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ESTATE PLANNING AND ADMINISTRATION: THE COMPLETE GUIDE

COMMON TRUST STRUCTURES AND THEIR TAX CONSEQUENCES

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Trust

What is a Trust?

A separate document or provisions in a Will directing Trustees to manage and control the trust assets (money, real estate, business, etc.) for the benefit of one or more persons.

What are some terms used in a Trust?

1) Grantor/Settlor - Competent person, 18 years or older, who states his or her wishes with regard to assets administered pursuant to the terms of the Trust Agreement. See New York Estates, Powers and Trusts Law ("EPTL") §7-1.14.
2) Beneficiary - Person(s) for whom the Trust is administered.
3) Trustee - Legal owner of the trust property (or trust corpus) who holds the property for the benefit of the beneficiary. The Trustees owes a fiduciary duty to manage and preserve assets for the beneficiaries.
   - Trustee may have personal interests in the trust which conflict with the beneficiary. The attorney should counsel the client to name someone who can handle the conflict and with whom the other beneficiaries will be comfortable. Otherwise, the client may wish to consider a corporate trustee. Another option is to name a trust advisor, who can be a family member, to work with the corporate trustee.
   - A Trustee who is a beneficiary cannot make discretionary distributions to himself under New York law unless he is also the Grantor of the Trust. Therefore, the client must name a co-trustee to serve with such a beneficiary or limit dictionary distributions to the ascertainable standard (HEMS – health, education, maintenance and support). EPTL §10-10.1; Internal Revenue Code of 1986, as amended (the "Code" or "IRC") §2041 and 2514.

Reasons to use a Trust:

- Remove burden of complex financial decision making from family members
- Reduce estate taxes in donor's estate
- Growth of assets outside of both donor's taxable estate and beneficiary's taxable estate
- Avoid capital gains tax on sale of appreciate securities
- Provide security for family members
- Protect family members
- Keep assets in the family
- Medicaid Planning

During the current economic conditions, many assets are undervalued. By gifting them in today's market at the lower values, the donor is able to transfer what would otherwise be highly valued assets at reported values well under expected future worth. The donor will use less of his or her annual exclusion, lifetime gift tax exclusion and GST tax exemption on the gift. The donor can minimize gift and GST taxes by taking advantage of these lower values. Additionally, the donor can give away a larger percentage of that asset or additional assets by gifting the asset at its depressed value.

Types of Trusts:

TESTAMENTARY TRUSTS - Trusts created in a Will to take effect upon Testator's death.

CREDIT SHELTER TRUST (OR BYPASS TRUST) - Trust created in an amount equal to an individual's available applicable exclusion amount (unified credit) which is the first $5,490,000, indexed for inflation, that is exempt from estate tax upon Testator's death. The available applicable exclusion upon death will be reduced by the amount used to shelter lifetime gifts from federal gift tax. Presently, there is a disconnect between the Federal and the New York applicable exclusion amounts. New York law is as follows:

For deaths as of April 1, 2017 and before January 1, 2019, the exemption is $5,250,000.

As of January 1, 2019 and after, the exemption amount will be linked to the federal amount, indexed for inflation.

Because the estate tax law is so much in flux, many estate planners are using Disclaimer Trusts in place of the mandatory Credit Shelter Trust. Fully funding a Credit Shelter Trust may have an adverse financial impact on the surviving spouse. These Disclaimer Trusts offer the same benefit of the Credit Shelter Trust but have the added benefit of allowing the surviving beneficiaries, usually the spouse, to decide how much to protect from estate tax after first spouse dies.

The disclaimer of assets into the Disclaimer Trust must be made within nine months of the Grantor's date of death. The Will may include a provision that allows the surviving spouse to disclaim inherited property, real or otherwise (whether by operation of law or through the Will), so that it can be added to a Disclaimer Trust which would use the testator's applicable exclusion amount. See materials in Chapter VII Probate Process Overview within these materials for details on how to execute a proper disclaimer.

The Credit Shelter Trust or Disclaimer Trust is often created for the benefit of surviving spouse but can be created for the benefit of children or grandchildren or a class of beneficiaries consisting of the spouse and children. The amount placed in this Trust (and any growth on those assets) will pass free of Federal Estate tax on both Grantor's death and the spouse's death (if created solely for the spouse). This trust will not pass through probate on the death of the surviving spouse (if created solely for the spouse). There is also ease administration of assets if the spouse is disabled or elderly.

In both the Credit Shelter Trust and in the Disclaimer Trust, the Will can provide that the spouse has a limited power to withdraw principal, such as a 5/5 power. A 5/5 power gives the surviving spouse the non-cumulative right to withdraw from the principal, the greater of $5,000 or 5% of the principal each year (or a lesser amount) (Code §2041(b)(2)). The spouse has the freedom to withdraw funds with "no questions asked" by Trustees. In that way, the spouse will still have access to the assets without having to always ask the Trustee for a “hand-out.” However, on the death of the surviving spouse, 5% of the principal will be included in the surviving spouse’s estate.

This type of Trust also enables issue to receive assets sooner as both trusts can incorporate a “sprinkling power” for the benefit of the surviving spouse and issue which would allow for distributions to spouse and/or issue based on differing needs of family members.

These Trusts can also hold retirement accounts. The benefit to this beneficiary designation is that it allows for the application of the decedent’s unified credit against retirement assets. Also, it ensure that assets pass to specific beneficiaries upon death of spouse (i.e., children from first marriage) as opposed to the surviving spouse rolling over the retirement assets into his or her name and leaving uncertainty as to whom the spouse will name as beneficiary of this account. In this way, the retirement assets will be protected in case the surviving spouse remarries.

QUALIFIED TERMINABLE INTEREST PROPERTY TRUST (QTIP TRUST/MARITAL TRUST) – A Will also should focus on marital provisions. If there is a prenuptial agreement, it should be reviewed so that the attorney can include any obligations of the testator toward his surviving spouse. An outright bequest to a surviving spouse qualifies for the marital deduction and no federal or state estate tax is owed at the time of the testator's death. A bequest in trust for the surviving spouse, called a qualified terminal interest property ("QTIP") trust, must satisfy the requirements of IRC §2056 in order to qualify for the marital deduction. The assets are not taxed in the Testator's estate due to the unlimited marital deduction but they are taxed in estate of surviving spouse because the assets are includable in the spouse's estate.

A trust governed by Code §2056 provides that at a minimum all income is given to the surviving spouse, the spouse is the sole beneficiary, spouse can direct Trustee to invest in income producing assets and providing that the Executor must make a QTIP election. This QTIP Trust is used for many reasons including to ensure that assets pass to children (especially in cases where there are children from a prior marriage), prevent assets from passing to new spouse if spouse remarries following Testator's death; assist with Medicaid planning and to ease administration of assets if spouse is disabled or elderly. In general, a QTIP Trust should include principal provisions focusing on whether distributions are:

- Discretionary amounts decided by Trustee
- Governed by the ascertainable standard (HEMS - health, education, maintenance and support)
- At certain ages/years following Testator's death/annual "allowance" or
- Combination of those choices.

QUALIFIED DOMESTIC TRUSTS (QDOT TRUST/MARITAL TRUST) - Prior to 1988, assets passing to a non-citizen spouse were not eligible for the marital deduction. However, the Technical & Miscellaneous Revenue Act of 1988 (TAMRA) created the Qualified Domestic Trusts ("QDOT"), effective for decedents dying after November 10, 1988. The purpose of this new Trust was to provide a method for passing property to the non-citizen spouse that would qualify for the unlimited marital deduction like assets passing to a citizen spouse either outright or in a QTIP Trust. Therefore, in place of the QTIP Trust, when the Testator is married to a non-citizen spouse, the Will must contain a QDOT to secure marital deduction for assets passing to non-citizen spouse (IRC §2056A and Treas. Reg. §20.2056A). Here too, the Executor must make election. If the Will does not provide for a QDOT, the executor or the surviving spouse may elect to create a QDOT and transfer the inherited assets to the QDOT before the date on which the estate tax return is due.

There are very stringent restrictions on the QDOT. At least one trustee must be a USA citizen and that trustee has the right to withhold from the distribution the IRC §2056A(b) tax. The Trust must meet the requirements set by regulations to collect tax. In addition, it must satisfy requirements under IRC §2056(b). Distributions of income and hardship distributions of principal (immediate and substantial financial need relating to health, maintenance or support when other funds are not available) are not subject to estate tax. Any other distributions are subject to estate tax and the Trustee must withhold the tax to ensure it is paid. If the QDOT has assets in excess of $2,000,000, the Will must provide for one of the following scenarios: (1) the U.S. trustee must be a bank, (2) the individual U.S. trustee must furnish a bond for 65% of the date of death value of the QDOT assets, or (3) the individual U.S. trustee must furnish an irrevocable letter of credit to the U.S. government for 65% of the date of death value of the QDOT assets. Non-probate assets may be transferred to the QDOT at any time before the estate tax return is due to be filed. If these assets are not transferred, then the Testator's applicable credit amount will be allocated to these non-probate transfers.

In both the QTIP Trust and the QDOT, other provisions that can be included are an exclusive special power of appointment to the surviving spouse to allow for flexibility in distributing assets to surviving issue upon the death of the spouse (EPTL §10-3.2). The Will can alternatively provide for a general power of appointment to the surviving spouse to allow for flexibility in the spouse's estate plan since the trust assets will be includable in spouse's estate upon such spouse's death (EPTL §10-3.2).

