonable manner how receipts and expenses are to be allocated or apportioned as between income and principal, and what shall constitute income and what shall constitute principal, and it may withhold from income such reserves for depreciation or depletion as it may deem fair and equitable.

9.15 Partitions. The trustee shall have the power to make all partitions and divisions contemplated by this trust agreement. The actual partitions and divisions made by the trustee shall be binding and conclusive upon all interested parties. Any partitions, divisions or distributions may be made by allocating assets and property proportionately in kind or by allocating undivided interests therein in kind.

9.16 Commingling Assets of Separate Trusts. Although each separate trust is to be separately and independently maintained and accounted for as provided in this trust agreement, the trustee is authorized to make joint investments of funds in the trusts, with the separate trusts having undivided interests therein, dividing the net income or net loss proportionately among the beneficiaries of the several trusts.

9.17 Distributions. The trustee may make distributions in cash or in kind, or partly in cash and partly in kind, and may distribute undivided interests in the trust estate at current valuations, such valuations to be determined by the trustee.

9.18 Liability of Third Party. No person dealing with the trustee shall be obligated to see to the application of any money paid or property transferred to or upon the order of the trustee, or to inquire into the expediency or propriety of any transaction, or the authority of the trustee to enter into and consummate it.

9.19 Liability of Trustee. The trustee shall be liable only for its own gross negligence or willful misconduct.

9.20 Accounting from Estate. The trustee is authorized to accept without examination or review the accounts rendered and the property delivered by or for the executors of my estate without requiring an audit or other independent account of the acts of such executors. The trustee shall not be liable for any act or omission of such executors.

9.21 Accounting to Successor Trustee. Any successor trustee is authorized to accept without examination or review the accounts rendered and the property delivered by or for a predecessor trustee without requiring an audit or other independent account of the acts of any predecessor trustee. Any successor trustee shall not be liable for any act or omission of any predecessor trustee.

9.22 Fiduciary Capacity. All discretionary powers vested in the trustee shall be exercised by it in its fiduciary capacity and not in its individual capacity.

9.23 Decision of Trustee Final. Exercise of the discretionary powers vested in the trustee by this will shall be final and conclusive and binding upon all persons, including beneficiaries.

9.24 No Court Supervision. No trustee shall be required to qualify before, be appointed by, or in the absence of breach of trust, account to any court, or obtain the order or approval of any court in the exercise of any power or discretion.

9.25 Out-of-State Properties. If at any time any trust estate shall consist in whole or in part of assets located in a jurisdiction in which the trustee is not authorized to act, the trustee may appoint an ancillary trustee in the jurisdiction in which it is not authorized to act and may confer upon such ancillary trustee such rights, powers, discretions and duties to act solely with respect to such assets as the trustee may deem necessary or expedient. Such ancillary trustee shall be answerable to the trustee for all monies, assets and other property which may be received by it in connection with the administration of such property. The trustee may pay unto such ancillary trustee reasonable compensation for its services and may absolve it from any requirement that it furnish bond or other security.

9.26 Insurance on Life of An Individual Serving as a Trustee. If insurance on the life of an individual serving as a trustee should become an asset of any trust under this trust agreement, such individual, if and while acting as a trustee, shall not participate in the right to change beneficiaries, to obtain the cash or loan value, or any other right, privilege, or incident of ownership in such insurance, all of which incidents shall be vested solely in a trustee that is a corporation; otherwise all of such incidents shall be vested solely in the trustees other than such individual.

9.27 Tax Elections. The trustee may make such elections under the tax laws applicable to my estate and to the trust estate as the trustee in its sole discretion shall determine. No compensating adjustments between principal and income, nor with respect to any trust, shall be made even though the elections made under the tax laws by the executors or personal representatives of my estate, or the trustee, may affect (beneficially or adversely) the interests of the beneficiaries. The action of the trustee shall be binding upon all beneficiaries.

9.28 Documents. The trustee shall have full power and authority to execute and deliver any deeds, conveyances, assignments, leases, contracts, stock or security transfer powers, or any other written instrument of any character appropriate to any of the powers or duties herein conferred upon the trustee.

9.29 Retention of Securities. The trustee is specifically authorized to retain any stock or other security received from any source issued by a corporation serving as trustee, including stock dividends thereon, and any securities issued in lieu thereof as a result of any recapitalization, consolidation or merger, and shall have with respect to that stock or securities the same powers which apply to other trust property.

9.30 Periodic Accounting. The trustee shall make periodic reports, at least annually, to those beneficiaries who are entitled to receive current distributions from such trust and who have attained twenty-five (25) years of age. I hereby relieve the trustee of each trust from any duty to keep remote beneficiaries reasonably informed concerning the administration of the trust and the material facts necessary for such beneficiaries to protect the beneficiaries' interests. Also, remote beneficiaries shall not be entitled to demand an accounting from the trustee under Section 113.151 of the Texas Trust Code, and the trustee is not required to respond to demands for accountings from remote beneficiaries. For purposes of this section, "remote

beneficiaries” are beneficiaries who are neither entitled nor permitted to receive current distributions from the trust and who would receive no distribution from the trust if the trust then terminated.