DESCENDANT'S TRUST (RESIDUARY TRUST) - Trust providing that income and principal is distributed to children/grandchildren in discretionary amounts, at certain ages or in discretion of Trustee (or combination of those choices). The assets are taxed in the Testator's estate. These types of trusts are used for many reasons including to ensure that assets do not pass to children until they have reached a certain age when they would be fiscally responsible, keep assets in the family and out of the hands of future spouses or current spouses of children, ease burden of administration, ensure that financial decisions are not made by children alone and to assist with Medicaid planning. There are two types of trust available: a separate trust for issue and a "pot trust" for issue. When separate trusts are created, each child's expenses are handled separately and individual management can be decided based on the need of such child. A Pot trust mimics the way the Testator manages property for his children during his lifetime. One trust is administered for the benefit of all of the testator's children and income and/or principal is distributed to the children when needed. However, such a trust can result in disproportional treatment of the children. In general, a trust for the testator's children should include income and principal provisions focusing on whether distributions are:

- Discretionary amounts decided by Trustee
- Governed by the ascertainable standard (HEMS - health, education, maintenance and support)
- At certain ages or
- Combination of those choices.

The Testator must focus on the unpleasant possibility that the child will not survive the trust term. In such a rare instance, the Testator should decide who receives the trust assets upon the death of a child before the age at which the trust terminates.

INTERVIVOS TRUSTS - Trusts created during lifetime.

REVOCABLE TRUST (LIVING TRUST) - Trust that can be terminated or amended by the Grantor during Grantor's lifetime. Used as a Will substitute and contains the same provisions as a Will with regard to disposition of property upon death of Grantor. The Trust also contains provisions for how the trust is administered during the lifetime of the Grantor. Pursuant to EPTL §7-1.17, revocable trusts must be in writing, executed and acknowledged by the Grantor. If there are Trustees other than the grantor, then at least one Trustee must also execute the Trust. The execution must either be notarized or witnessed by two witnesses.

EPTL §7-1.6 provides that all trusts are irrevocable unless specified as revocable. When trust are revocable, they can be amended by the Grantor during the Grantor’s lifetime or under the Grantor’s Will by specific reference to the Trust. Amendments and revocation must be in writing and executed by the person with authority to amend or revoke. Such writing should be acknowledged or witnessed by two witnesses. Written notice of the amendment or revocation must be delivered to at least one Trustee if there is a Trustee other than the Grantor. EPTL §7-1.17.

Reasons to use the Revocable Trust instead of a Will would be in situations to avoid probate due to heir issues or possible will contest, avoid ancillary probate due to residences in multiple jurisdictions, avoid court imposed accountings on testamentary trust, ensure smooth transition of management of assets for family post death of Grantor and assist Grantor with managing assets during lifetime.

IRREVOCABLE TRUST - Trust that cannot be terminated or amended by the Grantor during Grantor's lifetime. There are many types of irrevocable trusts. We will discuss a few of them below.

An **IRREVOCABLE LIFE INSURANCE TRUST (ILIT)** is a trust created to own one or more life insurance policies. The Trust can apply for a new policy or can receive an existing policy on the Grantor's life. Generally speaking, if the Grantor lives for more than three years after an existing insurance policy is transferred into the trust, the policy proceeds should not be included in the Grantor's estate. The applicable exclusion amount is allocated against the cash value of existing policies transferred into the trust and a Federal U.S. Gift (and Generation-Skipping Transfer) Tax Return (Form 709) must be filed.

The annual exclusion is defined at Code, §2503(b), and provides that up to $14,000 (indexed for inflation) can be gifted annually during a client's lifetime to as many individuals as the donor desires. There is no limit on to how many people or to whom you may benefit. The gift must be gift of present interest (right to immediately enjoy the gift) and applies only to gifts between individuals. While a donor may make unlimited gifts to a spouse in any amount, when the spouse is not a US citizen, special annual exclusion rules apply to the gift. Under these circumstances, a donor may make one or more gifts to a non-citizen spouse equal to $149,000 (indexed for inflation) (IRC §2523(i)(2)).

Annual exclusion gifts are not deductible by donor nor are they taxable to the donee. The unused portion of a person's annual exclusion lapses and cannot be carried over to subsequent years. In general, the donor does not need to file a Form 709 to declare the annual exclusion gift. However, as discussed when transferring an existing life insurance policy into the ILIT, the donor must file a Form 709 showing the allocation of annual exclusion against the cash value of the policy.

A donor may make split gifts of $28,000 with the donor's spouse without paying gift tax. However, in order to take advantage of this provision, the donor and spouse must be married at the time of the gift. Gifts made earlier in the year, before the marriage of the donor and spouse, do not qualify for this treatment. While normally a donor does not need to file a Form 709 when making an annual exclusion gift, when splitting the gift with a spouse, the donor must file a Form 709 signed by both spouses consenting to the gift-splitting. This election will apply to all gifts made by either spouse while the couple is married during the year for which the return is filed. If the policy transferred to the Trust is a survivorship policy on both the husband and wife, the annual exclusion gift will be split on the 709.

This three year rule for contributing an insurance policy to the ILIT generally does not apply to new policies purchased by the Trustees of the trust. The ILIT serves to keep insurance proceeds available immediately upon death which enables the trust beneficiaries to have use of the money while the Grantor's other assets are tied up during the probate process. Additionally, by keeping the insurance out of the Grantor's estate upon his death, the Grantor's estate saves estate taxes.

During the Grantor’s lifetime, the annual premium is contributed by the Grantor to the trust and then the Trustees pay the premium. In order for the premium contribution to qualify as an annual exclusion gift, *Crummey* Notices must be given to the beneficiaries of the trust. In <u>Crummey v. Commissioner</u>, (397 F.2d 82 (9th Cir. 1968)), the Court held that the withdrawal right was sufficient to convert the interest into a present interest that qualified for the annual exclusion under Code §2503(b) and that so long as each beneficiary held a valid and legal right to acquire the property for a reasonable period of time, there existed a present interest that qualified for the annual gift exclusion. The beneficiary must have notice of right of withdrawal (*Crummey* Notice) and have a reasonable amount of time to exercise right of withdrawal before it lapses. Rev. Rul. 81-7, 1981-1 C.B. 474. Knowledge of a contribution to a trust and right of withdrawal constitutes adequate notice. <u>Holland Est. v. Comm’r</u>, 73 T.C.M. (CCH) 3236 (1997). However, written notice is preferred. Transfers subject to a right of withdrawal, even by a contingent beneficiary, qualify for the annual exclusion. <u>Cristofani Est. v. Comm’r</u>, 97 T.C. 74 (1991); see also <u>Kohlsaat Est. v. Comm’r</u>, 73 TCM 2732 (1997).

The ability to use contingent beneficiaries increases ability to shelter premium with annual exclusion gifts.

As the IRS dislikes this planning device, these signed Notices are important because acknowledged signed copies of the Notices might be requested at the time of the audit of the Grantor's estate tax return, if any. If the Notices cannot be produced, the IRS will claim that the annual contributions to the trust were unreported gifts and could not be sheltered with annual exclusion. Therefore, the IRS will calculate how much of the Grantor's applied exemption amount must be allocated to these gifts. Any amount allocated to the ILIT will not be available to be used under the Will. To the extent that the Grantor has used all of his or her applied exemption amount, then the IRS can charge interest and penalties on any gift tax owed on these transactions.

Upon the Grantor's death, the Trustees will collect the insurance proceeds and then administer them for the exclusive benefit of the trust beneficiaries (usually the surviving spouse and then the children). This ILIT provides for successful leveraging of annual exclusion gifts to yield non-estate taxable insurance proceeds.

Sample *Crummey* Notices and a Memo to the client discussing the *Crummey* Plan can be found at Exhibits A and B, respectively.

QUALIFIED PERSONAL RESIDENCE TRUSTS (QPRT) - With the housing market not fully recovered from its crash in 2008, the donor may wish to consider a Qualified Personal Residence Trust (QPRT). The donor transfers a residence to the trust (Treas. Reg. §25.2702-5) and the value of residence is discounted to account for term of trust and age of grantor. Usually this technique is considered when the §7520 rates are high because high §7520 rates result in a lower gift value. However, because a discount is taken on the already depressed value of the home, the donor is able to transfer what would normally be a large asset at a fraction of its worth to children. Additionally, since the house is not liquid, the donor presumably is not relying on the value of the house to meet every day needs. Therefore, this approach should be considered in this time of economic uncertainty.

The Grantor lives in the residence during the term of the trust and pays ordinary and recurring expenses such as real estate taxes, insurance and minor repairs. The residence then passes to the beneficiaries at the end of the trust term through use of a deed and related transfer documents. This transfer to the beneficiaries avoids having the house pass through probate. By the Grantor surviving the term of the trust, the residence is removed from the Grantor's estate having the added bonus of not being includable in the Grantor's estate for estate tax purposes upon the Grantor's death. Additionally, the transfer removes the appreciation on the value of the residence from the Grantor's estate. However, if the grantor dies before the trust term expires, the date-of-death value of the QPRT will be included in the grantor's estate. Since the house is removed from the Grantor's estate, there is no step-up in basis on the value of the house upon the death of the Grantor. The beneficiaries of the Trust will receive the house at the Grantor's basis which may be very low. Therefore, this Trust works better in situations where there will likely be an estate tax upon the donor's death because removing the house from the estate will lower the estate tax due upon death. The capital gains tax on the eventual sale of the house post death of the Grantor will be higher than if the Grantor had died owning the house, but it will be less than the estate tax that would be owed on the house if the house were owned by the Grantor upon death.

At the end of the QPRT term, the Grantor can rent the residence from the beneficiaries at fair market rent. Note that the rental payments the Grantor makes further reduce the value of the Grantor's estate resulting in less estate tax being owed. Additionally, these rental payments pass additional assets to the children without having to use any annual exclusion or lifetime unified credit. The Grantor cannot buy back the residence from the beneficiaries (nor can the Grantor's spouse).

This technique is especially useful with vacation homes so that an Executor can avoid the need for ancillary probate in a second jurisdiction. In such a case, a shorter term which results in a larger gift might make sense since a main goal is to avoid ancillary probate. Ensuring the survival of the Grantor during the term can avoid the added expense and delay of ancillary probate.

When making the gift, the donor applies his available lifetime unified credit against the gift and files a Form 709. If the grantor dies before the trust term expires, the date-of-death value of the QPRT will be included in the grantor's estate. If the individual survives the term of the Trust, then the residence is removed from the grantor's estate and will not be includable for estate tax purposes upon grantor's death.

Real estate is transferred into the QPRT by transferring the real estate with a deed and related transfer documents. Sometimes a nominee agreement is used such as when a co-op board will not approve the transfer. The IRS has approved the use of a nominee agreement which states that the Grantor retains title on behalf of the Trust. (See Private Letter Rulings 9249014, September 4, 1992 and 9433016, May 18, 1994). New York County Surrogate's Court has even held that a transfer of an interest in a residence to the donor's children by delivering the stock certificate to them qualified as a completed gift even though the co-op board did not approve the transfer (Matter of Katz, 142 Misc. 2d 1073, 539 NYS2d 659 (1989); see also Matter of the Accounting by Carniol, 20 Misc. 3d 887, 890, 861 NYS2d 587, 589 (2008) (reiterating the holding in Katz).

2503(c) TRUST - When a donor contemplates gifts to children and/or grandchildren to be used for expenses in addition to education expenses or wants greater investment options for the gift, instead of making a gift to the §529 Plan (or in addition to), the donor may wish to make a gift to 2503(c) Trust (see Code §2503(c)) . The Trust is created to receive annual exclusion gifts for a child or grandchild, which as discussed previously is $14,000, indexed for inflation. The Trust can also be used for larger gifts that utilize the Grantor's applicable exclusion amount. Placing interests in LLCs or LLPs may be the best way to pass shares of a business to the next generation and secure a discount for the transfer of a minority interest in the business. By holding these interests in the Trust, the beneficiary will not be able to control the entities while still a minor or even into adulthood.

Upon the beneficiary attaining the age of 21, the beneficiary must be given at least 30 day notice of right to withdraw all trust assets. If beneficiary chooses not to withdraw trust assets, the trust can continue for the benefit of the beneficiary. This trust passes money to the next generation and avoids probating these assets. The beneficiary's enjoyment of the proceeds is not tied into waiting for the donor to die or for appointment of an Executor or Testamentary Trustee. Additionally, the use of such a trust passes assets outside of the donor's estate before he dies causing there to be less available assets subject to estate taxes and probate upon the donor's eventual death. However, there is a risk inherent with this plan that the beneficiary will take the assets at 21 and not leave them in the trust. Careful guidance must be given to the donor and the beneficiary as to why leaving the assets in the trust is beneficial.

These trusts can be used as an alternative to making a gift to a custodial account for the benefit of a minor (person under the age of 21) pursuant to the Uniform Transfer to Minors Act in New York (UTMA). If the donor names someone other than self as custodian, then the account will not be includable in donor's estate if the donor dies before the minor attains the age of 21. The benefit is that there is the ability to retain the assets for the beneficiary's benefit beyond the age of 21 if the beneficiary does not elect to take the Trust assets.

To the extent that this trust is created for a grandchild, then the Grantor needs to be mindful of the risk of incurring the Generation Skipping Transfer ("GST") Tax. The GST tax was originally enacted in 1976 in an effort to prevent passing assets to grandchildren to escape estate tax owed at the child level. Under the current law, each person has a GST tax exemption amount which can be used during lifetime or upon death to avoid payment of federal GST tax (current rate is 40% and is usually paid by donor). Currently, up to $5,490,000 can be gifted during lifetime to a grandchild or more remote descendant, or to an individual 37 1/2 years younger than the donor who is not a family member. Upon death, the rules provide that up to $5,490,000 can be transferred to a grandchild or more remote descendant, or to an individual 37 1/2 years younger than the donor who is not a family member. However, this amount will be reduced by any amount used to shelter lifetime gifts from federal GST tax.

In planning for use of a donor's GST tax exemption during lifetime, the attorney should inform the donor that assets can be transferred during lifetime to a trust and still qualify for the exemption. Therefore, the donor has more gifting options available than simply outright gifts to grandchildren. Issue can be given general power of appointment in the 2503(c) Trust in case of death before trust terminates to avoid application of GST tax.

By using the Grantor's GST Tax exemption as part of the plan, the testator can protect grandchildren from creditors, preserve assets in the case of divorce, shield assets in the event of a business failure and assist the grandchildren in asset management. This Trust also preserves assets and prevents grandchildren from rushing to sell them upon inheritance. The 2503(c) Trust also enables the testator to ensure that there are sufficient funds available for education if the grandparent dies before the grandchild's education is completed. The application of the GST Tax exemption can be made on any trust that passes an interest to a grandchild and is not limited to planning with a 2503(c) Trust.

SUPPLEMENTAL NEEDS TRUST (SNT) (either testamentary or inter vivos) – This Trust can be used for currently disabled beneficiaries or in case a beneficiary becomes disabled at a future time. See EPTL §7-1.12, Omnibus Budget Reconciliation Act of 1993 (OBRA 93) Pub L 103-66, §13611[b], 107 US Stat 624, 525. 42 U.S.C. §1396p et seq., and Soc. Serv. Law §366. The trust assets will be available to help the party, but the trust will not render such person as ineligible for any such government program. Programs that are means tested have strict asset and income limitations. For example, Medicaid limits assets at $14,850. Supplemental Security Income (SSI) limits assets at $2,000. Trust assets are designed so that the assets in the Trust are not under the beneficiary's control and can never be deemed to be potential resources which could render the beneficiary ineligible for means tested programs. Assets are designed to be used exclusively for the beneficiary during the beneficiary's lifetime. In that manner, trust assets add to the quality of the beneficiary's life by supplementing government programs rather than substituting for government programs.

It is possible that federal law would change. It is also possible that the beneficiary would move to another state which has programs with different eligibility requirements. Therefore, since the Supplemental Needs Trust is irrevocable and cannot be amended or revoked, the trust can provide that the trustees have the power to modify the terms of the trust only to ensure the beneficiary's eligibility for means tested programs.

During the beneficiary's lifetime, the trust assets are to be used solely for the disabled beneficiary in a way that does not interfere with the beneficiary's eligibility for government sponsored programs. For example, the trust can purchase a specialized vehicle for the beneficiary's benefit. The trust can invest in housing for the beneficiary. The vehicle or the residence must be owned by the trust. The trust can also provide for family visitation, education, investment and insurance. Other powers can also be included such as vacation, recreation, restaurant meals, social services, legal services and purchase of goods for the beneficiary such as computers, stereos, televisions, exercise equipment and medical equipment (not covered by Medicaid).

All means tested government benefit programs treat cash as income. Therefore, the beneficiary should never be given cash. Instead, the beneficiary can use a credit card with a strict monthly limit. For example, the trustee could obtain a credit card for the beneficiary but limit it to $250 a month or $500 a month. At the end of each month, the trust can be used to pay the beneficiary's credit card bill. Please note that the beneficiary cannot use a debit card, as a debit card is deemed to be cash.

There are three types of Supplemental Needs Trusts: **THIRD PARTY TRUST, FIRST PARTY TRUST (SELF SETTLED TRUST)** and **POOLED TRUST**.

<u>Third Party Trust</u> - When the assets do not belong to the beneficiary before they are contributed to the trust, the trust is considered to be a third party special needs trust. No additions to the trust can be made by any person legally responsible for the beneficiary. Therefore, a third party trust only works if the parent is contributing the assets to a child who is over 18 when they are no longer legally responsible for the beneficiary's care. Upon the death of the beneficiary, the assets can be distributed to whomever the grantors wish.

Gifts to the trust do not qualify as annual gifts because a gift to a trust is not a gift to an individual. Gifts to this trust do not qualify as annual exclusion gifts and must be reported to the IRS on a gift tax return (Form 709) despite the fact that the gifts may be less than $14,000 in any calendar year. Gifts, for federal purposes are not taxable unless the total of reportable gifts exceeds $5,490,000. New York State does not impose a gift tax.

This trust can be funded at any time and by anyone not legally responsible for the beneficiary. The grantor (or anyone else for that matter) can also name the trust as a beneficiary under a Will. This trust can also be the beneficiary of a life insurance policy.

The trust may generate income, perhaps interest, dividends or capital gains. Income is taxable above a certain level and an accountant should prepare a return. The trust can pay these fees. Additionally, the trust does not require court approval of accounts. This trust is designed as a qualified disability trust. Trust income is ordinarily taxed at higher rates. A qualified disability trust is designed to be taxed at the lower individual rate. However, the lower tax rate applies only to contributions made prior to the beneficiary reaching age 65.