9.31 Powers Cumulative. The trustee shall have all of the rights, powers and privileges, and be subject to all of the duties, responsibilities and conditions set forth in the Texas Trust Code, and any amendments thereof, which serve to increase the powers granted to trustees; provided, however, that to the extent that such powers are inconsistent with the provisions of this trust agreement, the provisions of this trust agreement shall govern. Except as otherwise provided in this trust agreement, the powers conferred upon the trustee shall not be construed as in limitation of any authority conferred by law, but shall be construed as in addition thereto.

9.32 Waiver of Self-Dealing Restrictions. The trustee is specifically authorized to buy or sell, either directly or indirectly, any property owned by or belonging to the trust from or to the trustee, a relative, employer, partner, other business associate, or any firm or corporation in which the trustee may be interested, any provision in this document, the Texas Trust Code or the Texas Estates Code to the contrary notwithstanding. Testator, by this provision, invokes the power granted him by §111.0035 and §114.007(c) of the Texas Trust Code and §356.652 of the Texas Estates Code, and any amendments thereof, to relieve the trustee from any and all duties, restrictions, and liabilities which would otherwise be imposed by the Texas Trust Code or Texas Estates Code, and any amendments relating to self-dealing.

9.33 Additional Discretionary Powers. Notwithstanding anything elsewhere contained herein or anything contained in the Texas Trust Code as amended, including the Uniform Prudent Investor Act and the Uniform Principal and Income Act, the trustee shall have the following powers:

(a) The trustee may, but is not required to, invest trust assets in accordance to the standards set forth in the Uniform Prudent Investor Act. The trustee shall not be liable if the trustee does not invest the trust assets in accordance with the Uniform Prudent Investor Act, but instead chooses to invest in accordance with the powers and discretions set forth in this trust agreement.

(b) Notwithstanding anything contained in the Uniform Principal and Income Act, a trustee who is also a beneficiary of any trust established herein, shall have the power and discretion to make adjustments from income to principal or principal to income as authorized by Section 116.005 of the Uniform Principal and Income Act.

In administering any trust of which a child or a lineal descendant of a child of mine is the beneficiary, my primary concern is for such beneficiary, and the trusts shall be administered in accordance with this primary concern.

9.34 Special Provisions Regarding IRA and Qualified Plan Benefits. If any trust shall be the beneficiary of any benefits from a qualified plan as defined in Internal

Revenue Code §401(a) or an individual retirement account (“IRA”) as defined in Internal Revenue Code §408(a), then the trustee shall treat distributions from any qualified retirement plan or IRA as income of such trust to the extent of the greater of income generated or deemed to be generated by such plan or individual retirement account or the amount determined to be income under the Texas Trust Code. For purposes of determining income, fiduciary accounting principles shall be applied. The trustee shall not charge to income any expense properly chargeable to the principal portion of any distribution. In addition, the trustee shall have the right in its discretion to:

(a) Require the qualified plan trustee or IRA custodian to convert non-income-producing assets or low income-producing assets into income-producing assets or assets producing adequate income.

(b) Withdraw any part or all of the remaining qualified plan benefit or IRA, including, but not limited to, assets sufficient to meet the required minimum distribution rules.

To the extent necessary to cause the current beneficiary of a trust to be deemed and maintain the status as a “designated beneficiary” for the “required minimum distribution rules,” the trustee shall distribute to such current beneficiary an amount of income necessary to meet such rules.

9.35 Subchapter S Stock. If any asset of a trust created hereunder consists of an ownership interest in an existing Subchapter S corporation or if any asset of a trust created hereunder consists of ownership of stock in a corporation and the shareholders thereof including this trust, want to make the income tax election pursuant to Internal Revenue Code Section 1362 to be treated as an S corporation, then I hereby direct the trustee to take whatever procedural and administrative steps necessary to ensure that any such S election is either properly completed by the trust, or is maintained by the trust to the extent it receives such property. All references in this Section 9.35 to “Stock” shall mean the common shares of stock in a corporation which has or intends to make the election to be treated as an S corporation pursuant to Internal Revenue Code Section 1362. All references in this Section 9.35 to “ESBT” shall mean an “electing small business trust” which meets the requirements of Internal Revenue Code Section 1361(e). All references in this Section 9.35 to “QSST” shall mean a “qualified subchapter S trust” which meets the requirements of Internal Revenue Code Section 1361(d).