SSI is an income supplement for food and shelter for persons who are blind or disabled. Persons who receive SSI also receive Medicaid. The reverse is not true. Therefore, to avoid the risk that the disabled beneficiary's SSI income could be reduced by up to one-third by income "in kind" for housing, the trust uses restrictive language with respect to housing, in particular, to ensure that a third party is not making payments for food or shelter. Income "in kind" refers to indirect income such as the parent paying rent on behalf of the disabled child, mortgage, real property taxes, heating, fuel, gas, electricity, water, sewage and garbage. However, purchasing (or investing in) a house is not treated as income in kind. Medicaid does not recognize income in kind. Despite the reduction in SSI income, the beneficiary may be better off with the distribution for rent as the SSI income may not cover the rent. A properly drawn trust will allow for trustee discretion in such a situation.

First Party Trust (Self Settled Trust) - A trust funded with the disabled person's assets would be denoted as a first party trust and would be far more restrictive than a Third Party Trust. Under federal law, which is incorporated into New York Law, an individual can transfer all of their assets to a supplemental needs trust for their benefit and become immediately eligible under certain limited circumstances. With a first party or self-settled trust, the assets must be first be used to pay back any funds expended by the state on behalf of the disabled person. Please note, that under current law, the payback refers to Medicaid only, and to no other government programs. However, it does refer to all Medicaid paid during the beneficiary's lifetime and not just since the inception of the Trust. Additionally, under New York law, the social services district (New York State is divided into 58 local social services districts) must be notified of the creation/funding of the trust, the death of the beneficiary, substantial distributions if the trust principal exceeds $100,000, transfers for less than fair market value and proof of bonding if the assets exceed $1,000,000.

In order to qualify as a self-settled trust, the trust must be created by: (i) the individual; (ii) the individual's spouse; (iii) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; (iv) a person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse (42 U.S.C. 1396p(d)(2)(A)(i-iv)). Additionally, self-settled trusts can be created for disabled individuals if: (i) the trust is established for a disabled individual while he or she was under the age of sixty-five; (ii) the trust is established by a parent, grandparent, legal guardian, or court; and (iii) the trust provides that upon the death of the disabled individual the state will be paid back by the trust for the medical assistance it has provided, to the extent such amounts remain in the trust (42 U.S.C. 1396p(d)(4)(A) and Soc. Serv. Law §366 subd.2(b)(2)(iii)(A)).

If the beneficiary is a minor with assets in UTMA accounts, then the parents will need to file to become the beneficiary's guardians in order to get control over the money in UTMA accounts. The guardianship petition would include a specific application for the creation and funding of the supplemental needs trust. The application will be on notice to the Department of Social Services (DSS). DSS has an interest in the trust and must be a party to the petition as they have a remainder interest in the trust.

This trust has significant restrictions, including accountings and notices to DSS, under certain conditions. The trust cannot be executed or funded without Court approval. Payment of funeral expenses cannot be made until Medicaid is paid back. Therefore, the family may wish to purchase a prepaid burial contract for the beneficiary.

This trust is a grantor trust. Trust assets are to be taxed as though owned by the beneficiary. It is not necessary to obtain a separate tax identification number. If the bank or financial institution insists on a separate tax identification number, then the trust would file an informational return and the beneficiary will be responsible for any tax as though the trust did not exist.

If there is both a First Party Trust and a Third Party Trust created for the benefit of the beneficiary, it would make sense to actually spend the assets in the First Party Trust first so as to reduce the possibility of a payback.

Pooled Trust - Sometimes the creation of a Supplemental Needs Trust is not an option. In these cases, a not for profit agency manages the assets of many disabled beneficiaries with separate accounts for each one. These funds are used to pay for items not covered by Medicaid. If there are no family members available to serve as Trustee or the amount of money that will be contributed to the Supplemental Needs Trusts is not great, then a Pooled Trust may be a better option. With this type of trust, legal fees are minimal and the Trust already exists and is compliant with the Medicaid rules. The not for profit "pools" the beneficiary assets with the assets of other disabled beneficiaries and manages and invests them together. No funds can be distributed directly to the beneficiary but they can be distributed on behalf of the beneficiary to third parties and can pay bills directly. Contributions of assets to this Trust do not count as a charitable contribution even though a charity is running the Trust. Often these not for profits offer both a Third Party Trust option and First Party Trust option.

In addition to these types of pooled trusts, there are also pooled trusts designed for excess income. In order to avoid monthly spend down of excess income in order to qualify for Medicaid (current income level is $825), the beneficiary's excess income can be contributed to a pooled trust when the beneficiary is receiving homecare. The beneficiary's account can be used to pay for the beneficiary's living expenses, such as rent, food, utilities and medical supplies not covered by Medicaid. This option is not available for clients receiving institutional care.

IRREVOCABLE INCOME ONLY MEDICAID TRUST - In addition to the Supplemental Needs Trusts that can be created for a disabled individual, a client may wish to act proactively in the event that such client may become disabled in the future and require Medicaid. Irrevocable trusts can be used to protect assets. The creation and funding of this Irrevocable Income Only Medicaid Trust will create a five year period of time during which the client would be eligible for Medicaid for institutional care. The same is not true for home care as the creation and funding of the trust does not create any period of ineligibility for home based care under current law. The client needs to keep enough money available during the five year period to provide for his comfort and any potential health care needs.

The trust is irrevocable. Once the client transfers assets to the trusts, the client will have no right to demand the return of these assets. In fact, in order to protect the assets, the trust must provide that under no circumstances can the trustees exercise any discretion to return trust principal to the client. The client is entitled to income generated by the assets. With regard to a house transferred into the trust, the income is equivalent to the use and possession of the premises. During the client's lifetime, the client retains full right to use, occupy, etc. the house. The client will also remain responsible for taxes, insurance, upkeep and repair as well.

The trust is a "Grantor Trust" which means that the client will each be taxed for income tax purposes as though the client continues to own the assets. Every year, the accountant will prepare trust "fiduciary" returns showing all income, including interest, dividends and capital gains, if any. However, the trusts will not pay tax. Instead, the accountant will prepare a 1099 for the client on behalf of the trusts, which will show that the client remains responsible for all income tax, if any. If the only asset is the house, then there will be no income earned on the Trust.

Trust assets, although gifted to the trust, will remain in the client's taxable estate. The benefit is that any assets ultimately distributed to the children on the second death will be treated as inherited. Accordingly, the children will receive a step-up in basis for all such assets to the fair market value. The trust can contain one or two provisions which would give the client the right to change the final disposition of the trust assets. One is exercisable during the client's lifetime and the other by his last will and testament. These powers have several advantages besides the obvious consideration of giving the client the right to change who will ultimately benefit. The gift to children is uncertain, which renders the gift to them as incomplete, so that there will be no gift tax upon the transfer of assets to the trust. It may be prudent to file a gift tax return which will show no tax due. If the clause exercisable during the client's lifetime specifically provides that the client can exercise the power during his lifetime by attorney-in-fact, then the client's attorney in fact, who may be his child, will have the power to impact the client's estate plan, at least with respect to trust assets.

In order for the client to receive any trust principal, the trustees can make cash distributions to the client's children who in turn can voluntarily gift assets back to the client or pay for the client's care.

INTENTIONALLY DEFECTIVE GRANTOR TRUSTS (IDGT) - Gift planning with an Intentionally Defective Grantor Trust (IDGT) involves several steps. The donor creates a trust for children and then sells assets to the Trust in exchange for an installment promissory note (Self-Canceling Installment Note (SCIN)) from the Trustees, calling for periodic interest and a balloon principal payment at maturity. This sale is income and capital gains tax-free under Revenue Ruling 85-13 that holds that gain on the sale by the grantor to a grantor trust is not recognized. However, this unrecognized gain will be recognized at the donor's death (Crane v. C.I.R., 331 U.S. 1 (1947)).

In order for the Note to pass muster, the Trust must have assets with which it can pay off some of the interest payments. Therefore, the donor must make an initial gift to the IDGT of at least approximately 10% of the value transferred to the IDGT (that is, 10% combined purchase price and initial gift). See PLR 9436006 (trust initially funded with 10% of purchase price of stock was held to be a genuine sale). By gifting seed money to the IDGT, the donor shows that the Trust has economic substance independent of the sale to pay off the SCIN. See PLR 9535026. The term of the SCIN should be so that it is paid off before the death of the donor. The donor applies his available lifetime unified credit against the gift and files a Form 709. This structure works well when cash or other marketable assets are gifted to the IDGT so as not to raise valuation questions. Additionally, the note should bear interest at the rate in effect under Code §1274.

This technique works well with non-controlling interests in business entities such as LLCs so that the donor can take advantage of valuation discounts. However, since the note must be paid, these interests must generate enough cash flow to make the payments. If the income earned by the trust property exceeds the interest payments owed to donor by the IDGT, then the excess income may be used to prepay the notes, or to benefit trust beneficiaries, even though the income is taxed to donor as the grantor of the trust.

Transactions between the donor and trust are ignored. Trust assets are preserved when using this structure because the Trustees will not invade the trust income or principal to pay the income taxes owed on the Trust. By using this technique, the property in the Trust compounds income-tax free which, over a number of years, could greatly increase the value of the property in the Trust (and out of donor's estate). For the IDGT to be effective, the assets must appreciate at a greater rate than the value of the loss of the step up in basis. In other words, the estate tax savings gained by moving this asset out of the donor’s estate more than outweigh any capital gains tax owed when the assets are eventually sold. Additionally, there is the added benefit of the donor's personal assets being reduced by the donor's payment of income taxes. This reduction leads to a less estate tax owed upon the donor's death. As an added bonus, the payment of the Trust's income tax is not considered an additional gift to the Trust.

The note ends upon the death of the note holder if it has not been repaid before then and is not includable in the note holder’s estate (see Estate of Moss v. Commissioner, 74 TC 1239 (1980), acq in result, 1981-2 CB 1; Estate of Constanza v.

Commissioner, 320 F3d 595 (6th Cir 2003), rev'g TC Memo 2001-128; IRS General Counsel Memorandum 39503 (May 7, 1986)). When creating the note, the term cannot exceed the life expectancy of the note holder. If the note holder is terminally ill, then the shorter life expectancy must be factored into calculating the term of the note (Chief Counsel Advice 201330033 (July 26, 2013). Because the note is not includable in the donor's estate if he dies before it is repaid, the terms of the note must reflect a "risk premium." This premium is typically in the form of a higher interest rate on the note or an increased purchased price. There must be real expectation that the note will be repaid, otherwise, the IRS will classify the note as a gift. Estate of Musgrove v. United States, 33 Fed Cl 657 (1995). The SCIN will provide a step up in basis based on the value at the time of the sale even if the note holder dies before all payments are made. The purchaser can deduct the interest payments on his or her income tax returns.

However, the remaining assets in the IDGT are not includable in the donor's estate and will avoid probate. For estate and GST tax purposes, transfers to IDGTs are deemed to be completed gifts and outside of the donor's estate. Therefore, there is no step-up in basis on the IDGT assets upon the death of the donor. However, for income tax purposes, the existence of the trust is ignored and the donor is treated as the owner of the trust. Despite this fact, the donor is not treated as the owner for legal or equitable ownership purposes. Therefore, creditors cannot attach this Trust. However, creditors can reach the SCIN. Because of these benefits, the donor cannot be the beneficiary of the IDGT or manage the assets.

If the IDGT is for the lifetime of children (they would have use of the income and principal) and then passes to grandchildren, the donor will keep the trust assets in the hands of descendants and avoid the risk of the assets passing to future spouses-in-laws or other non-family members. Additionally, creditors of the donor's children would not be able to reach these trust assets. As an alternative, these trusts can be created to last for a term of years or until the donor's children reach certain ages. If the IDGT assets will pass to grandchildren, then the donor's Generation Skipping Transfer Tax Exemption should be allocated to the gift.

CHARITABLE LEAD TRUST (CLAT/CLUT) - A Charitable Lead Trust ("CLAT" or "CLUT") (Code §§664(d)(1) and (2) and EPTL §8-1.8) is an irrevocable trust created in a Will or during lifetime that will pay the charity an annuity for a period of time (or the charity can receive a percentage of the value of the assets re-calculated each year). Alternatively, the payments can continue for the life or lives of individuals alive at the time of the trust's creation or for a period which is the lesser of a term of years or a measuring life (plus a term of years). The measuring life must be that of the grantor, the grantor's spouse, a lineal ancestor of remainder beneficiary or the spouse of such ancestor.

The charity must be designated as the beneficiary at the time of the trust's creation and must qualify under Code §§170(c), 2055(a) and 2522(a). The trustee can have discretion to select a charity that satisfies this criteria or the grantor can name a specific charitable entity. The trust can also provide that the grantor's spouse or another family member has the power to pick the charity so long as such person did not contribute any assets to the trust. The trustee must have the ability to pick an alternate organization in the event the named charity ceases to qualify. The grantor should not have the power to change the charitable beneficiary if the CLT is a non-grantor CLT, discussed later, because of the risk of potential estate tax inclusion. One option is to name a donor advised fund ("DAF") as the beneficiary which will indirectly give the grantor control over the charities receiving the payments.

There is no minimum annual payment. Unlike the Charitable Reminder Trust ("CRT") discussed later in this article, with the CLT, a "net income" and a "make-up" option is not allowed. Upon the end of the Trust term, the assets pass to individuals named under the terms of the trust.

Unlike the CRT which will be discussed later in this article, the CLT is a tax paying entity which receives an income tax deduction for any income it pays to the charity each year. Code §642(c) allows the trust (or an estate) to deduct amounts paid for charitable purposes if the contribution was made from gross income and paid for a charitable purpose under Code §170(c), without regard to Code §170(c)(2)(A).

Under Code §§681 and 512(b)(11), the charitable deduction is reduced by payments allocable to unrelated business taxable income ("UBTI") to the extent that UBTI exceeds the percentage limitations under Code §170(b)(1)(A). A CLT can deduct distributions to charity allocable to UBTI up to 50% if made to a public charity and up to 30% for a private non-operating public foundation. Therefore, in order to maximize deductions, the trust agreement should provide that distributions come first from ordinary income, then short term capital gains, then long term capital gains, followed by UBTI, tax exempt income and then trust principal. However, on June 17, 2008, the Treasury Department in REG-101258-08 issued proposed changes to the Treasury regulations for Code §642 as follows:

> The IRS and the Treasury Department believe that the current regulations under §§ 1.642(c)-3(b) and 1.643(a)-5(b) require that such a specific provision in a governing instrument or in local law that identifies the source(s) of the amounts to be paid, permanently set aside or used for a purpose specified in section 642(c) must have economic effect independent of income tax consequences in order for the specific provision in the governing instrument or in local law to be respected for Federal tax purposes.

Therefore, ordering provisions will no longer be honored and "income distributed for a purpose specified in section 642(c) will consist of the same proportion of each class of the items of income as the total of each class bears to the total of all classes." Id. (see also, Rev. Proc. 2008-45 and 2008-46). Such regulations have not yet been adopted.

A non-grantor CLT must pay income tax on income not distributed to the charities. Therefore, the trust can be structured as an income only trust that requires all income to be paid out to the charitable beneficiaries. The value of the grantor's income tax charitable deduction increases with higher payout amounts, lower interest rates and longer trust terms and is only available when the CLT is structured as a grantor trust. In determining the interest rate used in the calculations, the grantor picks the lower of the 7520 rates for the month of the contribution to the trust or the two immediately preceding months.

To qualify as a grantor trust, the trust must meet the requirements of Code §§671 - 679l. A common method of qualifying is for the grantor to retain a greater than 5% reversionary interest under Code §673(a). With a grantor CLT, the grantor is treated as the owner of the trust and takes a current income tax deduction at the creation of the trust limited to no more than 30% of his or her AGI but can carry forward the deduction for up to five years. Going forward, the grantor must include all trust income, deduction, and credit in his or her personal income tax return (i.e., "phantom income") and cannot use the trust's assets to pay the tax liability. The grantor may not take any further income tax deductions for the CLT payments to the charitable income beneficiary. The grantor may serve as trustee of a grantor CLT but in general the grantor or the grantor's spouse may not serve as trustee of a non-grantor CLT. Typically, they are not structured as grantor trusts because there are more tax benefits to the grantor with a non-grantor trust.

Using a non-grantor CLT, the grantor is able to avoid the percentage of income limitation under Code §170 and the reduction in the charitable deduction under Code §68. The grantor is also able to avoid earning income on assets and paying income tax before making a non-deductible contribution. Here, the trust takes the income tax charitable deduction and not the grantor. Because of this fact, it is important that if the CLT generates too little realized income, some of the charitable deduction will be wasted and conversely, if the CLT generates too much realized income, the CLT will owe income tax. While the income tax deduction is utilized by the trust, the grantor does receive either a gift or estate tax charitable deduction for the amount passing to the charitable income beneficiary.

If the grantor transfers appreciated assets, the grantor incurs no capital gains tax on these assets when they are sold by the trust. Unless the trust is drafted to include capital gains as an item of gross income from which the annuity or unitrust amount may be paid, a Code §642(c) deduction will not be allowed for the portion allocable to capital gains when the asset is sold by the trust.

The grantor realizes an estate tax savings of the value of the assets removed from the grantor's taxable estate plus the growth on these assets. No additional contributions may be made after the trust is created. The gift or estate tax is calculated on the present value of the remainder interest passing to the named individuals. The remainder is the difference between the actuarial value of the annuity or unitrust amount and the value of the assets contributed to the trust. If the annuity payment is high and the term is sufficiently long, it is possible to structure the gift so that the remainder interest equals the value of the contributed assets. The result would be no gift or estate tax. This structuring only works with a CLAT and cannot be used with a CLUT. However, the trust can be structured to result with a near zero result. If the investments outperform the 7520 rate used for the trust, then the remaindermen will receive more than the calculated remainder. As the value of the gift is calculation at the time of the transfer, this excess passes to the remainderman estate or gift tax free. In general, the grantor's estate receives an immediate tax deduction at the time of the grantor's death based on 7520 rate for the full amount of the interest passing to the charity. There are no deduction limits.

To avoid estate tax inclusion with a non-grantor CLT, the following provisions should not be included:

- Donor or donor's spouse as a beneficiary;
- Donor or donor's spouse as Trustee;
- Donor or donor's spouse retaining the power to change the charitable income beneficiary; and
- Donor or donor's spouse retaining the power to change the remainder beneficiary;

A grantor's GST tax exemption may be applied against a CLUT equal to the amount of the taxable gift. However, when GST tax exemption is applied against the CLAT, an adjusted amount must be applied because of the impossibility of knowing the growth of the trust. Therefore, there is no way of knowing whether the gift to the grandchildren will be fully protected from GST tax.