(a) Provisions Regarding Subchapter S Elections. The trustee is specifically authorized to make, consent, or join in any election required or deemed necessary under Subchapter S of the Internal Revenue Code regarding qualification of any corporation whose stock is held by the trust as an S corporation or regarding the qualification of the trust or any trusts established under this trust agreement. Additionally, the beneficiary is authorized to make, consent, or join in any election regarding the stock of any corporation held by the trust in regard to qualification as an S corporation or regarding the qualification of an ESBT or a QSST. The trustee and

beneficiary shall make such elections in accordance with the provisions under Subchapter S of the Internal Revenue Code and the regulations thereunder.

(b) Trustee's Power to Enter Into Agreements. The trustee shall have the express power to enter into any agreements with any other shareholder or shareholders of an S corporation to declare a dividend or dividends in order to allow the S corporation to make distributions.

(c) Special ESBT Provisions. The trustee is hereby specifically authorized to elect ESBT status for the trust and/or any separate trusts created hereunder if in its discretion, such an election would result in more favorable tax and/or nontax planning results for the applicable trust and its beneficiaries taking into account my planning objectives in establishing the trust.

(i) General Election Considerations: The statutory provisions regarding an ESBT contain unusual Federal income tax provisions, particularly insofar as Federal income tax rates are concerned applicable to S corporate income. I recognize that the trustee's election for the trust(s) of ESBT treatment may indeed result in greater Federal income tax liabilities for the trust(s) in contrast to comparative income tax liabilities if Stock were owned by QSSTs. Nevertheless, and while such comparative income tax liabilities should be considered by the trustee, I hereby direct that the possible or actual higher Federal income tax results shall not be the determinative factor in the exercise of the trustee's discretion in this regard. For example, the mandatory income distribution requirements applicable to QSSTs represents a statutory requirement which is generally inconsistent with my planning objectives in establishing the trust, a requirement which is not currently required for ESBT treatment.

I therefore direct that the trustee's actions, decisions and elections in this regard shall be final and conclusive, and the trustee shall have no liabilities whatsoever for its exercise of discretion with respect to the election or nonelection of ESBT treatment on behalf of the trust(s).

(ii) Authorization to Establish Separate Trusts: The trustee in its discretion shall have the power to create one or more separate trusts for purposes of segregating the Stock from this Trust and making the ESBT election. Each such separate trust shall have the same applicable terms and provisions of the trust from which the Stock was either transferred or would have become the owner of the Stock but for the creation of such separate trust. Stated differently, the trustee may in its discretion establish a separate trust for purposes of receiving ownership of Stock, the terms and provisions of which shall be generally identical to those of this trust.

(iii) Trustee's Power to Make Conforming Amendments: The trustee shall, in its discretion, have the power to make and adopt any amendments to this

trust or to any separately established ESBT which are consistent with my planning objectives and are, in the opinion of the trustee, appropriate to accommodate the ESBT election.

(d) Special QSST Provisions. The trustee shall comply with the provisions of this Section of the agreement to the extent it owns, receives, or will receive Stock and the Trustee, in its discretion, does not make the ESBT election as provided above, and the trust does not otherwise qualify as a permissible S corporation shareholder.

- (i) Establishment of QSSTs Following My Death. Following my death, the trustee shall, in its discretion, implement whatever procedures are necessary to create and maintain one or more separate trusts hereunder in order to qualify for QSST treatment, for Federal income tax purposes, which are in the discretion of the Trustee consistent with my planning objectives.

For example, the trustee may, in its discretion, maintain a separate trust created hereunder for the sole benefit of its primary beneficiary, and make the S election with respect to the entire trust estate only partly of which consists of Stock. The trustee may also establish a separate trust hereunder for the benefit of such primary beneficiary, the assets of which consist in whole or in part of Stock owned by or to be received by such trust.

The trustee shall notify each beneficiary of the trust in writing of any decision with respect to the maintenance of a single trust or the creation of a separate trust in order to qualify for QSST treatment. In the event a beneficiary is below the age of eighteen (18) years, then such notice shall be delivered or communicated to that beneficiary's parents or custodian or guardian, whether natural, adoptive or appointed.

- (ii) Beneficiary Treated as Owner of QSST. I hereby direct that the beneficiary of a QSST shall be treated as the owner of such QSST for Federal income tax purposes within the meaning of Internal Revenue Code Section 678(a) and Internal Revenue Code Section 1361(d) for so long as the QSST election is maintained.
- (iii) Determination and Distribution of Income. The trustee shall determine the net income of a QSST in accordance with Internal Revenue Code Section 643(b) consistent with applicable state law and generally accepted accounting principles. The trustee shall distribute all of such income of the QSST to the respective beneficiary at convenient intervals but at least as often as quarterly.
- (iv) Discretionary Distribution of Principal. The trustee may distribute the principal of the QSST to the respective beneficiary pursuant to the

guidelines and discretionary standards applicable to the trust from which such QSST was established.