Like CRTs, CLTs are subject to private foundation rules, including Code §4941, the prohibition on self-dealing which imposes an excise tax on the amount involved in acts of self-dealing between the trust and the disqualified person (i.e., trustees, grantor and family members). Self-dealing includes:

1) The sale, exchange or lease of property between the CLT and the disqualified person
2) The lending of money or extension of credit between the CLT and a disqualified person
3) The furnishing of goods, services or facilities between CLT and disqualified person
4) The payment of compensation or reimbursement of expenses by CLT to disqualified person other than reasonable compensation for necessary services
5) The transfer to or for the benefit of, or use by, a disqualified person of the income or principal of the CLT

The excise tax, which is equal to 10% of the amount at issue, is paid by the disqualified person and can be imposed on the trustees. If the act of self-dealing is not corrected, then a second tax equal to 200% of the amount at issue is imposed. The tax on the trustees is 5% of the amount involved and additional 50% if not corrected up to $20,000.

The excise taxes under Code §§4943 (excess business holdings) and 4944 (jeopardy investments) can be avoided by ensuring that the CLT and the disqualified person do not own more than 20% of a business and do not make investments that jeopardize the tax exempt purpose of the CLT. If the value of the charitable income interest is less than or equal to 60% of the assets transferred then these restrictions do not apply (Code §4947(b)(3)(A)).

A grantor may also make a gift to a non-qualified CLT. The advantage to this structure is that the trust is not subject to the private foundation rules. Additionally, the value of the gift will be excluded from the grantor's estate. However, the grantor is not entitled to an income or gift tax charitable contribution deduction for the grantor's completed gift to the trust.

Code §6019 requires the donor to file a Form 709 Gift Tax Return when creating an inter vivos CLT. The benefit to this requirement is that the filing of the Form begins the clock on the statute of limitations as to the value of the contributed assets for gift tax purposes (not for annuity or unitrust valuation purposes). The executor of an estate must file a Form 706, Federal Estate Tax Return, to claim the estate tax charitable deduction for a testamentary CLT.

The IRS has published sample CLATs found at http://www.irs.gov/irb/2007-29_IRB/ar10.html and at Rev. Proc. 2007-45 (inter vivos) and 2007-46 (testamentary) and sample forms of CLUTs found at http://www.irs.gov/irb/2008-30_IRB/ar19.html and at Rev. Proc. 2008-45 (inter vivos) and 2008-46 (testamentary).

CHARITABLE REMAINDER TRUSTS (CRAT/CRUT) - A Charitable Remainder Trust ("CRAT" or "CRUT") (IRC §§664(d)(1) and (2) or (3) and New York Estates, Powers and Trusts Law ("EPTL") §8-1.8) is an irrevocable trust designed to convert highly appreciated assets into a lifetime income stream without generating estate and capital gains taxes. The donor, trustee, and income beneficiary can be the same person. The only restriction is that at least one income beneficiary is not a charity. The CRT pays the donor (additional beneficiaries, if desired) an annuity for life or for a period of time not to exceed 20 years or the donor can receive a percentage of the value of the assets re-calculated each year. There can be more than one income beneficiary. To avoid making a taxable gift to the surviving beneficiary upon the death of the co-income beneficiary, the donor can keep the right exercisable by his or her Will to revoke the survivor's payments. However, if the donor is not one of the income beneficiaries, then retaining this right will include the trust in his or her estate. Also, if the other income beneficiary is the donor's spouse, then a marital deduction is available and the gift will not be subject to gift tax.

When the amount paid to the income beneficiary is a fixed amount, the trust is called a Charitable Remainder Annuity Trust, or CRAT and when the amount is a fixed percentage of the trust's assets revalued annually, it is called a Charitable Remainder Unitrust, or CRUT. CRATs are commonly used when the income beneficiaries are not concerned that inflation will reduce the spending power of their other assets and therefore, the annuity payments. On the other hand, CRUTs provide a hedge against inflation but can prove costly if unmarketable assets are held in the trust which need appraisals each year. Under Treas. Reg. §1.664-1(a)(7), the trustee can value the unmarketable assets can be determined by either an independent trustee or a current qualified appraiser.

There are four types of CRUTS:

• Standard Charitable Remainder Unitrust (STAN-CRUT or SCRUT) - pays a fixed percentage of the trust's assets revalued annually causing the amount paid to the income beneficiary to increase or decrease each year.

• Net Income Charitable Remainder Unitrust (NI-CRUT). The unitrust amount is the lesser of the fixed percentage of the trust's assets valued annually or the annual trust income.

• Net-Income with Make-up Charitable Remainder Unitrust (NIMCRUT). The trustee compares the fixed percentage unitrust amount to the trust's accounting income and pays the lesser of these two amounts to the income beneficiary. When the trust's accounting income is less than the unitrust amount, the difference is "made up" in the future when the accounting income exceeds the unitrust amount.

• Flip Charitable Remainder Unitrust (FLIP-CRUT). Treas. Reg. §1.664-3(a)(1)(i)(c). Initially, the trust resembles a NIMCRUT and only distributes the trust's accounting income to the income beneficiaries. Then, following a predetermined event, the trust "flips" to a STAN-CRUT and pays out a fixed percentage as a unitrust amount beginning the following tax year. The trustee has only until the end of the tax year in which the triggering event occurs to make up any payments. Permissible triggering events include:

1. The sale of an unmarketable asset see, Treas. Reg. §1.664-3(a)(1)(i)(d);
2. The marriage of any person see, Treas. Reg. §1.664-3(a)(1)(i)(d);
3. The divorce of any person see, Treas. Reg. §1.664-3(a)(1)(i)(d);

4. The death of any person see, Treas. Reg. §1.664-3(a)(1)(i)(d);

5. The birth of a child see, Treas. Reg. §1.664-3(a)(1)(i)(d);

6. A date certain see, Treas. Reg. §1.664-3(a)(1)(i)(c)(1), or

7. An event outside the control of the trustees or any other persons see, Treas. Reg. §1.664-3(a)(1)(i)(c)(1).

For either the CRAT or CRUT, the annual payments cannot be less than 5% of the initial fair market value of the trust and cannot be more than 50%. Additionally, the annual payments must pass the test that there is not more than a 5% probability that trust assets will be exhausted to pay the annual payments. Also, the value of the remainder interest passing to charity must be at least 10% of the value of the contributed assets on the date of creation of the trust. When a testamentary CRT is created, this rule can be violated because there is no way to predict that the bequest will satisfy this test. Therefore, under the Code, a CRT can be amended to satisfy this test. When drafting, the trust should provide that the trustee has the power to either amend the trust or void the trust to provide for flexibility when unforeseen circumstances arise.

The annual payments can be used all or in part to pay for life insurance policy premiums owned by an insurance trust in order to pass additional assets to children and/or grandchildren (wealth replacement trust). Upon the end of the Trust term, the assets pass to one or more charities which qualify under Code §§170(c), 2055(a) and 2522(a). The donor can retain the right to change the charitable beneficiary. The trustee can have discretion to select a charity that satisfies this criteria or the grantor can name a specific charitable entity. The trust can also provide that the grantor's spouse or another family member has the power to pick the charity so long as such person did not contribute any assets to the trust. The trustee must have the ability to pick an alternate organization in the event the named charity ceases to qualify.

In terms of deciding which type of trust to use, consideration should be given to using a NIMCRUT for retirement planning. The assets can be invested for growth until the beneficiary retires and then the investments can change to those that produce more income. By using a combination of the unitrust amount and the makeup payments, the trustee is able to replace the beneficiary's lost income on retirement. To achieve this goal, the trust must include a provision deeming capital gains to be accounting income if permitted under state law. Additionally, the trustee can invest in partnerships, life insurance or deferred annuities which can in some situations cause distributions from these assets to be accounting income.

A NIMCRUT can also be used to leverage the gift to pass out a greater amount to the donor's children but at a small gift tax valuation. This type of trust can also be called a "near zero CRUT." Here too, the NIMCRUT would provide that capital gains are deemed to be accounting income. The donor is the income beneficiary for a term of years. During this time, the trustee invests for growth causing the donor to receive few, if any, trust distributions. As a result, the makeup account increases. After the donor's term ends, the donor's children become the beneficiaries. At that time, the trustee switches investment strategies from growth to income. While the children are beneficiaries, the trustee distributes both the unitrust amount and the makeup account to the children. The gift to the children is valued at the time of creation based on the assumption that the donor would actually receive the unitrust amount each year.

The IRS dislikes these trusts because of the manipulation of the income streams and is considering whether such behavior constitutes self-dealing subject to excise tax under Code 4941. In PLR 9643014 the IRS refused to determine "whether the trustee's control over the timing and amount of realized income from the sale of trust assets would constitute an act of self-dealing." In that same year, it stated as Topic K in the IRS Training Manual, "1996 Exempt Organizations CPE Technical Instruction Program Textbook" that the use of NIMCRUTs to defer payouts to beneficiaries when such beneficiary is in a lower tax bracket constituted self-dealing under Code §4941. Then, in 1997, the IRS issued Rev. Proc. 97-23 in which it provided that it would not rule on whether a trust qualifies as a CRT in the situation where there is a NIMCRUT with a grantor, trustee, beneficiary or a person related or subordinate to any of those parties who controls the timing of the CRT's receipt of income because it is an area being studied by the IRS. Additionally, the Treasury Regulations provide that pre-contribution gain is allocated to principal upon the sale of the appreciated asset in the trust. Beginning on January 2, 2004, the requirement went into place that sale proceeds from assets purchased by the trust must be allocated to principal to the extent of the purchase price paid by the CRT.

Treas. Reg. §1.664-3(a)(1)(i)(c) applies to FLIP-CRUTs created on or after December 10, 1998. Trusts with defective flip provisions created before that date may be reformed or amended to comply with the new regulations. However, a CRT, regardless of when created, that is reformed or amended to add a flip provision will cease to qualify as a CRT unless an existing trust began the process to do by June 8, 1999. The key to this trust is the conversion from the NIMCRUT or NICRUT to a STAN-CRUT at the beginning of the first calendar year following the triggering event. After the change in payment method, the trustee must pay at least annually only the unitrust amount and not any makeup amount that accrued while the trust was a NIMCRUT. This condition eliminates the benefit from the makeup feature.

The donor of an inter vivos CRT receives an immediate tax deduction at the time the trust is created or the donor’s estate with regard to a testamentary CRT receives an immediate tax deduction at the time of the testator's death based on the remainder interest of the trust. This remainder interest is calculated using the donor's age (or CRT term), the selected payout percentage and the applicable federal (interest) rate. The value of the donor's income tax charitable deduction increases with lower payout amounts, higher interest rates and shorter trust terms. In determining the interest rate used in the calculations, the grantor picks the higher of the 7520 rates for the month of the contribution to the trust or the two immediately preceding months.

The donor realizes an estate tax savings of the value of the assets removed from the donor's taxable estate plus the growth on these assets. However, if the donor retains the income interest, then the principal is includable in the donor’s estate. At such time, the estate can claim a charitable deduction for the remainder interest passing to charity. No additional contributions may be made after the trust is created to a CRAT but they can be made to a CRUT if the governing trust authorizes additional contributions. Additional contributions must satisfy the 10% charitable remainder rule discussed above and the trust must contain provisions to recalculate the unitrust amount based on Treas. Reg. §1.664-3(b).

If the donor transfers appreciated assets, the donor incurs no capital gains tax on these assets. However, if there is an understanding between the donor and the trustee to sell the assets, the IRS could impute the gain to the donor. If the donor contributes stock in a closely held business that the donor has held for more than a year, the donor should consider naming a public charity as discussed previously in this article over naming a private foundation. A CRT is not a qualifying S corporation stock holder and therefore cannot hold S corporation stock without terminating the S corporation status of the entity causing the corporation to be taxed as a C corporation. An alternative would be for the S corporation to create the CRT and fund it with appreciated assets causing the charitable deduction to pass through to the shareholders. Gifts of tangible personal property to a CRT are valued at the basis of the contributed property.

Code §6019 requires the donor to file a Form 709 Gift Tax Return when creating an inter vivos CRT. The benefit to this requirement is that the filing of the Form begins the clock on the statute of limitations as to the value of the contributed assets for gift tax purposes (not for annuity or unitrust valuation purposes). Often, the CRT assets are included in the donor's gross estate under Code §§2036 and 2038 (retaining an income interest, retaining the right to revoke surviving income beneficiary or to designate a beneficiary, or retaining the power to designate a beneficiary). The executor of an estate must file a Form 706, Federal Estate Tax Return, to claim the estate tax charitable deduction for a testamentary CRT. A CRT cannot pay the estate tax or gift tax of the donor (see Revenue Ruling 82-128). Additionally, the grantor's GST tax exemption may be applied against a CRT equal to the amount of the taxable gift.

Unlike the CLT, the CRT is not a tax paying entity and is exempt from income tax. Any income earned in the trust exceeds the amount payable to the income beneficiaries, the trust accumulates the income tax free or tax deferred. Prior to 2007, even $1 of UBTI would cause all of the CRT's income to be taxed. Congress amended

Code §664(c) in 2006 to provide that a CRT with UBTI is subject to a 100% excise tax on the UBTI. The trustee must file Form 4720 Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code to report the UBTI. In order to avoid the imposition of the excise tax, the donor should avoid contributing assets which produce UBTI such as an interest in an active trade or business (i.e., sole proprietorship, a general partnership interest, a limited partnership interest, or a limited liability company (LLC) interest), a working interest in an oil and gas well and unrelated debt-financed income from trading on margin or other borrowing.

Even though the trust is exempt from tax, the trustee must still file a Split-Interest Trust Information Return, Form 5227, to report its financial activities and to determine whether the trust is treated as a private foundation subject to excise taxes. Additionally, the trustee must file Form 8283, Noncash Charitable Contributions, when the CRT is created by attaching it to the donor's Form 1040 as a means of reporting the charitable deduction claimed for a gift of non-cash property. If a contributed asset is sold within three years of being contributed to the CRT, then within 125 days of the sale the trustee must file Form 8282, Donee Information Return, to report the sale price of the asset. The purpose of this form is to provide a vehicle for the IRS to compare the initial value used in claiming the charitable deduction against the sale price.

Like CLTs, CRTs are subject to private foundation rules, including Code §4941, the prohibition on self-dealing which imposes an excise tax on the amount involved in acts of self-dealing between the trust and the disqualified person (i.e., trustees, grantor and family members) discussed above in the section on CLTs. The excise tax is equal to 10% of the amount at issue and is paid by the disqualified person and can also be imposed on the trustees. If the act of self-dealing is not corrected, then a second tax equal to 200% of the amount at issue is imposed. The tax on the trustees is 5% of the amount involved and additional 50% if not corrected up to $20,000. The trustee files Form 4720 to disclose the act, describe the corrective action taken, and compute the excise taxes.

The excise taxes under Code §§4943 (excess business holdings) and 4944 (jeopardy investments) can be avoided by ensuring that the CRT and the disqualified person do not own more than 35% of a business and do not make investments that jeopardize the tax exempt purpose of the CRT. If the value of the charitable income interest is less than or equal to 60% of the assets transferred then these restrictions do not apply (Code §4947(b)(3)(A)).

In Rev. Proc. 2005-24, the IRS stated that the mere existence of a spouse's right of election caused an inter vivos CRT to fail to qualify under Code §664(d) if it was created before June 28, 2005. If the spouse exercised such right, in New York for example, the spouse would have the right to take back one-third of the gift to the CRT causing the trust to fail to qualify as a split interest trust and be subject to gift tax. The gift would also not qualify for an estate tax charitable deduction. That ruling has since been suspended pending further guidance. The IRS advised in the interim that the spouse should waive the right of election in writing no later than six months from the Form 5227 due date for the later of the year in which

1. the CRT was created,
2. the grantor married the non-grantor spouse,
3. the grantor became a domiciliary of a state with a right of election satisfied with CRT assets (such as New York), or
4. the law creating the right of election was enacted.

On February 3, 2006, the IRS issued Notice 2006-15 to grandfather in all CRTs. Unless the surviving spouse actually exercises the right of election, the CRT will qualify under Code §664(d). Current best practice is to have the spouse waive the right of election as to the CRT when the CRT is created.

The income beneficiary of the CRT must pay income tax on the income distributed from the CRT each year. Distributions are taxed on a tier system that takes into account the different tax rates as follows: first from ordinary income, then short term capital gains, then long term capital gains, followed by tax exempt income and then trust principal. Under 2005 regulations, the trustee assigns capital gains and losses to different classes based on the income tax rate applicable to the assets at the end of each year.

Unlike a CLT, a CRT should not be a grantor trust. The trustee should avoid triggering grantor trust status by using the income for the grantor's benefit. Examples are having the trust make the donor's mortgage payments or pay the life insurance premiums on a policy on the life of the donor or donor's spouse.

The IRS has published sample CRATs found at http://www.irs.gov/irb/2003-31_IRB/ar01.html and at Rev. Proc. 2003-53 through 2003-56 (inter vivos) and 2003-57 through 2003-60 (testamentary) and sample forms of CRUTs found at http://www.irs.gov/irb/2005-34_IRB/ar02.html and at Rev. Proc. 2005-52 through Re. Proc. 2005-55 (inter vivos) and 2005-56 through 2005-59 (testamentary).

FUNDING THE TRUST

Each person has an applicable exclusion amount (unified credit) ($5,490,000) which can be gifted during lifetime without paying a federal gift tax (current rate is 40% and is usually paid by donor). The available applicable exclusion upon death is currently $5,490,000 and will be reduced by amount used to shelter lifetime gifts from federal gift tax. Additionally, as discussed, each person has a GST tax exemption amount which can be used during lifetime or upon death to avoid payment of federal GST tax.

To fund both revocable and irrevocable trusts, a new bank account is created for the trust in the name of this trust typically under the employer identification number assigned to the trust. However, Revocable Trusts and some irrevocable Grantor trusts use the tax identification number of the Grantor. The assets are transferred from one bank account to the other to fund the trust. To the extent that partnership interests or share in a corporation or limited liability company are transferred, assignment and assumption agreements are also signed. Real estate is transferred into a trust by transferring the real estate with a deed and related transfer documents. Sometimes a nominee agreement is used such as when a co-op board will not approve the transfer. The IRS has approved the use of a nominee agreement which states that the Grantor retains title on behalf of the Trust. (See Private Letter Rulings 9249014, September 4, 1992 and 9433016, May 18, 1994). New York County Surrogate's Court has even held that a transfer of an interest in a residence to the donor's children by delivering the stock certificate to them qualified as a completed gift even though the co-op board did not approve the transfer (Matter of Katz, 142 Misc. 2d 1073, 539 NYS2d 659 (1989); see also Matter of the Accounting by Carniol, 20 Misc. 3d 887, 890, 861 NYS2d 587, 589 (2008) (reiterating the holding in Katz).

Assets do not receive a step-up in basis on the date of the gift but do receive a step-up in basis if transferred upon death. Therefore, the donor must weigh benefit of giving away highly appreciated assets during lifetime to reduce potential estate tax against the loss of the step-up in basis the donee would have received had the donor passed the same asset to the donee upon death (IRC §1014). In general, the capital gains tax the donee will have to pay upon sale of the asset will be less than the estate tax owed on the same asset if the donor's estate will be subject to estate tax. This analysis becomes very important when planning with a Qualified Personal Residence Trust. Therefore, the attorney should be sure to ascertain the basis of the house when discussing the transaction with the client. Assets transferred to a Revocable Trust retain the Grantor's basis since these assets are not removed from the Grantor's taxable estate.

In planning for a gift of an appreciated asset to an irrevocable trust, the donor should obtain an appraisal of the asset. Appraisals are essential for hard to value assets such as real estate, art, collectibles and closely held business interests. These appraisals will be the basis for determining the fair market value of the gift and can be challenged by the IRS. Therefore, the donor should work with the attorney to consult a valuation expert knowledgeable about the specific asset to be gifted.

Gifting highly appreciated assets makes sense when the donor is in a higher tax bracket than the donee. By doing so, the donee can sell the asset and be taxed in a lower tax bracket than the donor. Conversely, when an asset depreciates, the donor should first sell the asset if the donor can take advantage of the capital loss on his own return. Following the sale, the donor then gifts the sale proceeds to the donee.

Since the gift is valued as of the date of the gift for gift tax purposes, any post-gift increase in the value of the property escapes the donor's estate which will reduce estate tax owed upon the donor's death. Therefore, in deciding which assets to gift, consideration should be given to how much the asset is expected to appreciate in the future in addition to the present value of the gift and its appreciation to date.

During the current depressed economic conditions, many assets are undervalued. By gifting them in today's market at the lower values, the donor is able to transfer what would otherwise be highly valued assets at reported values well under expected future worth. The donor will use less of his or her annual exclusion, lifetime gift tax exclusion and GST tax exemption on the gift. The donor can minimize gift and GST taxes by taking advantage of these lower values. Additionally, the donor can give away a larger percentage of that asset or additional assets by gifting the asset at its depressed value.

When a donor gives away a partial interest in an asset such as real estate, a partnership or a limited liability company, the donor is able to take a discount for lack of marketability and/or control. This gift of this minority interest allows the donor to give away more of the asset without having to use more of his or her annual exclusion, lifetime gift tax exclusion and GST tax exemption. For example:

> Partnership is valued at $1,000,000. Donor wishes to give trusts for his three children and five grandchildren annual exclusion gifts of his interest in the partnership. Therefore, the donor can give this class of beneficiaries a total of $112,000 in annual exclusion gifts ($14,000 x 8). He can split this gift with his wife and give away a total of $224,000.
>
> However, if the donor has the partnership appraised and the appraisal values the effect of the lack of marketability and the lack of control present in the gifted interests to the trusts for the donor's children and grandchildren, then the appraisal will show that the donor is entitled to take as much as a 35% discount with respect to the transfer. The donor can now give away an interest valued at $172,308 (before the discount is applied) to this class of beneficiaries and for split gift purposes he and his

wife can give away $344,616. By utilizing this discount technique, the donor and his wife are able to gift an additional $120,616 to their children and grandchildren without having to use any of their lifetime gift tax exemption or lifetime GST tax exemption.

The Form 709 must be filed in April of the year following the date of the gift if more than the annual exclusion is gifted or if a discount was taken when valuing annual exclusion gifts. On the Form 709, the donor reports the fair market value of the gift on the date of the transfer, the tax basis (as donor) and the identity of the recipient. The donor must attach supplemental documents to support the valuation of the gift, such as financial statements and appraisals.

Treas. Regulation §20.2031-1 defines fair market value as:

> The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate.

There is no joint gift tax form. If a husband and a wife each make a taxable gift, each spouse must file a Form 709. If husband and wife are splitting an annual exclusion gift, then each of them must file a Form 709 to reflect the split gift.

The gift tax is a tax on the transfer of any type of property by one individual to another while receiving nothing, or less than full value, in return. The taxable transfer includes a gift of the use of or income from property, the sale of an asset for less than its full value and an interest-free or reduced-interest loan. The tax applies once the donor has exhausted his lifetime applicable credit amount.

By filing the Form 709, the three year statute of limitations begins to run on the transaction. If the donor chooses not to file a gift tax return, the IRS can question the valuation of the transferred property at any time in the future. Therefore, even in the case of a transfer limited to the annual exclusion or sale of property for full fair market value, the transferor may still wish to file a Form 709 if the value of the transfer could be contested in the future (such as in the case of hard to value assets like heirlooms, business interests and artwork).

The Form 709 should be prepared by the donor's attorney or by the donor's accountant with review by his attorney. A copy of the Form 709 should be keep in the donor's file at the attorney's office since copies will be needed upon the death of the donor and in the event the donor intends to make future gifts.

<u>**EXHIBIT A**</u>

CRUMMEY NOTICE FOR ADULT

Trust u/a John Doe Dated ______________, 20____
c/o Jane Doe, Trustee
987 West 6th Street
Apartment 5
New York, New York 43210

Date

Ms. Jill Smith
910 Madison Avenue
New York, New York 12345

Dear Jill:

This Notice is to notify you, that on ________(date)____________, a contribution was made to the trust created by your father dated ______________, 20____ (the "Trust") in the amount of $________________. Under the Trust Agreement, you have the right to withdraw up to _____(fraction based on number of Crummey people)____ of this amount, subject to the limitations set forth in the Trust Agreement, or property of that value from the Trust. If you wish to exercise this power of withdrawal please contact me before December 31st.

Please acknowledge your receipt of this Notice by signing the enclosed copies of this Notice and by returning one fully signed copy of this Notice to (insert name of attorney) in the enclosed envelope and one to me in the enclosed envelope.

Sincerely yours,

Jane Doe, Trustee

ACKNOWLEDGEMENT OF RECEIPT:

By: ____________________
Jill Smith

Date:____________________

CRUMMEY NOTICE FOR MINOR

Trust u/a John Doe Dated ______________, 20____
c/o Jane Doe, Trustee
987 West 6th Street
Apartment 5
New York, New York 43210

Date

Mrs. Jane Doe, parent and
natural guardian of
George Doe, an infant
987 West 6th Street
Apartment 5
New York, New York 43210

Dear Jane:

This Notice is to notify you, that on ________(date)____________, a contribution was made to the trust created by John Doe dated ______________, 20____ (the "Trust") in the amount of $_______________. Under the Trust Agreement, George has the right to withdraw up to _____(fraction based on number of Crummey people)____ of this amount, subject to the limitations set forth in the Trust Agreement, or property of that value from the Trust. During the time period that he is a minor, you have the right to withdraw said amount on his behalf. If you wish to exercise this power of withdrawal on George's behalf please contact me before December 31st.

Please acknowledge your receipt of this Notice by signing the enclosed copies of this Notice and by returning one fully signed copy of this Notice to (insert name of attorney) in the enclosed envelope and one to me in the enclosed envelope.

Sincerely yours,

Jane Doe, Trustee

ACKNOWLEDGEMENT OF RECEIPT:

By: ____________________________
Jane Doe,
parent and natural guardian
of George Doe, an infant

Date:____________________________

EXHIBIT B

M E M O R A N D U M

TO: Grantor

cc: Trustee #1
Trustee #2

FROM: Attorney

RE: Trust u/a John Doe dated ___________, 20___

DATE:

The following information is a reference guide of the steps that need to be taken with regard to the Trust u/a John Doe dated ___________, 20___ which you created:

The IRS has assigned Employer Identification Number 12-1234567 to this Trust.

A non-interest bearing checking account will need to be opened with a nominal amount (i.e., $100) and with Trustee #1 and Trustee #2 as signatories on the account.

Premium Notices should be sent to Trustee #1.

When the premium comes due, you will contribute the amount of the premium to the insurance trust checking account. If you do so by check, you should write a check payable to the "Trust u/a John Doe dated ___________, 20___." Trustee #1 should then follow up with a Crummey Notice that will need to be signed by you as the parent of _______________. Once __________ and any other minor children you have in the future attain the age of 18, they will sign the Notices themselves. Original Notices should be sent to me for safekeeping and a copy kept by you and/or Trustee #1 for your records.

The required annual Crummey Notices allow you, as the grantor of the Trust, (or anyone else) to contribute funds to the Trust that will be considered to be present gifts and which will qualify for the annual Federal Gift Tax exclusion. The law requires __________ (and any other children you may have) to acknowledge that he knows that he has the right to withdraw the amount contributed by the grantor (or by others) to the Trust. These signed Notices are important because acknowledged signed copies of the Notices might be requested at the time of the audit of your estate tax return, if any.

Once the Crummey Notices have been sent, Trustee #1 will write a check from the Trust checking account payable to the Insurance Company for the amount of premium.

Please do not hesitate to contact me at 914-___________ or email address with any questions.

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.