- (v) Termination of QSST. Each QSST established hereunder shall terminate on the first to occur of the following events: (1) the distribution of the Stock to the respective beneficiary in accordance with the terms and provisions of this trust agreement; (2) the termination of the S election by the applicable shareholders; or (3) the distribution of the Stock following the respective beneficiary's death to other individuals pursuant to the terms and provisions of this trust agreement, subject, however, to any applicable continued trust provisions which would require the further creation and maintenance of QSST.

The trustee is hereby vested with all powers to carry out my planning objectives incident to the termination of any such S election and/or the termination of a QSST which are consistent with their manifest tax and nontax planning objectives hereunder.

(e) Division of and Continued Administration of Distributive Shares as ESBTs or Separate QSSTs. The trustee is hereby directed to implement whatever procedures as are necessary and appropriate to maintain any applicable S elections for Stock owned by a trust at the death of its respective beneficiary. For example, the trustee shall therefor make the election on behalf of the trust(s) to be treated as an ESBT(s), or shall implement appropriate steps to establish and fund separate QSSTs for the respective beneficiaries. Here, too, I direct that the trustee shall have the discretion to take whatever actions it determines are appropriate to achieve my general tax and non-tax planning objectives in this regard, including, for those purposes, any applicable GSTT provisions as provided hereby.

ARTICLE X

MISCELLANEOUS PROVISIONS

10.1 Will Not Contractual. This will is not being executed pursuant to or as part of any contract, and I am free to revoke or change this instrument at any time.

10.2 Use of Words. Whenever necessary in this will and where the context admits, the gender of all words shall include the masculine, feminine and/or neuter, and the number of all words shall include the singular and the plural.

10.3 Titles, Headings, and Captions. The titles, headings and captions used in this instrument have been inserted for administrative convenience only and do not constitute matters to be construed in interpreting this will.

10.4 Per Stirpes Distributions. Wherever this Agreement directs a per stirpes distribution or allocation of assets to a person's descendants, division of those assets is to be made with reference to that person's children, regardless of whether any of them are living. Thus, though a person's children are all deceased, the assets to be distributed or allocated would nevertheless be divided into as many equal shares as

there were such deceased children with descendant or descendants surviving at the time of distribution or allocation, and each such share would be divided similarly among the descendants of a deceased child.

10.5 Presumption of Survival. For purposes of this will, no person shall be deemed to have survived me if such person dies within thirty (30) days of the time of my death.

10.6 Right to Disclaim. In addition to any rights to disclaim conferred by law, I hereby authorize any person at any time within nine (9) months after the date of my death to disclaim in whole or in part any interest, benefit, right, privilege or power granted to such person by reason of my death.

IN TESTIMONY WHEREOF, I have hereunto signed my name and for verification I have also signed my initials on each page of this, my WILL (except this page and the following pages), in the presence of the undersigned witnesses, who sign their names hereunto as witnesses at my request and in my presence and in the presence of each other, this the _____ day of _____, 20__.

FRED FLINTSTONE

On the _____ day of _____, 20__, FRED FLINTSTONE declared to us, the undersigned witnesses, being each more than fourteen (14) years of age, that the foregoing was his LAST WILL AND TESTAMENT, and he requested us to act as witnesses to the same and to his signature thereon. He thereupon signed said will in our presence, and we, being present at the same time, now, at his request and in his presence and in the presence of each other, do hereunto subscribe our names as witnesses. We, and each of us, declare that we believe FRED FLINTSTONE to be of sound mind and memory.

WITNESS ADDRESS: _____

WITNESS ADDRESS: _____

THE STATE OF TEXAS §
 §
COUNTY OF _____§

BEFORE ME, the undersigned authority, on this day personally appeared FRED FLINTSTONE, _____ and _____, known to me to be the Testator and the Witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities; and all of said persons being by me duly sworn, the said FRED FLINTSTONE, Testator, declared to me and to the said Witnesses in my presence that said instrument is his LAST WILL AND TESTAMENT, and that he had willingly made and executed it as his free act and deed; and the said Witnesses, each on his oath stated to me, in the presence and hearing of the said Testator that the said Testator had declared to them that said instrument is his LAST WILL AND TESTAMENT and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each Witness stated further that they did sign the same as witnesses in the presence of the said Testator and at his request; that he was at that time eighteen (18) years of age or over and was of sound mind; and that each of said Witnesses was then at least fourteen (14) years of age.

FRED FLINTSTONE, TESTATOR

WITNESS

WITNESS

SUBSCRIBED AND SWORN TO before me by the said FRED FLINTSTONE, Testator, and by the said _____ and _____, Witnesses, on this _____ day of _____, 20____.

Notary Public, In and For the State of Texas

My Commission Expires:
